SIR ALFRED STEPHEN

AND

DIVORCE LAW REFORM IN NEW SOUTH WALES,

1886-1892

by

Martha Rutledge

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## Abbreviations

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<tr>
<td>N.S.W.P.D.</td>
<td>New South Wales Parliamentary Debates, (followed immediately by volume number and page number).</td>
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<td>N.S.W., V. &amp; P.</td>
<td>New South Wales Legislative Assembly, Votes and Proceedings together with Parliamentary Papers.</td>
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<td>P.C.</td>
<td>Parkes Correspondence.</td>
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<td>Stephen</td>
<td>Sir Alfred Stephen.</td>
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<td>Uncat. MSS.</td>
<td>Always preceded by a name and denotes uncatalogued manuscripts and papers.</td>
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<td>Sydney Morning Herald.</td>
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<td>D.T.</td>
<td>Daily Telegraph (Sydney).</td>
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<td>F.J.</td>
<td>Freeman's Journal.</td>
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<td>W.Ad.</td>
<td>Methodist Weekly Advocate.</td>
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"There is but one law for all, namely, that law which governs all law, the law of our Creator, the law of humanity, justice, equity, - the law of nature, and of nations."

(Edmund Burke: Impeachment of Warren Hastings, 28 May 1794)

"Most men's minds petrify by middle age, and are incapable of new impressions. Sir Alfred's mind had remained fluid." 1 James Froude, the historian, had perceived this remarkable quality of Sir Alfred Stephen, which enabled him, at the age of eighty-four, to change his mind on the question of divorce and to begin a struggle that would have daunted many a younger man. However it takes more than flexibility of mind to explain not only why he could take up this controversial cause, but also his ultimate success. Although he had spent thirty-four years on the Bench, his mind had never become narrowed by his profession, nor his essential humanity blunted by long familiarity with crime.

Born in Basseterre on the island of St. Christopher in 1802, during the reign of George III and before the Battle of Trafalgar, the life of Alfred Stephen spanned the nineteenth century. When he died in 1894 Queen Victoria had been on the throne for more than fifty years. He had only been called to the bar for a year when he sailed to Van Diemen's Land in 1825. Soon after his arrival he was appointed Solicitor-General and Crown Solicitor to that Colony by Governor Arthur.

The years he spent in Hobart Town were active, and already he showed that vital interest and energy which led him to participate in so many spheres of colonial life. He was among the foremost who fought for trial by jury, and, later, for representative government. While on a visit to England in 1832-3 he was appointed Attorney-General, with a seat on the Executive Council. He found time to become President of the Hobart Town Mechanics Institute, treasurer of the Hobart Town Book Society, and a Church Warden, in spite of the demands of his work, a young wife, a growing family, and the pleasures of society.

In 1839 Stephen was appointed a Puisne Judge of the Supreme Court of New South Wales, and five years later, on the death of Sir James Dowling and the promotion of Mr. Justice Burton to the Bench of the Supreme Court of Madras, the Chief Justice of New South Wales, Sir Alfred Stephen filled this exacting position, which had in fact killed his two predecessors, for the next twenty-nine years. Fortunately for him he possessed not only great vitality, but also a great capacity for hard work, since he frequently sat in Court until late at night, on one occasion sitting for nineteen hours, while it was not unusual for

1. For accounts of Stephen's career see :
   - Sir Alfred Stephen: Jottings from Memory.


him to sit up all night writing a judgment.¹ H.W.H. Huntington, a law reporter, wrote of Stephen's legal career:

By a singular combination of moral and intellectual lights, which no law learning ever gave, he rose above the ordinary level of judicial qualifications, while his imperturbable calmness of temper, masterly analysis of evidence, and sound judgments gave unmistakable evidence of the first-rate rank of legal capacity.²

Both Leslie Stephen and the obituary in the London Times credited Stephen with much of the responsibility for the fearlessness and high judicial standard of the Australian Courts. Although Stephen's ability as a judge was never questioned, he was criticised for the severity of his sentences. In 1864, he sentenced the bushranger Gardiner to thirty-two years hard labour on a comparatively minor charge, after he had already been acquitted on a capital one. It was alleged, with some justification, that Stephen was punishing Gardiner for crimes that he was popularly held to have committed. His long experience on the Bench made him wary of reprieveing criminals on capital charges, which sometimes led to differences of opinion with the Government.³

I am glad that the boy was reprieved—Yet I think that, had he been executed, bushranging in that district would have been put down. It is "Feeling" v. "Duty". I recommend the sparing of life in the "Rape" case at the last Glbn Circuit Ct. But the consequence is, that you now have five men on trial for Rape, at the same town, next week. I summed up for a Convict (at Mtld 12 years ago) for Murder in Collins' Case—and by 2 separate reports, the Jury have ret'd a verdict of Manslaughter only, did all I could to keep him in custody for the

². Huntington: p. 11.
³. The information on Gardiner comes from Mr. N.B. Nairn.
Those fifteen years have not yet expired and he now has to be tried for
taking 5 lives; & he may also perhaps suffer death himself.
Had he been convicted & exec'd in 1855, on which side wo'd the
balance of mercy been?".

Stephen was strongly against mercy being extended in cases of
rape because it was unjust and often cruel to the prosecuting woman,
who had no means of hearing or refuting later statements, which were not
made under oath. The society in which he had to administer the law
was brutal and violent; at times, especially during the depredations
of the bushrangers, lawlessness seemed to be getting the upper hand.
Furthermore the colony, although vastly improved since 1839, was still
close to its convict past, a past of which Stephen was aware. He
wrote to James Macarthur to thank him for an account of Morgan,

"...which confirms wholly my persuasion - that the worst of
our felon population spring from the imported convicts - & that few turn out ill under ordinary cirtces, who have
the happiness of a careful education. But crime descends,
as surely as physical properties and constitutional tem-
perament do."

From his early days in Van Diemen's Land, Stephen had been
interested in the legislative process and in drafting legislation.
He left a fairly long list of the extra-judicial work he performed
between 1840 and 1873. Many of the Acts he drafted concerned the

1. Sir Alfred Stephen to Sir Henry Parkes, 31 Mar.1868, P.C., 904,
p.417 (M.L.) Hereafter these two correspondents will be re-
curred to simply as "Stephen" and "Parkes", respectively.
2. Stephen: Uncat. MSS, 211/3 (M.L.) Copy of the Lieutenant-
Governor's Memo on R. v. Peter Brennen and John Gerrard, 24 Apr.
1879.
(M.L.)
law and its administration, such as the Administration of Justice Act, various Acts involving Intestate Estates, Circuit Courts, Sheriff's Duties, and so forth. He was, however, proudest of his Deserted Wives and Children Act, the part he played in drafting the Marriage Act of 1855, and the Act prohibiting the "Harbouring of Bushrangers, and to facilitate their apprehension. 1865." He felt that this act was largely responsible for the suppression of bushranging. Stephen prided himself not a little on his draftsmanship.

He had been brought up in that particular line by the ablest draftsman that ever lived in England. - Sir James Stephen. It had been his peculiar habit through life to look carefully at the construction of statutes, and if it might not be considered too vain on his part to say so, he thought he might regard himself as a master of that subject.

Stephen's most important work in this sphere was carried out near the end of his term as Chief Justice, when he was President of a Commission on Law Reform. The results of this Commission were a Consolidated Lunacy Bill, the Supreme Court Consolidation Bill, which became law in 1879, and the drafting of a Consolidating and Amending Criminal Law Bill, which finally became law in 1883 after a long struggle. The same year he published with Alexander Oliver the Criminal Law Manual, which is regarded by lawyers as Stephen's greatest work.

His interest in legislation was not confined to drafting bills and statutes. He held high ideals about the role of the "legislator", and took a keen interest in all the discussion over a Constitution for

New South Wales. In 1853 he wrote two pamphlets on the question, copies of which he despatched to important people in London, including Earl Grey, Gladstone, Robert Lowe, and Sir John Pakenham.¹ Sir Alfred recommended a plan for a partly nominated and partly elected Upper House, with the Judges of the Supreme Court as ex-officio members. He thought that the Council should differ from the Assembly, hence if it were elective this would only be feasible with stringent property qualifications to act as a brake on the democratic element and to check hasty legislation. Whereas an entirely nominated chamber was equally objectionable because it would be "exposed to those violent changes, the result of Party triumph in the Assembly", and therefore liable to be "swamped".²

In 1856 Sir Alfred Stephen became the first President of the Legislative Council and was largely responsible for drawing up its rules and forms, as well as for its organisation. He was forced to resign from the Presidency eight months later as the extra work was too great, but he remained in the Council until Judges were excluded in 1858. Stephen expressed his displeasure to James Macarthur.

But I shall thank you still more, for the other passages as who you told me were in Romilly, on the subject of Judges sitting in Parliament. I have copied out all I can find, or hear of, on the subject, & my present conclusion is that there is no man of authority, or of note, - out of N.S.Wales, - who has advanced the opinion that Judges ought not to be in the Legislature.

Montesquieu had been misunderstood. Blackstone (a mere echo, - on this question, - of Montesquieu) has been equally so.

1. Stephen: Journal, pt.6, Sept.1852, MSS 777/2 .. (M.L.)
In fact, were Plunkett's idea right, Blkstne would be grossly inconsistent with himself in the whole tenor of his book; which is a panegyric on all that is or then was; throughout the 4 volumes.
Romilly merely uses the word 'Politics' in a party sense: for he spoke of Judge being in the Cabinet—a thing to my mind monstrous. The arguments of Castlereagh, & of Wilberforce, I think unanswerable. But I at present am not aware (I repeat) of any man of repute disapproving of Judges in the Legislature. I have not read Lord Hotham's speech yet, however."

Stephen was convinced that the reason that Sir Francis Forbes was "at daggers with" Sir Richard Darling was because "Forbes was a strong politician and a liberal, not because he was a legislator!, which had nothing at all to do with the matter."3

On the departure of Lord Belmore in 1872, Sir Alfred Stephen was called on to administer the Government, and in 1875 was appointed Lieutenant-Governor. From the beginning he was doubtful about this so-called honour, and confessed to Belmore that Prudentia "is the Deity I regret to say, whom I have least worshipped — & her Temple ought to be the Vice-Regal Mansion".4 He was four times required to carry out the duties of the Governor. His interest in the framing of legislation made him delighted when Parkes offered him a seat in the Legislative Council in 1875. Almost till the end of his life, Stephen enjoyed fulfilling his legislative duties. In politics he could best be described as a reforming Tory, although in England he might have

2. Sir Francis Forbes was Chief Justice of New South Wales, and sat on the Executive Council, to the disapproval of the Governor.
been a Liberal. It was this position that enabled him to speak out against the Chinese Restriction Bill on the ground that it was "inconsistent with the principles of eternal justice".\(^1\)

In 1879 Stephen became involved in a dispute with Parkes, who was then Premier, over the necessity of resigning his seat in the Council before assuming the duties of Lieutenant-Governor. At first he reluctantly agreed to resign, but pointed out to Parkes his pleasure in the deliberations of the Council, and his sorrow "if on ceasing to have on my shldrs the duty of Administrator I shall not be re-appt.\(^2\) I care not one fraction for the Office of Lt. Gov. - and would rather be an M.L.C. than that barren honour".\(^2\) However Stephen soon decided that resignation was unnecessary, and if it became necessary, he would choose to resign the gubernatorial office, which gave him little pleasure, "Whereas the seat in the Legislature, employing my mind, on matters familiar to me, affords me much pleasure - and (pardon the conceit) moreover is of service to the country".\(^3\) He infuriated Parkes by adding that Sir Hercules Robinson, Martin and Hay agreed with him. Parkes replied that the whole idea of the Representative of the Crown and a member of Parliament in the same person was repugnant to him; and if Stephen persisted in his obstinacy, his first duty as Governor would be to receive Parkes's resignation as a Minister. Parkes refused to be influenced in this by the opinions of

1. Stephen in the Legislative Council, reported in the S.M.H., 1 June 1888, p.3.
"gentlemen however eminent, who do not have my responsibility".  
Sir Alfred gave in, but only on the understanding that he would be re-appointed to the Council as soon as his gubernatorial duties were over. He duly wrote to remind Parkes of his promise. Such a contingency as Parkes may have feared occurred in 1890 when Stephen was accused of sending a message from Government House, thanking his supporters for their attendance. Aside from such incidents, and the occasional obstinacy of both old men, Stephen and Parkes were firm friends by the end of their lives, exchanging their memoirs and discussing the tribulations of old age.

Despite the fullness of his professional life, Stephen was a man who liked to be concerned in everything that went on, to the extent that his greatest fault was, probably, to meddle in what did not concern him. Even in the middle of his last fight for the Divorce Bill in 1890, he offered himself as a Strike Mediator. Some of his many activities were largely administrative; he was Chairman of the Paris Exhibition Commission in 1855, President, then a Director, of the Art Gallery, and also of the Museum, and a Trustee of Hyde Park. Far more important were his philanthropic activities. All his life he was interested in the Sydney Female Refuge, the Home Visiting and Relief Society, the Industrial Blind Society, the Melanesian Mission, the

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Destitute Children's Asylum, the Benevolent Society, the Home for Fatherless Boys, and the R.S.P.C.A. He was always very fond of animals and his pets included a civet cat and a chameleon. At one time or another he was president of most of these institutions. Perhaps his greatest charitable contribution was the part he played with Alfred Roberts in the founding of the Prince Alfred Hospital. His interest in education led Stephen to play a large part in the founding of an Anglican College at the University, and to ensure that it would be relatively free of Church control. He also sat on the Senate of the University, and on the Council of Education between 1873 and 1882.

Anyone in distress was sure of sympathy and assistance from Stephen and his wife. He sometimes recorded in his journal appeals for help. "Rec'd deputatn from 3 blind men of Indust. Bld. Institun. Called on by a painter in distress," or that he was called on by "an elderly gentleman, for advice as to his dghtr; a lady deserted by her husband".2

Like many Victorian philanthropists, Stephen was deeply concerned about the effects of strong drink, and was a member of the Temperance Movement. His experience as a judge led him to believe that a large percentage of crime could be attributed either directly or indirectly to drunkenness. It was his participation in the Temperance Movement that was ultimately one of his reasons for taking up divorce reform. Stephen was beginning to see that this would be necessary when

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2. Ibid., pt.22, 2 Apr.1886.
he delivered an "Address on Intemperance and the Licensing System" in 1869. On this occasion he claimed:

But wives, however exemplary, receive still worse treatment from drunken or sottish husbands. ...and in the great majority of these cases, I believe in fact nearly all, the ultimate or direct cause of abandonment — in most cases by the husband's quitting his family, but in many by the wife's being driven by brutality from her home — has been drunkenness."

Most cases of assault were due to the same cause. Stephen was even more explicit on this aspect of the problem when he gave evidence before the Royal Commission on Intoxicating Liquors in 1886. Inevitably he did not limit his interest to addresses and pamphlets on the effects of drunkenness on the family, but wrote to Parkes about the condition of the soldiers in the Paddington Barracks. Praiseworthy efforts had been made to reclaim them from strong drink, but they would be useless unless the men could read or have other employments at night, which was impossible at present as the Barracks were not lit. In the interests of the masses, of education, and of temperance, it would be a credit to Parkes if he installed gas-lighting at Colonial expense.2

At the end of his life Sir Alfred was still attending meetings of the Prince Alfred Hospital, the Museum and Art Gallery, the Industrial Blind Institute, the City Night Refuge and Soup Kitchen, and had added the Nurses Home Society and the Primrose League.

Sir Alfred Stephen was a member of the same family which distinguished itself in England during the nineteenth century in the

fields of law and letters. His uncle was James Stephen, Master-in-Chancery and the brother-in-law of William Wilberforce. While Alfred was a member of Lincoln's Inn, he was taught his law by his cousins Henry Stephen, Serjeant-at-law, and Sir James Stephen, Under-Secretary of State for the Colonies. "To the very end," wrote Leslie Stephen, "Sir Alfred maintained his affectionate relations with his English relatives, and kept up a correspondence which showed that his intellectual vigour was unabated almost to the last."¹ He not only corresponded with the cousins he had known in England, but also their children, particularly with Sir James Fitzjames and Leslie, who was his godson, and A.V. Dicey.²

Law was not the only thing that the young Alfred was taught by his family. James Stephen and Wilberforce were public men of strength and character, and were prominent members of the Clapham Sect. In his youth, Alfred met many of the other members at dinner with his uncle. He recalled one memorable occasion when Canning, then Foreign Secretary, was present. "Zachary Macaulay, father of Lord Macaulay, Dr. Lushington, M.P., and Mr. Gladstone (then I believe a member for Liverpool - and father of the great disintegrator) were also there."³ His own experiences in St. Kitts heightened his awareness of the efforts of his uncle and Wilberforce to abolish the slave trade.

². Throughout his journals Stephen kept a note of the letters he wrote to England. MSS 777/2 * (M.L.)
Alfred Stephen came to the colonies as a young man, with a young man's ability to adapt to the strange conditions of a harsh country and a penal colony. He also brought with him traditions of reform and public service, fundamentally based on Christian principles. Despite battles against ecclesiasticism, he remained a faithful member of the Church of England, and was for a time a member of Synod. Froude commented that he had "held by the Clapham theory of things till he found the bottom break out of it". However, because he was a young man when separated from the main stream of Evangelical thought, he never became narrow in his views. Like the best of the Evangelicals, he relied on personal experience in life, and on his conscience to guide him in all he did. He possessed the same superb self-confidence, together with the ability to rationalise, which enabled him to fight for what he believed to be right, even if doing so ran counter to orthodox Anglican belief, or meant taking on the whole Church hierarchy. This may partly explain why he remained a low churchman until the end of his life, and why, with his reforming zeal, he never became an agnostic.

Stephen acknowledged his debt to Clapham in the third reading of his divorce bill in 1886.

I believe not, that all this certain and enormous extent of evil is to be left remediless, because of possible, and unproved, and as I think, improbable results to others, whose happier fate calls for no commiseration. This, Sir, may be mere sentiment; but it is of the kind which animated Wilberforce, and his revered associates with him, whom in my boyhood I knew and learned to love; and which led Howard and Mrs. Fry to visit outcasts in their dungeons. It was sentiment which made Gordon and Nelson heroes. I trust that the dictates of sentiment, which are in this case the dictates of humanity, will not to-night be rejected by this Chamber; and I humbly trust, as I do fervently believe, that in following them we shall not displease Him who is all compassion, and light, and love.

There was a lighter side to Stephen's character. He was twice married: to Virginia Consett, who came out to Van Diemen's Land with him; and after she died in 1837, he married her best friend, Eleanor Bedford. Each wife bore him nine children, and it seems quite evident that he was adored by his family and descendants. He possessed the happy knack of regarding children as people, but his charm was not confined to them. Even in old age he was an extremely handsome man, and combined "the family perception of the ridiculous

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1. N.S.W.P.D., 20, pp.2037-8. (1886)
2. The Chief Justice, while bored sitting on the Bench at Bathurst in 1859, wrote these lines, "Twice Nine - or Judicial Impartiality Exemplified" :

"Of children this Knight had no less than eighteen -
Twice nine little heads, with a marriage between.
He had nine when a barrister, nine when a judge,
And of "sex" - thus to Nature he owed not a grudge -
Nine precisely were girls, the other half boys,
An equal division 'twixt quiet and noise;
While, if by marriage the number be reckoned,
There were nine of the first and nine of the second,
Nine in Tasmania, nine New South Wales,
Then to show with what justice he still held the scales,
Since nine it was clear he could not divide;
(A third sex as yet having never been tried),
Five sons and four daughters in Hobart were born,
And four sons, five daughters might Sydney adorn.
Twin daughters, twin sons, complete the strange story
Of this patron of "Wigs", though constant old Tory."

Reprinted by Bedford, op.cit., pp.188-189
and humourous side of things,"\(^1\) with courtly manners. He enjoyed playing the flute, as well as going to parties and the theatre. At the age of eighty-four he could still enjoy a Ball. "Went to the Races & Lady Carrington's Ball - (Danced with her! - & staid till near 1 o'clock.)"\(^2\) This took place at the height of the controversy raised by his divorce bill. On another occasion he recorded a pleasant evening with plenty of riddles.\(^3\) Stephen always liked the company of women, whom he treated with chivalrous gallantry. Clearly the man had the art of being able to relax. Every person of note who came to the colony, from the Duke of Edinburgh to the novelist Anthony Trollope and the singer, Catherine Hayes, visited the Stephens. It was sufficiently rare for Lady Stephen to record it when they were alone for a meal.

Stephen had that liberal and cultivated mind that comes from wide reading throughout life. His library contained works of history and biography, fiction and poetry, in addition to the judicial and political books that one would expect. His religious books included the Koran and the Talmud. In addition he made a large collection of pamphlets, covering a wide range of subjects from railways to horticulture, from science to Federation, which is now in the Mitchell Library. Somehow he managed to keep up with the latest

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2. Stephen: *Journal*, pt.22, 28 Apr.1886, MSS 777/2 •• (M.L.) He was so pleased about the Ball that he also told his nephew, Frank, about it. 23 May - 2 Apr.1886, ASL3 •• (M.L.)
English and American journals and magazines. He spasmodically
collected in his journal what he had lately been reading, and some-
times made a critical comment. Carlyle he regarded with disfavour.
"On the whole I read his writings as I take medicine; feeling them to
be nauseous, however excellent for their purpose."\(^1\) He regularly
attended the dinners of the Shakespeare Society.

Sir Alfred Stephen's faults were few, and were accurately
pointed out by Sir Roger Therry in 1861. "Notwithstanding his great
failing in meddling in matters that did not concern him, - and getting
into trouble a more prudent person would have kept out of, - he
really was a clever and painstaking judge."\(^2\) It should be added that
he would speak at too great length in Parliament and at annual meet-
ings. He was aware of his lack of caution in a letter to Parkes:
"And I have in my time said too many things in the excitement of de-
bate, & speaking in Court wh: I have found to be quite mistaken, &
which I have regretted."\(^3\) His failings did not diminish with age,
but where they had made enemies for him/early and middle life, in old
age they were tolerated, and even regarded with affection. One news-
paper called him "Alfred the Irrepressible"\(^4\) and likened him to a
Jack-in-a-box, popping up when least expected. With his humour and
compassion, his faults made Stephen more human.

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2. Sir Roger Therry to James Macarthur, 11 Jan.1861, Macarthur MSS,
   vol.34, p.89.
After such an active life of service, it was not surprising that Stephen was regarded as a venerable patriarch or an elder statesman, a role he thoroughly appreciated. Honours poured down on him. He was knighted in 1846, made a C.B. in 1862, a K.C.M.G. in 1874, a G.C.M.G. in 1884, and finally in 1893 he was made a Privy Councillor, being only the second Australian to receive that honour.¹

¹ The first Australian to become a Privy Councillor was William Bede Dalley after despatching a contingent to the Sudan.
"The law regards physical fidelity as the vital element in the marriage bond."

A.P. Herbert - *Holy Deadlock.*

The laws governing marriage and divorce have always been of the utmost importance to both the Church and to the State, for the family is the foundation of morality. The Australian Colonies inherited the English marriage laws, but not, after 1856, their divorce laws. The English in turn based their laws on the Christian ideal of marriage and the canon law. Until the Middle Ages, the simple consent of both parties, without any religious ceremony, was deemed sufficient to constitute a valid marriage. In the twelfth century the Church raised marriage to the status of a sacrament, and held it to be absolutely indissoluble. The Council of Trent made its celebration by a priest essential for the validity of the marriage, and, at the same time, reinforced the medieval idea that marriage was a formidable barrier to spiritual purity when it reaffirmed the celibacy of the priesthood and pronounced anathema on anyone who dared to say that "the state of marriage is to be preferred to the state of virginity or celibacy".

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1. The English marriage laws differed considerably from the Scottish laws, and also the Irish.
Although the Church insisted on the indissolubility of marriage, it had not always been agreed on this point. The early Christian Emperors - Theodosius, Valentinian, Justinian, and Constantine - permitted divorce. Besides only valid marriages were indissoluble, and the Church recognised at least fourteen general grounds for pronouncing marriages null from the beginning (\textit{void ab initio}). These included pre-contract, relationship within the fourth degree of consanguinity, the same degrees of spiritual affinity, and, with true logic, these applied equally to illegitimate connections. With possible technical irregularities in the ceremony itself, a couple who wished to separate were unlucky if they could not find an impediment, and, if sufficiently rich and powerful, get their marriage annulled.\footnote{In 1880 Lady Mary Hamilton's marriage with the Prince of Monaco was annulled by a committee of Cardinals on the ground of "lack of inward consent on the lady's part", although external complaisance was not questioned, while she lived with the Prince and bore him a child. However, she managed to satisfy the Cardinals and was permitted to re-marry. Hanbury C. Geoghegan: \textit{Divorce Extension Justified}, Melbourne 1888, p. 13.}

Papal power was abolished in England in 1536, but four years later 28 Henry VIII, Ch. 7 affirmed as the law of England the Levitical degrees of consanguinity, and that illicit carnal intercourse created the proscribed affinities as did actual blood relationship. This remained the law until Hardwicke's Marriage Act of 1753, which abolished marriages contracted by simple consent followed by cohabitation and also endeavoured to curtail clandestine and "Fleet" marriages. Except for Jews and Quakers it was obligatory to be
married by a clergyman of the Church of England.\textsuperscript{1} Hardwicke's Act did not apply to Scotland, but was a grievance to Dissenters. This was not rectified till the Marriage Act of 1836, which also introduced the principle of purely civil marriage for those who objected to a religious ceremony, and enforced the registration of all marriages.

The position of the Church of England on the question of divorce was confused and inconsistent. It was the only reformed church to reject the Roman Catholic premise that marriage is a sacrament, while accepting its conclusion that marriage should be indissoluble. At the same time, under Henry VIII, it rejected the wide grounds of nullity, which in practice, had made the Catholic system tolerable. The Ecclesiastical Courts could pronounce decrees of divorce a mensa et thoro, (divorce from bed and board), which had the effect of judicial separation, and did not carry the right of remarriage. Henry VIII, having got his marriage with Anne Boleyn annulled by the Ecclesiastical Courts on two grounds: her pre-contract with Northumberland, and the affinity created by his carnal knowledge of her sister,\textsuperscript{2} was satisfied. However, the question was again raised during the reign of Edward VI by the Marquis of Northampton, whose wife was convicted of adultery. He obtained a divorce a mensa et thoro and claimed the right of re-marriage. While his case was being considered by a commission of ten bishops, he remarried.

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They eventually confirmed his marriage, but he was advised to get a special Act of Parliament passed.¹

Edward VI set up a commission of thirty-two men: eight bishops including the Archbishop of Canterbury, Cranmer, and Bishops Hooper and Ridley; eight other divines including Peter Martyr, Professor of Divinity at Oxford University; eight Doctors of Civil Law and eight other lawyers. Their duty was to revise the entire ecclesiastic and canon law of the country. The result was the Reformatio Legum Ecclesiasticarum. This remarkable document had an important section on divorce. Their conclusion was that divorce should be permitted for adultery, desertion after three years, and after a stringent search had been made for the deserter; (if he could not be induced to return, he was condemned to imprisonment for life); and for cruel and deadly hostility.² The Commissioners also utterly condemned divorce from bed and board: "Cum a sacris literis aliena sit, et maximam perversitatem habeat, et malorum sentinam in matrimonium comportaverit."³ Although sanctioned by both Church and State, the Reformatio never became law, largely because Edward VI died before he could give it his royal assent. Inevitably it lapsed during the reign

¹ Lecky, p. 175.
² Stephen in an open letter addressed to the Bishops and clergy, S.M.H., 31 March 1887, p. 11.
³ "Cum a sacris literis aliena sit, et maximam perversitatem habeat, et malorum sentinam in matrimonium comportaverit." "Since it is inconsistent with the sacred writings and is the cause of the greatest perversity and has brought into marriage a very cesspool of evils." Notes in Stephen's handwriting, taken from the Reformatio Legum Ecclesiasticarum, C.19, p. 55. He was lent a copy of the old book in 1887. Stephen: UnCat. MSS 211/3. (N.L.)
of Mary and some of its authors were burnt alive. Under Elizabeth
Archbishop Parker made several attempts to have it enacted, but failed
because of Elizabeth's growing dislike of Puritans.

The men who drew up the *Reformatio Legum Ecclesiasticarum* were
the authors of the Reformation in England, and cannot be written off
as heretics or of doubtful orthodoxy. O.R. McGregor made an important
point when he claimed that

If the Church of England accepted absolute divorce in the
early days of its establishment, then assertions now being
made by the doctrinally dominant section of the Church of
England that the Church has never deviated from the medieval
doctrine of indissoluble marriage, have no historical warrant. 1

Although the *Reformatio* never became law, Scotland in 1573 introduced
divorce for adultery on the part of either the man or the woman, and
for desertion. Even in England it seems that marriage was not regarded
as indissoluble by the Church, for the Courts seemed to grant divorces
for adultery between about 1550 and 1602.2 However Foljambe's case,
decided in 1602 by the Star Chamber, re-established the power of the
Ecclesiastical Courts and the indissolubility of marriage, re-
lieved only by divorce *a mensa et thoro*. Ostensibly this system
lasted until 1857 although the poet, John Milton, claimed that di-
vice was obtainable for adultery and after long years of desertion
during the Commonwealth.3 This has not been entirely substantiated,
but being in accordance with the opinion of the Reformed Churches,

2. O.P.E. Joske: *Laws of Marriage and Divorce in Australia*, Third
was possible in England under Cromwell. Milton wrote much on the subject and practically believed in divorce by mutual consent. If the status quo had been altered during the Interregnum, it was restored with the accession of Charles II.

Such a situation was intolerable for long and was of especial concern to the aristocracy with lands and titles to bequeath. The only power in England which could override the Ecclesiastical Courts was Parliament, and to Parliament Peers with adulterous wives turned. In 1697 Lord Macclesfield petitioned the House of Lords for a Private Act to give him an absolute divorce on the ground of his wife's adultery. Parliament agreed, and in 1700 the Duke of Norfolk was similarly successful. They established a precedent which lasted until the law was changed in 1857. The wording of Norfolk's Act gives the reason for Parliament's acceptance of the role of a Divorce Court.

"For as much as the said Henry, Duke of Norfolk, hath no issue nor even any probable expectation of posterity to succeed him in his honours, dignities and estates, unless the said marriage be declared void by authority of Parliament; and the said Duke be enabled to marry another woman,"

It emphasises the importance of primogeniture to the social fabric of England. When the succession to a title or property was endangered by an adulterous wife, Parliament was willing to override the Ecclesiastical Courts by granting absolute divorce by Private Act of Parliament. The procedure became standardised: a man first obtained a divorce a mensa et thoro from the Ecclesiastical Courts, and took criminal proceedings against the seducer for criminal conversation,

1. Quoted McGregor, p.11.
then Parliament would grant a divorce for adultery as a right. Only four wives managed to prosecute successful suits, and in each case the husband was guilty of aggravating enormities in addition to adultery.

As the nineteenth century progressed the illogicality of this system became increasingly apparent. If Parliament could legislate for divorces a vinculo matrimonii, then marriage was not indissoluble. More and more people were petitioning for Private Acts, and, although this method of relief was not limited exclusively to the aristocracy, nobody could pretend, in the age of the Reform Act, that it was just to have a law for the very rich, and no relief for anyone else. A climax came in 1845 when Mr. Justice Maule imposed the lightest possible sentence on a poor man who had committed bigamy, in order to provide for his young family, after his wife had deserted him.

"But, prisoner, you have committed a grave offence in taking the law into your own hands and marrying again. I will show you what you should have done. You should have brought an action in a civil court, and obtained damages, which the other side would probably have been unable to pay, and you would have had to pay your own costs — perhaps 100L, or 150L. You should then have gone to the ecclesiastical court and obtained a divorce a mensa et thoro, and then to the House of Lords, where, having proved that these preliminaries had been complied with, you would have been enabled to marry again. The expenses might amount to 500L, or 600L, or perhaps 1,000L. You say you are a poor man, and you probably do not possess as many pence, but, prisoner, you must know that in England there is not one law for the rich and another for the poor."  

1. Jane Austen, in Mansfield Park (1814), did not question Mr. Rushworth's ability (with an income of £10,000 a year) to get a divorce, after his wife had run away with Henry Crawford.
2. Quoted Lecky, pp.201-2; also in a slightly different form by McGregor, pp.15-16.
A change in the law was slow to come, for not only were the legislators cautious, but the Church of England protested violently. This was not entirely expected as, although the ecclesiastical courts considered that marriage was indissoluble, no Bishop, sitting in the House of Lords, in 150 years had protested on religious grounds against a divorce by Private Act of Parliament. A Royal Commission in 1851 recommended that the law should be changed, and three years later the Cabinet, which included Gladstone, introduced a Divorce Bill. More than a thousand clergy petitioned against it, and it was not passed for another three years, when it was introduced in the House of Lords by the Lord Chancellor himself. It was supported there by Bishop Thirwell, and nine other Bishops, but this time was opposed in the Commons by Gladstone.

The Matrimonial Causes Act of 1857 did no more than transfer from the House of Lords the power to pronounce decrees of divorce a vinculo matrimonii (absolute divorce with the right of re-marriage) to husbands on the ground of simple adultery, to the new Divorce Court, situated in London. Despite the efforts of Lord Lyndhurst, a wife had to prove, in addition to adultery, desertion for two years and upwards without maintenance, physical cruelty, (which had to amount virtually to attempted murder), incest, or bigamy, or such unnatural offences as rape, sodomy, or bestiality. The reluctance to permit a woman to divorce her husband for simple adultery goes back to the importance of primogeniture as the argument was always raised that a woman's adultery was worse than that of a man because to condone a
wife's adultery was to run the risk of "spurious" children. Although the Ecclesiastical Courts' jurisdiction over divorce was abolished, divorce a mensa et thoro was merely re-styled Judicial Separation. A woman could petition for separation on the grounds of adultery, cruelty, or desertion, and be given maintenance. The grounds for the annulment of a marriage remained the same as under the Ecclesiastical Courts; namely, inability to consummate the marriage, being of unsound mind at the time of the marriage, or any informality in failing to carry out the provisions of the Marriage Act. Nor did the new Divorce Court cheapen the legal process of procuring a divorce as much as had been expected. Divorce still remained the monopoly of the rich, while the poor had to make do with judicial separations. In addition the Matrimonial Causes Act of 1857 did nothing to unify the marriage and divorce laws of the United Kingdom; Ireland had no divorce, or only by Act of Parliament, while Scotland, apart from different marriage laws had, and had had since 1573, divorce for adultery, equally for both sexes, and for wilful desertion.

There was a considerable amount of confusion over what was the actual marriage law in New South Wales, as the English marriage law was limited by what was applicable to colonial conditions. Sir Francis Forbes and Judge Dickinson held that Lord Hardwicke's Marriage Act did not apply since it was specifically confined in its jurisdiction to England and Wales. "Nothing in this Act shall extend to ... Scotland, ... nor to any marriages solemnised beyond the

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In a much later judgment, Chief Justice Griffiths held that it did apply. Forbes upheld the English Common Law, subject to 28 Henry VIII, Ch.7, allowing the verbal consent of two persons, in the presence of a witness to constitute a valid marriage. However it was generally held Hardwicke's Act did apply. This meant that to be valid in the Colony, all marriages had to be solemnised by an Anglican clergyman. The decision resulted in some uncertainty, and annoyed Dr. John Dunmore Lang, who had celebrated several marriages when the parties were Presbyterian or Scottish.

The situation was not regularised until a local Act, 5 William IV No.2., 1834 was passed by the Legislative Council. It was both declaratory and retrospective, safeguarding all marriages celebrated by ordained or officiating ministers of the Roman Catholic and Presbyterian Churches, and declaring all future marriages to be valid if one of the parties were a Roman Catholic or a Presbyterian. Methodist marriages were not validated until 1839, and those of Baptists and Congregationalists until 1840 although their ministers had been on the scene earlier than J.D. Lang. However the House of Lords in its judicial capacity, created more confusion when they overruled Forbes, and declared that common law marriages were only valid if made with

2. Ibid., pp.98-100.
the intervention of a minister in holy orders conferred by episcopalian ordination. These orders included Roman Catholics as well as Anglicans but excluded everyone else. Everyone was unsettled—Presbyterians; Jews and Quakers, who had always been provided for. Mothers apparently became concubines, children bastards, and finally inheritance became unsure. At first nothing was done to remedy the position.

In 1852 a Select Committee on the Marriage laws recommended reform in the direction of simple laws upholding the principles of publicity, uniformity, and certainty. Marriage should be capable of easy proof, and be celebrated according to conscience, even should it involve a civil contract before a registrar.¹

The result was the Marriage Act, 1855, (19 Victoria No.30.), which was drawn up by Sir Alfred Stephen and J.H. Plunkett, the Attorney-General, and guided through the Legislative Council by the latter. The Act repealed all previous legislation and confirmed all marriages in the Colony by any minister before 1 March 1856. All Ministers of Religion had to be licensed by the State before they could celebrate a marriage. The parties had to sign a declaration on a prescribed form, two witnesses had to sign the marriage certificate, and minors had to have the written consent of the father, mother, guardian, or a Justice of the Peace. Jews and Quakers were exempt providing that their marriages were valid according to their own usage. As far as the State was concerned, the Marriage Act of 1855 established once and for all that marriage was a civil contract.

Amid all the discussion about responsible government, the Churches

swallowed it without a murmur. The marriage question was not to be raised for thirty years, until the Royal Commission on the Registration of Births, Deaths, and Marriages in 1886.

If the validity of marriages posed a problem, the question of divorce posed a far worse one. Until 1873 it was impossible to get a divorce, to all intents and purposes, although theoretically possible by Act of Parliament. New South Wales had no ecclesiastical courts and the power was long withheld from the Supreme Court of matrimonial jurisdiction, which had been asked for in 1820, in order to give alimony to maltreated wives. This power was an intentional omission from the Charter of Justice of 1823. When the subject was revived in 1825, by Saxe Bannister, James Stephen in the Colonial Office was not averse to giving the Supreme Court such power, but it was never directly conferred by the Imperial Parliament. Nevertheless C.H. Currey argues that under 2 and 3 Victoria Ch. 70, which empowered the Legislative Council "to make such provisions as to it seemed meet for the better administration of justice in New South Wales", the local parliament could have legislated on divorce.

Since the New South Wales Marriage Laws were far from perfect, there were plenty of opportunities for hasty or clandestine marriages. Wentworth, in 1853, moved, in the Legislative Council, a motion to annul a marriage between Emmeline Blake, a member of the Church of England and aged fourteen and a half, and Patrick Mehan, a Roman Catholic. Despite their religions, they were married by a Presbyterian

2. Ibid., p. 111.
minister, who had been deceived, without the consent of her father, who was a wealthy publican. The girl was duped and Mehan wanted her father's money. The Legislative Council was inclined to regard the girl with sympathy. When the power of the Legislature to enact such a measure was questioned, the Judges agreed that such an act was within its compass, although Darvall thought the bill was unnecessary as the marriage was not protected by 5 William IV No.2, and was not valid under common law either. In the event the Legislative Council did pass the bill, but it was twice refused the Royal Assent, thereby starting a long line of refusals to divorce bills.¹

The Royal Commission on the Registration of Births, Deaths, and Marriages in 1886 revealed that there were ministers of religion who traded on celebrating as many as 400 marriages in a year. One of these gentlemen was Dr. Lang who had charges instituted against him for violating the Marriage Act by marrying a girl under the age of twenty-one without the consent of her parents. The Registrar-General only dropped the prosecution at the request of Sir John Robertson. Dr. Bailey, of the Free Church of England, and Dr. Fullerton, a Presbyterian also were known to celebrate a great number of marriages in a year.² The Commissioners were unanimous in recommending alterations in a law, which permitted that any two persons, if under no actual legal impediment,

may — whether known or unknown to the celebrant — be united together, by the simplest and shortest of forms, at any time, either day or night, without even an hour's notice, and without inquiry.

This state of affairs was such that it would be surprising if divorce were not needed. Furthermore the peculiar condition of colonial life with no reciprocal arrangements for enforcing the law, provided great facilities for desertion, and even for committing bigamy as a man had only to leave the Colony to be safe from being charged with that crime.2

The English Matrimonial Causes Act of 1857 was the basis of the first colonial legislation on the subject of divorce. As it became law a year after the colonies of New South Wales and Victoria received Responsible Government there was no question of it applying to the colonies. The Secretary of State, Lord Stanley, was concerned about this omission, and accordingly sent a despatch to the Governor of New South Wales, urging the State legislature to introduce a divorce act on the same lines as the English one, and stressing the desirability of uniform marriage and divorce laws within the British Empire.3

South Australia passed a Matrimonial Causes Act, almost identical with the English Act, in 1858, Tasmania in 1860, Victoria in 1861, Western Australia in 1863, Queensland in 1864, and New Zealand in 1867. Victoria's original bill provided for four years desertion and adultery on the part of the husband, but these grounds were rejected when the bill was submitted for the Royal Assent.4 The power of the Colonial

2. Stephen to Lord Belmore, c.1871, Belmore MSS vol.11, p.865.
3. The Secretary of State for the Colonies to the Governor of N.S.W., 12 April 1858, L.C. Journal, vol.5 (1859-60),ii, p.655.
4. Joske, p.34.
Governors to sign all marriage and divorce bills was specifically withheld in the Act defining the Powers of the Governor 1855. This was to cause endless trouble over divorce bills.

New South Wales paid no attention whatsoever to Lord Stanley's despatch. Charles Cowper, a devout Anglican, was Premier, and Plunkett, a Roman Catholic, was Attorney-General. Three abortive attempts were made before 1873 to introduce a Matrimonial Causes Act, but none of them reached the Legislative Council. In 1862 Mr. Holroyd introduced a bill along the lines of the 1857 English Act, giving the husband the right to sue for divorce on the ground of adultery, and the wife the right on the ground of incestuous adultery, adultery with bigamy, or adultery aggravated by cruelty or desertion, or on the grounds of rape, sodomy, or bestiality. Similar bills were introduced in 1866 and 1867.

It is possible that there was little pressure for divorce in New South Wales, and this is borne out to some extent by the statistics. After the New South Wales Matrimonial Causes Act was passed in 1873, only one divorce was made absolute the following year, and ten in 1875. On the other hand, New South Wales was held to have more crime than any other Colony: the advocates of divorce claimed it would help to reduce the number of cases of suicide and murder, as well as of drunkenness and prostitution.

2. Information from Mr. Jeckeln, Clerk of the Legislative Council of N.S.W.
The lead in introducing divorce legislation in the New South Wales Parliament came from that "good drinking man", David Buchanan after 1870. Unfortunately he complicated matters further by fighting for the right of a woman to divorce her husband for simple adultery. When he introduced his Divorce Bill in 1870 he made a stirring if unimpressive speech, in that he devoted half of it to baiting the Roman Catholic members of the House, thus wantonly raising the sectarian issue, and offering neither solid arguments in favour of the measure, nor facts, nor figures, nor cases of abject misery that would have supported his case. He urged the Colony to lead the way in raising women to equality with men before the law, unlike the British law which treated women "with an injustice which is founded on feudal barbarism and that wretched vassalage, the spirit of which animates certain orders in England to this day".


   David Buchanan, took up Law in middle life and became a successful criminal pleader. He was a notable and colourful orator, both in Parliament and in Court. He belonged to a small Scottish sect, the Glassites.


   An example of Buchanan's Catholic baiting: In granting annulments "the Romish Church has acted from no higher motive than a grovelling desire to enrich her coffers, and hesitates not to perpetrate rank injustice as well as deep sin, that the priesthood may be clothed in purple and fine linen, and live in rank and idle luxuriance. From all my reading and investigation of this subject I am persuaded this indissolubility of the marriage tie is a device of the Romish Church originated and maintained for no other purpose than the extortion and fleecing of the poor, helpless victims who fall so easy a prey to their priestly tyrants."

Although the Assembly passed the divorce bill by a large majority, it was not returned by the Council. Apart from the controversial nature of the subject, the Council was strongly opposed to his clause giving equal rights to women, which would make the law different to that of England. Victoria had failed to get a similar clause included. It would have made the British Cabinet extremely reluctant to advise the Queen to give her assent to the measure, while it was also very unlikely that any subsequent marriages would be recognised by the English Courts. Eventually the first New South Wales Matrimonial Causes Act was carried in 1873, without the controversial clause giving women the right to divorce their husbands for simple adultery. Buchanan's irresponsible, if picturesque, championship of divorce almost certainly added to the difficulties of all those who wanted such a law.

Although Stephen was still Chief Justice of New South Wales and technically above politics, he was interested in the problem of divorce and not averse to having his say. Under the signature, "An Australian Colonist", he published three letters in the Sydney Morning Herald, in October 1870, on the "Indissolubility Question". In certain respects he was never to change his mind.

Believing as I do, that the divorcing of a man and wife for unfaithfulness, to which object alone the measure is confined, is on religious and social grounds both justi-

liable and expedient, conducive to morality, an act equally of justice and mercy to those sinned against as sinning, and that the clamour in certain quarters against it is the result of prejudice.... 1

He was to widen his definition of unfaithfulness, but remained constant in his belief that divorce was conducive to morality. One thing that made him such an irresistible supporter of divorce extension was his ability to meet the ecclesiastical objectors on their own ground with an equal knowledge of the Bible and greater scholarship. This was quite clear in 1870.

It is easy to cite half a sentence, and, by relying on one text and ignoring another elsewhere, or by adopting a literal interpretation of certain words, in opposition to the well known rule by which we construe all others, to perplex, and mystify and mislead.

He pointed out that the words, "Whosoever marrieth her that is put away, doth commit adultery", relied on so heavily by some, were not to be found in the ancient Sinaitic Bible, and in any case they referred to a voluntary act, not a judgment from any form of legal tribunal. Moreover the State held marriage to be a civil contract before the law, and the facility with which very young men, and men "of any (or of no) character" could make hasty marriages, made it a mockery to call such a marriage "a sacred thing, with which human hands must not interfere". 3 In spite of the fact that Roman Catholics held marriage to be indissoluble, they could get marriages annulled, the Pope could grant dispensations permitting re-marriage,

2. Ibid., Second letter, p.8.
3. Ibid., p.9.
and Parliament could override the Ecclesiastical Courts. He considered that very few people would commit adultery merely to get rid of their shackles. "Women may indeed fall, as now, because of an unhappy home, or from any of the other causes which at present lead them astray, but this new source of frailty, I am persuaded, will have no influence on them." 1

There had been no difficulty in getting the Royal assent to the 1873 Matrimonial Causes Act, for it merely adopted the provisions of the English 1857 Act. It did, however, establish the principles that marriage was not indissoluble, and that the State had had the power to dissolve it under certain circumstances. If New South Wales was the last colony to introduce a divorce law, she was the first to press for divorce extension. For the next twenty years the divorce issue was constantly before Parliament and the country. Undaunted by his initial failure, Buchanan continued to fight to win the right for a woman to divorce her husband for simple adultery. He now had to fight not only against ecclesiasticism and social prejudice, but also against the jurists and constitutional lawyers on the one hand, and the Imperial Government on the other. Until 1877, the bills he had annually introduced to this end, were either not returned by the Legislative Council or stopped by prorogation.

Stephen's position on this question was equivocal. In 1870 he gave indications that he was not opposed to women being able to divorce their husbands for simple adultery.

The object is, solely, to enable an injured husband, and as the draft now stands, equally an injured wife, to procure by the law that redress, to which each is entitled in (I believe) every other portion of the Queen's dominions save this; but which the wife would now seek in vain, however aggravated the offence against her, ... the continued existence of which, as everyone admits, is a standing national reproach.

He may have been concerned because as things then stood, a woman could not even get a judicial separation. However further on he claimed that divorce for unfaithfulness was "likely to be even a larger act of justice to women than to men". Even at this early date he realised that divorce for adultery would not solve all the problems of maltreated wives. Out of 332 orders for maintenance, under the Deserted Wives Act, 53 disclosed elopement by the husband with another woman, and in many other cases of desertion and drunkenness the wife was unable to prove adultery. He was full of compassion for the temptations of abandoned wives.

Stephen was appointed to the Legislative Council in 1875, and, despite his comparatively liberal views on divorce, bitterly opposed Buchanan's bill. The Council was not intimidated by his stand and in 1877 passed it for the first time, then the trouble started, for the bill had to be reserved and the Queen twice refused her assent. The Secretaries of State for the Colonies, Sir Michael Hicks-Beach and Lord Kimberley, were both strongly disapproving of this departure from

2. Ibid., p. 7.
English divorce law, on the grounds of the inexpediency of different marriage laws within the British Empire, and the "confusion and uncertainty as to the validity of subsequent marriages, the status of children, and the rights of succession to property which would ensue if sentences of dissolution of marriage were pronounced by the Courts of New South Wales, the validity of which was not recognised in other countries."  

Buchanan's Divorce Bill was attacked by Stephen in 1877, 1879, and 1880. He was particularly displeased after the receipt of the Hicks-Beach despatch in 1880 "because the Secretary of State, without previous communication to him, and without his knowledge or wish, introduced his name into the despatch referred to, and made him a principal opponent of the Bill."  

He was forced into the position of convincing Parliament that he had not taken it upon himself to write privately to the Colonial Secretary to give his opinion on the undesirability of the Bill, which was unconstitutional in any case. But irritation does not excuse his specious arguments; even his usual chivalry towards women seemed to have deserted him.

It might be that a husband's adultery alone was insupportable to a woman, but it was not ordinarily the case; as women were often treated with affection and respect by an erring husband who continued to reside with her and loved their children. In cases of that kind a woman knowing the infidelity of her husband was not likely to seek divorce.

Sir John Robertson: And need not seek it under this Bill.

1. Lord Kimberley, (Secretary of State for the Colonies) to the Governor of N.S.W., 22 June 1880, V.& P. 1880-1, vol.1, p.295. See Appendix II, p.vi.
2. N.S.W.P.D., I, p.303.
Sir Alfred Stephen: Exactly so; therefore the Bill was not wanted.

Stephen's eight points of objection to the Bill are worth stating because he put forward the strongest arguments that could be made against divorce extension, without involving religion, as well as some of the weakest. First: the Bill was without precedent in any part of the Empire, except Scotland. Second: that diversity of laws within the Empire upon so vital a subject as marriage was impolitic and likely to injure women and children. Third: a woman could already get a divorce absolute from the power and society of her husband in a judicial separation — lacking only the right of re-marriage. Fourth: it affected not only the residents of New South Wales, but all married persons emigrating from, or returning to the United Kingdom and their children. Fifth: that it was unconstitutional, and also unseemly to object to the use of the veto. Sixth: that the principle of a different law for men and women regarding adultery did not rest on equality of rights as the inflicted injury, social and political, was entirely different. Seventh: that unless there was something exceptional in the circumstances of the Colony, it was unbecoming and unwise not to defer to the authority in England. Eighth: that the measure was not proposed to restrain the offence, but on the contrary was calculated to encourage immorality and collusion in married people wanting release from their bonds. He regarded the measure as "experimental, unprecedented, uncalled for, and very

1. N.S.W.P.D., I, p.305.
mischievous”.¹

The problems raised by bigamy and illegitimacy, if the Courts in England refused to recognise colonial divorces, were very great, and easily recognisable to a lawyer. Stephen was no doubt right when he claimed that it was likely to encourage people to commit adultery, and also collusion. The rest of Stephen’s speech was sententious and pedantic; he was later to fight desperately against similar arguments when campaigning for his own divorce bill. He was to change his mind completely about the morality of judicial separations. Sir John Robertson was pardonably annoyed by Stephen’s objection that it was unconstitutional to dispute the right of the Queen’s advisors to use the veto. Despite Stephen’s opposition the Bill was passed quite easily, but was refused the Royal assent.

In 1881, Stephen reluctantly withdrew his opposition, largely because he thought it was time that the undignified squabbling with the Home Government ceased. By this time the Divorce Bill had been passed three times by the Legislative Council and at least six times by the Assembly. Possibly the Imperial Government was tired of the persistence of Buchanan who, discontented with the usual methods, had, by his own admission been bombarding both Gladstone and Disraeli with arguments and requests to use their influence.² Unwillingly they gave

¹. N.S.W.P.D., 1, pp. 310-11.
². S.M.H., 22 March 1888. (Buchanan)

"This Bill went twice home while Disraeli was Premier, and three times while Mr. Gladstone held that office. I wrote them both, remonstrating with them on what I considered their unjust treatment of this country. They both wrote me in reply, and Mr. Disraeli gave me a rare chance to rebut what he had written. In his letter he said that the principal reason that induced him not to recom-

(contd)
in, providing that the Bill was modified by clearly laying down in
the Act, that it was the duty of the Court to prove that the parties
were domiciled in New South Wales. The Queen assented to the Bill
(thus amended) in 1881. This was a great achievement. The assent
had been given while Gladstone was Prime Minister, and although he was,
no doubt, fully occupied with Egypt, no man was more convinced that
divorce on all grounds was utterly wrong and against the Scriptures.
Now that this major point, permitting a woman to divorce her husband
for adultery, had been carried the law was different to that of Eng­
land and Scotland, and indeed, to that of the other Australian Colo­
nies. Hereafter, no matter how strongly worded, the complaints of
Secretaries of State, about future divorce bills making the law
different to that of England and Scotland, lacked conviction, be­
cause the law already was different.

The agitation over the divorce question was not to slacken
after Buchanan's success. It was to continue in New South Wales for
another decade, to be taken up in Victoria, Queensland and South
Australia. The controversy over marriage and divorce was not limited
to the Australian Colonies. In 1884 France introduced a divorce law
for the first time since Napoleon. Its most outstanding feature was
that: judicial separation could be converted into a divorce after three
years without a new court case. The French included a clause making

2. (contd) mend for the Royal Assent was that it altered the uniformity
of the law: in her Majesty's dominions. I met this by pointing out
that in this he was in error, as the principle of the bill was, and
had been, the law of Scotland from the date of the Reformation.
"bad treatment and grave injuries" as a ground of divorce. On the other hand some Americans were becoming increasingly concerned about their divergent laws, the varied and wide grounds in some States, the loose administration of those laws, and most of all about the divorce rate, which was increasing twice as fast as the population.

Washington Gladden\(^2\) published an article in Century Magazine, 1882, in which he cited figures illustrating the growth of divorce, taken from the Reverend Dr. Samuel Dike's address at the founding of the New England Divorce Reform Association. Mr. Gladden was quoted by the opponents of divorce extension in New South Wales, and almost certainly provided the figures on the American divorce rate which were cited in the debates. He thought that the alarming increase in the divorce rate went hand in hand with the demand for female suffrage and other efforts to increase the self-respect of women. He considered that the best checks to unnecessary divorces would be for property to be jointly owned, the guilty party prevented from re-marrying for three years, and in cases of adultery the imprisonment of the criminal.

The North American Review took a great and continued interest in the divorce question. All the writers agreed that the administration of the courts should be tightened, while very few thought that divorce should be entirely abolished. The Rev. Dr. Theodore Woolsey\(^3\)

1. Quoted by Lecky, p.198.
was something of an exception in preferring judicial separation to divorce, and thought that the number of divorces increased with the number of grounds. Noah Davis¹, Judge of the Supreme Court of New York, was with Woolsey in limiting the causes of divorce to infidelity in either party. He thought that the greatest safeguard against divorce was large families, but children were now thought of as an encumbrance. He was scandalised by the many fraudulent divorces, and advocated a uniform divorce law. Judge Davis was also to be quoted in the New South Wales controversy. He was taken to task by Elizabeth Cady Stanton,² who thought he had sacrificed the individual to the State. She dismissed the Bible as reactionary. Another Judge, Jameson,³ thought that some divorces should be permitted on all grounds, but particularly for desertion, drunkenness, and cruelty; on the other hand the administration of the law should be tightened and offending parties penalised.

**Nation** was also crying out against the fraudulent divorce business, which was openly advertised in the press, while the American Bar Association was equally disturbed and wanted legislation to insist on the use of "domicile" instead of "residence".⁴

The English, meanwhile, were trying to ignore the fact that

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their divorce laws perpetrated some gross injustices. There was a
great deal of controversy over the Marriage with the Deceased Wife's
Sister Bill, which was regarded by some as incestuous, but there
was no marriage or divorce controversy till 1888. Only one English-
man at this time spoke out against the divorce law in England, and
especially of the cruelty to poor women of judicial separation. George
H. Lewis, in the Fortnightly Review advocated additional grounds of
divorce for women: cruelty; desertion without due cause for two years
and upwards; adultery committed under her roof or in disgraceful cir-
cumstances; conviction of penal servitude for five years and up-
wards, and for either party, incurable insanity after two years.
Stephen later quoted extensively from Lewis's article.

The English and American journals and magazines were suf-
ficiently widely read in New South Wales to be reviewed not only by
the Sydney Morning Herald and the Daily Telegraph but also by the
Evening News.

By the eighteen-eighties the Victorian ideal of family life was
being challenged from various directions. Youth was demanding more
freedom, and it was not only the Press which saw larrikinism as an

1. The controversy over marriage with deceased wife's sister was so
great that it was mentioned by the Queen of the Fairies in Gilbert
and Sullivan's Iolanthe.
   "He shall prick that annual blister,
   Marriage with deceased wife's sister!"
2. George H. Lewis: "Marriage and Divorce", Fortnightly Review,
    May 1885, pp.640-53.
extreme symptom of the growing impatience with restraint. The Primate, Bishop Barry, in an address on "Freedom and Government" saw in it far wider implications.

What was known as larrikinism and rowdyism was not exactly vice, but a spirit of lawlessness. He had heard of this larrikinism not only in the streets, but also to some extent in our Houses of Legislature, at the academical gatherings of the Universities, and it had now and then even displayed itself at church meetings. This spirit of lawlessness and want of order, which in its extreme form became larrikinism, constantly mistook itself for freedom. One thing which tended to larrikinism was the want of true domestic discipline — a want of authority on the one hand, and the respect and honour which obeyed it on the other. There was a growing dislike to restraint, and this was shown in the agitation for an extension of the causes for which divorce could be obtained.

Indirectly, at a higher level, the desire for divorce extension was to lead to increased impatience with Britain.

Since the publication of Darwin's *Origin of Species* religion had been under strong attack from some natural scientists. Agnosticism was increasing, and for the first time, the law makers were beginning to realise that as everyone in the community might not be Christians, provision should be made for them, e.g. by facilities for civil marriage, and later for divorce. In 1893 Leslie Stephen published his *Agnostic's Apology*. Sir Alfred, a prominent member of the Church of England, did not mean to attack the power and prestige of the Church by introducing his Divorce Extension Bill, but the issue became involved with the question of the secularisation of

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the State. Religious scepticism rubbed off on the discipline of the family.

Marriage was only directly challenged by a few, but it was sufficiently discussed for the Daily Telegraph to begin an editorial with the assumption: "That the marriage question is distinctly the social question of the day is so fully recognised in many different quarters as to require not a word to be said in proof".\(^1\) The Methodist paper, the Weekly Advocate was decently shocked by Sir George Campbell's suggestion in England that marriages should be the subject of scientific regulation.\(^2\) The clergy preached sermons on the subject, particularly the Reverend Dr. Jefferis who gave a series of public lectures on preparation for matrimony in 1886. This concern with the problem of marriage, and its converse, divorce, in addition to its connection with/movement for women's rights is reflected in the literature of the age. Perhaps nothing was as sensational in its impact as the first performances of the Doll's House by Henrik Ibsen. An American clergyman damned popular literature completely.

Another prolific source of family disintegration and divorce is a pernicious literature. The vile books are afloat, and they are multiplied as the frogs of Egypt. They are sold at every news-stand. They are placarded and trumpeted by every possible device --- books that trifle with marital vows, that make a mock of its high solemnities, that play fast and loose with that holy thing we call virtue. ... And Howell lauds with fulsome panegyric its chief apostle, Tolstoi, as the greatest of novelists living or dead. And we go to Anna Karenina for the justification of this high eulogy, and we find that 'the courage to picture men and women as they are' consists in the effrontery that lifts the veil from lust,

a simple refinement of the brazen thing that finds its coarser expression in Zolaism, and its unbridled licence of speech in harlotry. ...

I name one other source of our social trouble ... a pernicious drama. What are most of the popular plays but scenes in which marital rights are played with as a foot-ball, and vice is gilded and made alluring with every sensuous and scenic attraction; ...

There is room here for puritanical exaggeration, but C.L. Montefiore writing in the Sydney Quarterly Magazine agreed completely.

If the present state of drama could be taken as an indication of the times, popular taste was depraved.

Nor could the most rigid moralist expect that the subject of unhappy conjugal relations, and complications ensuing therefrom should never be touched upon. What he should expect and demand is, that these subjects should be handled in such a manner as to leave no doubt whatever on the mind of the spectator as to the true moral aspects of the case. That they are so treated in a large majority of modern plays will hardly be seriously asserted; ...

A reviewer of a novel by Mrs. Campbell-Praed knew from experience that she would not be on the side of the sanctity of the marriage tie. The heroine of the Bond of Wedlock, inevitably married, chafed at her bonds so that her father and lover concocted the material for a divorce. The reviewer concluded:

And this is a specimen of the novels, relying for their interest solely on descriptions of fashionable vice, which are produced by hordes of female writers for the perusal of girls and women in a country which professes to look down on the 'immoral French novel' with pure and lofty disapproval.

Although Nation preferred W.D. Howell's novel, *A Modern Instance*, to Margaret Lee's *Divorce*, Gladstone took the opportunity of reviewing the latter to air his disapproval of divorce in general. He gathered that in America, as in England, it was more prevalent among the less solid and stable portions of the community, (which was untrue in England as the less solid members of the community could not afford divorce). Gladstone was delighted by Margaret Lee.

It is with great gallantry as well as with great ability that Margaret Lee has ventured to combat in the ranks of what must be taken nowadays as the unpopular side, and has indicated her belief in a certain old-fashioned doctrine that the path of suffering might not be the path of duty only, but likewise the path of glory and of triumph for our race.

A more important novel concerning the implications of divorce, showed both the danger of gossip, and a great deal of sympathy for the beautiful heroine who was shocked into a marriage of convenience, and then behaved with a complete lack of discretion. This was George Meredith's *Diana of the Crossways*. It was first published as a serial in the *Fortnightly Review*, in 1884 and as a book the following year.

Although much of the Christian world was re-appraising the questions relating to marriage and divorce in the light of a demand for more freedom and the rapidly increasing secularisation not only of the State but also of society, there is no doubt that to be involved in a divorce case, was a disgrace. More stress than ever was being placed on moral purity, and it was beginning to be demanded of

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public men. The private life of Lord Palmerston would scarcely stand investigation, two decades later the careers of both Dilke (in 1886) and Parnell (in 1890) were completely shattered by their appearance in the Divorce Court. The Australian press was no kinder to them than the English. The Sydney Morning Herald maintained that the cases of Dilke and Parnell

...go at least some distance towards showing that the public and judicial exposure of immorality, when charges are held to have been proved through the verdict of a jury or the judgment of a Court, will place a barrier in the way of public men who would either hold or seek to gain positions of leadership in connection with great political parties or with the service of the State.

Divorce was even harder on women, and no matter how cruel her husband, legally and morally it was ruinous for her to desert him. Bathsheba's attitude in Thomas Hardy's novel, Far from the Madding Crowd, was not unusual.

...It is only women with no pride in them who run away from their husbands. There is one position worse than that of being found dead in your husband's house from his ill-use, and that is, to be found alive through having gone away to the house of somebody else. I've thought of it all this morning, and I've chosen my course. A runaway wife is an encumbrance to everybody, a burden to herself and a byword --- all of which make up a heap of misery greater than any that comes by staying at home --- though this may include the trifling items of insult, beating, and starvation.

It is not surprising that in this atmosphere of moral purity and womanly virtue there was great concern about the publication of divorce court evidence. Even a highly respectable paper, like the

Sydney Morning Herald, which did not feature lurid articles, published the unsavoury evidence in full. Queen Victoria was horrified and wrote to her Lord Chancellor begging him to do something about it.

These cases, which must necessarily increase when the law becomes more and more known, fill now almost daily a large portion of the newspapers, and are of so scandalous a character that makes it almost impossible for a paper to be trusted in the hands of a young lady or boy. None of the worst French novels from which careful parents would try to protect their children can be as bad as what is daily brought and laid upon the breakfast-table of every educated family in England, and its effect must be most pernicious to the public morals of the country.

There were repeated protests made in the Sydney newspapers. The Freeman's Journal considered that divorce evidence outdid Zola at his most realistic, and that the only solution was to have judicial censorship of the Press in criminal and divorce cases.² The Herald, some years later argued that the publicity of divorce proceedings not only gave some guarantee of the fair administration of the law, but also was a useful check on wrongdoing when public exposure had disastrous effects on the wrongdoer, viz. Dilke and Parnell.³ "T.C." in the Telegraph, however thought that it was not the wrongdoer who was harmed but the innocent victim.⁴

3. S.M.H., 20 Nov. 1890, p.4.
4. D.T., 5 March 1887, p.9. It was the publication of the evidence in Colin Campbell’s Divorce Case in London that had started the discussion in the Sydney papers in 1887.
Even in 1881 Sir Alfred Stephen was at best lukewarm towards divorce extension; in 1884 he made a complete volte face and criticised a further amending Matrimonial Causes Bill, introduced in the Legislative Council by W.H. Suttor, to extend the grounds of divorce to include habitual drunkenness and syphilitic disease, for not going far enough.¹ In an interesting speech, Stephen foreshadowed his own Divorce Bill two years later. He argued that people who think that in spite of any law, marriage is indissoluble, had no right to force their views on other people. The question ought not to be mixed up with religion, for the law only recognised marriage as a civil contract.

It lies in the power of Parliament to provide means to put an end to a civil contract, the conditions of which are violated by one of the parties. Those conditions are violated by a man who ill-treats his wife, or renders her life miserable by habitual drunkenness. There may be difficulty proving habitual drunkenness, but there is also great difficulty proving adultery. ... I believe that it would be for the benefit of society if the contract under the circumstances to which I have referred could be put an end to. I believe that in a great number of instances where women are treated

¹. In 1884 there were two Matrimonial Causes Bills introduced in the Legislative Council, William Bede Dalley’s Bill has survived in which he proposed extending the grounds of divorce to include desertion after five years, and attempted murder or assault. See Appendix V, p.xl. The bill was mostly concerned with Court procedure, and the clause was omitted. W.H. Suttor’s Bill does not appear to have survived, and was not proceeded with after its second reading.
by their husbands with scandalous brutality, or where they have been deserted by their husbands for three, four or five years, the women are induced to commit adultery, or to resort to drink and prostitution;... Morality itself would be served by the ending of a contract that had already been virtually ended by the conduct of one of the parties to it. A truly religious woman would probably refuse to release herself or her husband because the marriage vow is registered in heaven. Stephen was prepared to vote for the second reading of the Bill, but he thought it had been very crudely drawn, with insufficient consideration, and hoped it would be withdrawn. The Bill was not proceeded with after the second reading.

Inspired by the Matrimonial Causes Bills introduced in the Legislative Council, Buchanan in September 1884 had introduced a bill in the Assembly to extend the grounds of divorce to cover desertion for two years and upwards. It is perhaps a measure of Stephen's later achievement that this bill was rejected, in the elective House, on its second reading by 26 votes to 6. J.P. Abbott commented on the measure: "I do not think a more objectionable bill was ever presented to any legislature." It was not only Stephen who was to change his mind over the divorce question during the next few years.

What had occurred in the intervening years to make Sir Alfred Stephen, already an octogenarian, change his mind about divorce extension, a subject which tended to bring out blind prejudice and in-

1. *N.S.W.P.D.*, 13, p.4138, 2 July 1884.
grained religious dogmas in a large number of influential, and otherwise reasonable people? The single most important thing was the decision in England, in the case Harvey v. Farnie. The facts of this case were that a Scot, domiciled in Scotland, went to England and there married an English woman. After being married for three years he committed adultery, and his wife successfully petitioned for a divorce on the ground of his adultery, which was not a recognisable ground of divorce under English law. He later married for a second time in England, and his second wife, tiring of him, tried to get the second marriage annulled on the ground that at the time of the marriage he had a wife living. It was three times decided unanimously, by the Divorce Court Judge, by the English Court of Appeal, and finally by the House of Lords in 1882, that since the man was domiciled in Scotland, the Scottish decree was equally valid in both countries, and that the second marriage could not be annulled or impeached. This important decision was believed by Stephen to imply that no matter what the grounds of divorce were, a decree pronounced by the Divorce Court in New South Wales, if the parties were domiciled there in good faith, would be valid in England (or anywhere else). Hence there would not be any problems of bigamy, illegitimate children, and the inheritance of property. This decision completely did away with his reasonable legal objection. An undated note from Stephen to Sir Edward Knox, who organised opposition to his Divorce Extension Bill in the Upper House, shows quite clearly the importance of the apparent legal obstacle.
In my protest on the Divorce for the Husband's infidelity alone (without desertion or cruelty added) I was influenced by the all important objection of the then supposed (but now overruled) law... i.e. that a Colonial state might not be in the case of a second marriage be recognised. But, so soon as that objection was removed by Fernie v. Varney (sic, now by even residence as in Niboyet v. Niboyet) I changed with the changed view of the law.

It was against this background of discussion about every aspect of marriage and divorce that Sir Alfred Stephen, moved by his first hand experience from the Bench of the misery suffered by women with brutal, drunken husbands, made his decision to render the divorce law more humane. Such was his chivalry towards all women however degraded, that he could not bear to see them wronged. Moreover, no one ever came to him for help in vain.

"I know there will be a great deal of sentimental trash talked about the danger of passing such a bill as this."


At the age of eighty-four Sir Alfred Stephen was a man of immense prestige and occupied a unique position in Sydney. He had been Chief Justice for far longer than anybody else, and his legal knowledge was probably unequalled; he was one of the few men, with Sir William Manning, who had held office before Responsible Government; he had been the first President of the Legislative Council, and now in his retirement he sat there once more; he held the honourable position of Lieutenant-Governor, and society still revolved around Government House; he was respected for his integrity and known to be a devout member of his Church; and his brain was still as alert as that of a man in the prime of life. All this was to make his immense task possible, for the very fact that such a radical measure was introduced by such a respectable man, meant that even the timid were prepared to consider the matter.

After a great deal of thought, and consultation with eminent people, dating from the divorce bills of 1884, Stephen began drafting a bill in September 1885. On 10 February 1886, he rose in the Legislative Council to move the First Reading of a "bill further to

1. Buchanan, op. cit., p.22.
amend the law relating to divorce".¹ Mr. Piddington refused to allow it to pass as a formal motion. Stephen conceived the measure "in the interests of morality, and for the relief of unoffending married persons in cases in which the objects of marriage would be frustrated as in the case of adultery and cruelty".² He proposed extending the grounds of divorce to cover cases of desertion without just cause for two years and upwards; habitual drunkenness for three years and upwards; if the respondent had become insane, wasted the means of support, or left the petitioner for one year without any such means; imprisonment on a commuted life sentence, or on a sentence of penal servitude for seven years and upwards; or two convictions for assault on the petitioner, within the last two years.³

The Divorce Extension Bill was greeted cautiously by the Sydney Morning Herald. The editor was prepared to be tolerant, although he referred to the example of America, and considered that it was the duty of the Legislature to provide relief if it were shown that many married women were suffering from evils from which the law offered them no escape.⁴ The other papers were content to ignore

1. N.S.W.P.D., 18, p.703, 10 Feb.1886.
2. Ibid., (Stephen)
3. As the bill was first presented in Committee in the Legislative Council. N.S.W.P.D., 19, p.1224, 8 April 1886.
the Bill for a time.

When Stephen moved the Second Reading of the Divorce Extension Bill,\(^1\) on 24 March, he did not fail to stress his belief in the sacredness of the marriage tie but went on to argue that in each of the four cases that he wished to relieve, the object of marriage had already been frustrated,

therefore if adultery on the part of either husband or wife be a sufficient ground for the dissolution of marriage, that which is equally as bad and as insufferable, and in many cases worse, ought to be a ground for divorce also.\(^2\)

Judicial separation was not an acceptable solution to the problem as it had all the consequences of divorce except that the parties were forbidden to remarry, which led directly to concubinage. He felt that arguments based on religion should be kept out of the discussion as they were inconsistent in a country which permitted civil marriage. He argued that in cases of habitual drunkenness the wife at least could gain some relief by getting a judicial separation if treated with brutality, but a husband had no redress at all from a drunken wife who neglected both home and children. In cases of desertion the objects of marriage were equally frustrated, while a man on a commuted life sentence was civilly dead in the eyes of the law, so why should the wife remain bound. Since 1860 there had been "no less than 1200 wives and husbands separated by judicial order, owing

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1. *N.S.W.P.D.*, 18, pp. 916-924, 24 March 1886, (Second Reading) See Appendix V for a list of the stages of the divorce bills introduced between 1886 and 1892.

to acts of brutality arising from drunkenness". Stephen followed this up by giving the details of a dozen cases of brutal assault taken from police files. After quoting from an unnamed American law writer, he appealed to the House "to take from misery its excuse for crime; to separate the living from the dead; and to confer on outraged men and women the right now denied them of acquiring again a home".

Mr. Colin Campbell, described by the Bulletin as "the most eloquent opponent" of the bill, while deeply regretting the action of his honourable and learned friend, thought that he made no service to his cause by introducing the complications in America, and that Australia would get into the same position if she followed America's example. The law of England was based on Christianity and Christ permitted no second marriage. Furthermore, the measure would inflict a great evil on society: one only had to look at the foulness that "had been engendered in Rome by the practices consequent upon the easiness of divorce". Sir Alfred Stephen was preoccupied with sex, Mr. Campbell continued, since he considered that a man or woman, debarred from that indulgence is reduced to abject misery, or to seek

1. N.S.W.P.D., 18, p. 918. 24 March 1886. One of the cases cited by Stephen: "S.A.A. Husband a violent man, given to drink; has constantly ill-treated, beaten and kicked her, threatened her life, to smash her head; once threatened her with an axe; one child living. Compelled to leave him. He is absent from her in the country."
2. Ibid., p. 920.
3. Bulletin, 10 April 1886, p. 3.
4. N.S.W.P.D., 18, p. 922. 24 March 1886. (C. Campbell)
it in an illicit manner.

I say that the whole of my hon. and learned friend's jeremiad to-night was based upon the fact that the man or the woman if separated from each other for a time is debarred from sexual intercourse. Now I want to know if my hon. and learned friend does not think that a pious and humane Sister of Charity is as happy a person as there well can be in this world of ours?

Moreover he had strong legal objections to divorce extension. In the first place he thought it unwise to institute a distinction between those who happened to be married in New South Wales and those who were married elsewhere, and even if this were desirable, there should be unanimity among all the Colonies on the question. Secondly, the number of people suffering under the present law was not so large as to need a law at variance with that of Britain. Thirdly, the needs of the smaller number should be subservient to those of the greater number, for society at large would suffer from this bill. Campbell then moved that the Second Reading be postponed for six months, and the debate was adjourned in order to give the hon. members time to consider the matter.

When the debate was resumed on 31 March the House had shaken off its customary lethargy: the debate was animated. Frederick Darley, a prominent barrister and soon to be Chief Justice, strongly approved of this most salutary measure. He emphasised the permissive nature of the bill. No one, who had grounds, was forced to petition

1. N.S.W.P.D., 18, p.923, 24 March 1886.
2. N.S.W.P.D., 18, p. 1024–19, p.1045, 31 March 1886, (Second Reading, cont.)
for a divorce unless he or she so desired. He then quoted the purposes for which marriage was ordained from the Church of England Prayer Book and maintained that when there was no longer any mutual society, help, and comfort the objects of marriage had been defeated. This brought the wrath of Mr. Piddington down on his head for misinterpreting the Prayer Book. Piddington went on to argue that the confusion in America over their divorce laws was a warning to others. He declared that it would be impossible to define an "habitual drunkard", a generally contentious point, even among lawyers. He seemed genuinely appalled at the clause giving relief for aggravated assault as it would encourage the criminal classes to beat their wives in order to break their bonds. He then delivered a personal attack against Stephen, which was rare, as Stephen's sincerity and philanthropy were generally recognised by his opponents.

Mr. J. Smith raised the question of the fate of the innocent children of divorced parents, which the opponents of the Bill were wont to dwell on with pathos, conjuring up visions of cruel stepmothers and bad tempered step-fathers. Dr. Creed, one of the most active supporters of Stephen, asserted that: "No doubt many gentlemen object to divorce on account of their religious training or beliefs, and many others perhaps object to the bill owing to ignorance of the misery suffered by those whom its provisions will afford relief." An active worker for the Temperance Movement, he considered that it

1. *N.S.W.P.D.*, 18, p. 1029. 31 March 1886. (Creed)
was worse for the children to see a parent drunk in the home, setting a bad example, than to have the chance of a new home. He also thought that drunkenness was a greater sin against married life, and danger to society, than adultery. Mr. Macintosh who was to oppose the bill at every stage of its progress, protested that it would do away with any chance of a couple becoming reconciled, prevent criminals reforming if they feared they might lose their wives while in prison, and cause people to commit crimes simply to get a divorce. Drunkenness was curable and the bill instead of promoting morality would foster immorality. Mr. Charles, who had once been a sailor, was quite convinced that a man might be unavoidably absent from his wife for a long period, such as being shipwrecked in the South Seas, or being kept prisoner by natives, or, if a sailor, might become a prisoner of war. He agreed with Macintosh that drunkenness was curable.

Mr. Knox, who was to organise the opposition to the bill in the Upper House, contented himself on this occasion, with expressing regret that he could not support Stephen's measure as he knew that it had engaged his attention and anxious thought for some years. He felt that the hard cases could get sufficient remedy under the existing Matrimonial Causes Act and the Deserted Wives and Children Act. Moreover it was extremely objectionable to make the law substantially different to that of England. R. Hill, A.H. Jacob, A. Stewart and H. Dangar all warmly supported the measure and claimed that extraordinary arguments were used against it. Stewart pointed out that
countries such as Italy, Spain and Ireland, which had no divorce, had a far higher percentage of mysterious murders and suicides, while Ireland had records of murders committed for the express purpose of getting rid of an intolerable husband or wife: Dangar, a conservative, claimed that daily the newspapers carried stories of fearful brutality. There was no reason why the Colony could not set England an example in liberal legislation. Both Mr. Webb and Mr. A. Campbell registered their disapproval.

Stephen was very cross by the time he replied. The bill had been framed so that it could easily be amended in committee to overcome the objections of over-conscientious, over-scrupulous, and pardon me for saying it, ignorant minds—the objections of men who have never read anything on the subject and have not the opportunity of comparing other men's judgment with their own.

The main objection, and the most futile, was that by legislating to relieve flagrant wrongs, the door would be opened to lesser cases.

Did I ever suppose that because a man had been inflicted by the hand of God with insanity that it should be a ground of divorce? Not at all. Did I ever suppose that incompatibility of temper, which may easily arise—which may be due to faults on both sides—which may easily be remedied if the parties desire to bring about a reconciliation—should be a ground for divorce? 1

He believed that ample provision had been made under sections 33 and 34 of the Matrimonial Causes Act, and also the Deserted Wives and Children Act, for the Court to provide for the children and appoint guardians if they have been abandoned. Furthermore "was it not nonsense" to argue that a man would commit a crime and go to

1. N.S.W.P.D., 18, p. 1041. 31 March 1886. (Stephen)
prison simply to get a divorce, when his wife might not want to
go to court? Everyone knew of the case in high life where the man
committed a single act of adultery, and the wife got a divorce. He
would not touch the religious question because

if men will entertain that most unfounded idea, and will
construe scripture in that idle and wrong manner, I have no-
thing more to say to them. I cannot give brains to a man
who has not got them. You know very well that the great
Author spoke only against and in respect of the Jewish law
and practice, which enabled men in Judea to get rid of their
wives for any cause whatever.

He claimed to be deeply shocked by Mr. Charles Campbell’s assertion
that many of those who wanted divorce instead of judicial separation
did so from love/sexual intercourse. Stephen vehemently asserted
that marriage meant far more: love and solace when tired, and inter-
change of thought which had nothing to do with sexual desire. Ste-
phen, before ending the debate, once more emphasised that

the tendency of this bill is largely to promote the
happiness of the community, to promote its morals, to
largely extend human happiness, and to relieve in an immense
number of cases human misery - misery quite as great as,
and in many instances greater than can be produced by any
case of infidelity whatever. If I did not think it was cal-
culated to benefit society, certainly I should not be found
the strong advocate for the bill that I am, and shall ever
continue to be; ...

The question was put, and the Second Reading was carried on division
by 13 votes to 10. The debate had raised most of the arguments that
were to be used both for and against the bill.

Already the controversy was showing signs of becoming

1. N.S.W.P.D., 18, p. 1043. 31 March 1886. (Stephen)
2. Ibid., p. 1044.
academic with both sides quoting from appropriate authorities. This was to become more and more noticeable as time went on. The religious reasons for opposition could scarcely be described as argument, for in the first place they usually stemmed from ingrained conviction and dogma which were repeated ad infinitum. The Parliamentary opponents of the Bill on the whole tried to minimise the religious arguments by concentrating on the ruin of society. In the second place, in a sense there was no argument because before the law, marriage was a civil contract. That Stephen introduced the measure in the spirit of liberalism, utilitarianism, and compassion for human misery was not questioned by his antagonists, but they felt that his judgment had been overborne by a small number of cases of great misery that had come to his notice, and by his notorious sympathy for wronged women, not to mention his great age. They, too, used utilitarian arguments, and maintained that while divorce extension would benefit a few, it would do irreparable damage to society and to the morals of the community, so the few must suffer to benefit the many. Others looked to the confusion in America, with different laws in every state, and foresaw the same confusion among the Australian Colonies. Others intensely disliked the idea of the law being different from that of England and reiterated that a different divorce law would not be recognised there, conveniently forgetting that the law was already different. This had been fought for and won five years previously over Buchanan’s Divorce Bill. On the whole, however, the honourable members were prepared to discuss the bill on
Stephen's plea of social necessity. The Bulletin was surprised by the unaccustomed energy displayed in the Upper House on the divorce issue...

... our 'ancients' in the Council are equally imbued with a sense of the gravity of the question, and their customary legislative farce has during the debate been superseded by a political drama of even tragical solemnity. Several members have been able to keep awake during nearly the whole of the speeches, and argumentative, if ponderous, deliverances have attacked or supported the Bill. That a progressive measure of this nature should have originated in the Upper House is of itself a remarkable fact, but the narrow majority of three for the second reading does not augur well for its fate.

When the Divorce Bill entered the Committee stage it was in for a rough passage. Indeed this stage of a bill was always fraught with peril. Minor amendments of phrasing could be wrangled over indefinitely and facetious ones introduced. Stephen on his part was prepared to accept minor changes, but all four grounds of divorce must remain. He carried an amendment altering "domiciled in this colony for two years and upwards" to "shall have resided in..." 2

This may have been mistaken, for although it increased the number of people who could benefit from the provisions of the Bill, the British Government was adamant on this very controversial legal point that "domicile" should be used. 3 This was an important reason why the

1. Bulletin, 10 April 1886, p. 3.
3. "Domicile" is an extremely difficult legal term, and lawyers are still arguing over its meaning. There are various types of 'domicile', e.g. "domicile" of birth. A wife's "domicile" is always that of her husband. Briefly it is usually taken to mean the place where a man intends to die. Hence if the term was used in the N.S.W. Divorce Bill, it would exclude people who were only in the Colony temporarily, even though they had been resident long enough to fulfill any qualifications of time, which was not the case when "residence" was used instead of "domicile".
Bill was to be refused the Royal assent. Mr. Charles enlivened the proceedings by stating that

It was proverbial throughout the colony that the hon. member in charge of the bill, and judge who presided over the Divorce Court, had always been most anxious to grant a divorce to every woman who applied for it, taking it for granted that all that was said by the ladies was true, though, as a rule, the women who applied for a divorce were the least to be depended on.

Mr. Macintosh wished to know whether the Government intended to support the bill, but Mackellar refused to say what attitude the Government would take over a private member's bill. At this point the House was counted out, which meant that it would take some time before it could be restored to the order paper. It was a favourite delaying tactic of the opponents of divorce extension to walk out of the House, leaving no quorum.

Meanwhile a storm of public opinion had broken. The churches, led by the Church of England, created such a furore that their positions will be discussed in the next chapter. It was partly the violent disapproval openly shown by the churches in general of di-

1. Mr. Justice Windeyer.
2. N.S.W.P.D., 19, p. 1225, 8 April 1886. (Charles)

"Th. 8 Ap. In Legislative Co'1: Divorce Bill in Committee - House scandal'ly cut out by Mr. Terry [and Mr.] Macintosh at 7 p.m." These were excellent tactics to employ in either House against a Private Member's Bill. The Council normally only sat on Wednesdays and Thursdays from four in the afternoon; it liked to rise not later than nine in the evening. In addition Government business had precedence. Once the bill was restored to paper it would have to wait its turn.
vo
cence, and their efforts to prevent any extension of the grounds, that brought the press out so strongly on the side of reform. At the end of March the *Sydney Morning Herald* published another editorial commenting on the "curious revolution of opinion which is gradually taking place on the subject of divorce throughout the world".¹ The editor considered that the canon law had been virtually revoked by the 1857 Matrimonial Causes Act. Unless the State stepped in to release the wives of drunkards and criminals, it was all too probable that the unfortunate wives and children would sink into destitution, becoming a burden on the State. The extreme prevalence of the specified offences could no longer be ignored and the law should "expand with the necessities of the age".² The editor of the *Herald* not only believed that something should be done, but that it should be done for the same reasons that moved the Judges to action.

The *Daily Telegraph* hailed the Bill as "a simple application of reason and common sense to a department of social life which existed for centuries under the petrifying influence of utterly irrational notions borrowed from theology".³ Its editor at the same time expressed surprise at the warm reception which the bill had met with in the Upper House. Characteristically, the *Bulletin* was also strongly in favour of the measure, but the *Evening News* was not so sure that it would be a good thing, as it feared that a divorce would become as

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2. *Ibid*.
easy to get as in America, which would mean social revolution.\(^1\)

In April another sub-leader from the Herald, expressing concern at the widespread report that many divorce suits were collusive which was very dangerous, caused Sir Alfred to write to Judge Windeyer, then on circuit at Maitland, requesting his opinion. Their correspondence was published by the same paper a week later. Windeyer emphatically denied that collusion occurred frequently, as the evidence was generally corroborated by unimpeachable, independent witnesses and the suit only brought after much mental suffering.

To listen to the cry of the danger of collusion, should the right of divorce be extended to cases based upon desertion only, would indeed be to strain at a gnat after swallowing the camel. The real danger of collusion is in suits depending on proof of adultery alone.\(^2\)

How right he was, can be seen by looking at the low ebb to which the English Divorce Law, which permitted divorce for adultery only, had sunk by 1934. One of the objects of A.P. Herbert's Divorce Bill "was to protect the law from mockery by perjury, conspiracy, elaborate deceit, or simple humbug.\(^3\)

Windeyer took the opportunity of adding some of the sanest and most ironical words written on the whole divorce issue. They were to be quoted many times during the next six years. He considered that objections to desertion as a ground for divorce were raised with a singular lack of knowledge of the world. Men did not desert their wives to live a life of celibacy, and desertion was evidence on

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which subsequent adultery could safely be presumed, although proof was not always forthcoming. Humble women frequently came to him inquiring whether they could get a divorce for desertion.

Their story is usually the same - neglect, cruelty, and finally desertion by the husband. Where he is gone, or how he is living they do not know; ... To such inquirers, often women of evident respectability, I can, as long as the law remains as it is, but make the mocking answer - 'My good woman, you have been legally married, either by a clergyman, or, as I once chanced to witness, by a registrar, with a clerk assisting in his shirt-sleeves. In that solemn ceremony you were told by the church that God in his infinite love and wisdom joined you, a young and innocent girl, all ignorant of the world, to a brute in human form, and those whom God has thus joined together in holy matrimony, man may not put asunder. True it is that your husband, having done his best to degrade you to his own level, has deserted you, and left you without the means of buying bread for yourself and children; but, unless you can afford to retain a shrewd attorney, who may, with the aid of a clever detective, discover your husband, and prove the adulterous life which he is doubtless leading, you must patiently submit to this misery; and do your duty in that state of life to which God has been pleased to call you. If you are friendless and poor, your children must be beggars in the street, or surrendered as children of the State. If the bailiffs are in your house, beware of the libertine who offers you his protection and a home; and keep at a safe distance the upright man, who, knowing your character and virtues, sympathises with you in your misery, and, if you were free to marry, might offer you an honourable escape from the wretchedness of your lot. The State regards marriage as a civil contract; and, though, when married, you were told that marriage was for purposes which have all been absolutely defeated by the desertion of your husband, you have no redress under the law, and practically no sympathy from the Church.'

Judge Docker was impressed by this letter, although he had shown himself completely opposed to divorce, save for the cause of adultery, on religious grounds. After quoting from Windeyer's letter, he conceded that the Judge was the best authority on the subject of

desertion, and put forward a new suggestion: "...why not simplify matters and obviate the conscientious objections of a large portion of the community by simply enacting that wilful desertion shall be prima facie evidence of adultery? ... I, for one, should not object."¹

Throughout April and May letters poured in to the newspapers, principally to the Sydney Morning Herald.² Very few of the letters came from women, and those that did were always signed by pseudonyms. One signing herself "Ophelia", in the course of drawing the attention of happily mated women to the plight of their less fortunate sisters, applauded "the noble sentiments of Sir Alfred Stephen" in helping the weak, and described the bill as "heaven's just measure".³ In the absence of gallup-polls, these letters are the only indication possible to the state of public opinion over the Divorce Extension Bill, but as a guide they have serious limitations. Letters can only indicate the interest of the educated classes and provide no clue to what the working classes thought, although the bill was particularly designed to assist working class women. Their other defect is that so many were written under the cover of pseudonyms and, in theory, could all have been written by the same person.⁴ Their importance lies less in what was said, than in showing the fluctuations of public interest in the question. In 1886 the Herald published over sixty letters, almost equally divided between for and against, and the Daily Tele-

¹ S.M.H., 27 April 1886, p. 4. (Judge Docker)
² See Appendix VI for a list of the letters to the editor published by the S.M.H.
³ S.M.H., 1 April 1886, p. 3. ("Ophelia")
⁴ The indications are that all the letters were not written by the same person, but it remains a possibility.
graph about twenty, almost all in favour of the measure. Many clergymen took the opportunity of airing their views in the columns of the Herald, led by the Bishop of Sydney himself. Nearly all the people who objected to divorce extension had strong religious reasons for doing so, no matter what other arguments they conjured up.¹

The fuss about the dangers of collusion by no means died down after Windeyer's letter. Henry Harris, a correspondent, was convinced that the bill would promote collusion and fraud. Harris, indeed went so far as to accuse women of provoking their husbands into cruelty or drink by their misbehaviour.² Later on "Cato" had the same conviction.³ He was treated with scorn by the irrepressible David Buchanan, who almost flooded the Herald with his letters supporting the bill and ruthlessly attacking every opponent.⁴ "In my lifetime I never listened to such twaddle, on the subject, as my eyes encounter in every issue of the Herald, nobly counteracted by the able and admirably reasoned leaders that have appeared in the same journal."⁵ He had at last forgiven Stephen for attacking his own bill and threw himself heart and soul into the battle for further divorce extension.

Despite his spirited attacks on ecclesiasticism and "mitred mountebanks",⁶ he was too willing to quote from the Bible to the discomfort

1. Although almost inextricable, the letters on the religious discussion has been left till the next chapter.
2. S.M.H., 10 April 1886, p.4. (Henry Harris)
3. Ibid., 5 May 1886, p.7. ("Cato")
4. Ibid., 6 May 1886, p.6. (David Buchanan)
5. Ibid., 11 May 1886, p.3. (David Buchanan)
of the religious minded. There were many teachings of Christ that were not literally interpreted.¹ In all he wrote at least five letters in 1886. However the very enthusiasm of his support put him on the verge of the lunatic fringe, whose assistance was not always an asset to the cause. Stephen was aware of this: he wrote to Dr. Creed sending him copies of a letter he had sent to the Argus, defending himself against the Victorian Attorney-General. "If Mr. David Buchanan was a less violent partisan, I wo*d send him a copy. He was furious — years ago — at the rejection of the 'woman's rights' clause in his bill — (carried eventually as you know, agst my better opinion:— but I am not sorry at the result — on the whole.)"²

Buchanan was right about some of the "twaddle" written on the subject. "Cor Unum" thought that all too frequently when a man was imprisoned for robbing his employers, it was the wife's fault.³ William Pratt leapt into print almost as often as Buchanan and was incensed by the latter. He argued that what was needed was not a new Divorce Act but an "Act to prevent silly women from tying themselves up to criminals of the Hopett stamp". He also thought that something should be done to prepare wives for marriage.⁴ Some men in responsible positions also wrote to the Editor of the Herald. Edward

¹ S.M.H., 11 May 1886, p. 3. (D. Buchanan)
² Stephen to Dr. Creed, undated, c.1887, Creed MSS A682 (Political).
³ M.L.
⁴ S.M.H., 17 May 1886, p. 7. ("Cor Unum")
⁵ Ibid., 28 April 1886, p. 6; 27 April 1886, p. 4. (William Pratt)
J.H. Knapp used the divorce issue to press for his own cause, Local Option. The Rev. F.B. Boyce felt that there would be no need for drunkenness as a ground of divorce when the whole problem could be settled by attacking it at the root and granting local option. "Look Before You Leap" raised the inevitable question concerning the fate of the destitute, forsaken children; "Alpha" compared divorce with profanation of the Sabbath; and "Vox e Paradiso" produced threats: "Let our legislators enact wholesome laws to punish wrongdoers, but woe will be to them if they dare to tamper with a divine ordinance on mere pleas of expediency and sympathy".

Apart from Buchanan, many people wrote in to support the bill. "Humanitas" was disappointed in the Primate, as the bill was to help the weak and would harm no one; "Justice" pointed out that drunkenness was often the result of an unhappy marriage, rather than its cause, and doctors should be asked if divorce extension would be beneficial or not; "Spes" thought the law should be amended in favour of sinners, and in any case judicial separation had no divine authority; "Puris Omnia Pura", a woman, said that only those who had been through it could realise what a boon divorce was. She praised both Stephen,

1. S.M.H., 5 May 1886, p. 7. (Edward J.H. Knapp - Hon. Sec. Local Option League)
2. Ibid., 27 April 1886, p. 4. (F.B. Boyce)
3. Ibid., 11 May 1886, p. 3. ("Look Before You Leap")
4. Ibid., 12 April 1886, p. 5. ("Alpha")
5. Ibid., 15 April 1886, p. 6. ("Vox e Paradiso")
6. Ibid., 17 April 1886, p. 10. ("Humanitas")
7. Ibid., 21 May 1886, p. 8. ("Justice")
8. Daily Telegraph, April 1886, p. 3. ("Spes")
and Windeyer "a lion in the cause of helpless women". "A Deserted Wife" was outraged by a clergyman calling at her house to ask her to sign a petition against the bill. Edward Skinner, President of the Liberal Association and a Freethinker, was another strong supporter of the measure on the grounds of reason and justice. He thought it ridiculous to attack the Bill on religious grounds when the theologians were utterly confused and incapable of agreement. A fruitful subject for argument, both in Parliament and in press, was raised by "A Protestant Querist" who brought up the question of Napoleon's divorce from Josephine. Napoleon's second marriage was solemnised by Cardinal Fesch.

It is well to inquire, considering the opposition by Roman Catholics to Sir Alfred Stephen's Divorce Bill, whether that iniquitous marriage was in accordance with Roman Catholic rule? was it one sanctioned by the Pope? If it was, what are we to conclude but that for the poor, the tortured, the helpless, there is in this matter of "indissolubility" one law, while for the powerful, the ambitious, the dissolute, there is attainable another. If it were not so sanctioned, what became of the Cardinal?... During April and May, when the Divorce Bill was not before the Legislative Council, Sir Alfred was not idle. He was "reading up" on the divorce question, before writing a pamphlet, which he was

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1. Daily Telegraph, 18 May 1886, p. 3. ("Puris Omnia Pura")
2. Ibid., 18 May, 1886, p. 3. ("A Deserted Wife")
3. S.M.H., 12 April 1886, p. 5. (E. Skinner, President of the Liberal Association)
4. Ibid., 19 May 1886, p. 6. (E. Skinner)
5. Ibid., 18 May 1886, p. 8. ("A Protestant Querist")
dictating to a shorthand writer. It was to be the first of many. Meanwhile the Divorce Bill was restored to the order paper on 5 May; the next day the Committee stage was resumed. Macintosh made a long-winded speech about the fallibility of judges, which was quite irrelevant. Charles was intent on defending himself from a charge of libel arising out of his remarks about Stephen and Windeyer being susceptible to ladies in distress. He was accused of stonewalling by A. Campbell, who also added that the bill had been got off the paper by artifice. All this wrangling made it hard to get any business done. However Darley, after re-phrasing the clause referring to habitual drunkenness, added "or, being a wife has habitually neglected her domestic duties, or rendered herself unfit to discharge them". Progress was reported and the Committee resumed on 12 May. Several new clauses affecting court procedure were carried without difficulty, but an amendment by W.H. Suttor, trying to prevent the granting of a divorce if the petitioner knew that the respondent was a drunkard at the time of the marriage, was rejected by one vote after a division. Knox insisted on the Third Reading being postponed from the following day for a week.

Fiddington refused to allow Stephen to move the Third Reading

1. Stephen: Journal, pt.22, 14 April 1886. "'Read up' on Divorce Bill", also 17 April; 30 April "Engaged 2½ hours this aftn with Mr. Hoge (shorthand writer) dictating for pamphlet on Divorce." 31 April "Ditto nearly all day".
3. Ibid., p. 1756. (A. Campbell)
4. Ibid., p. 1756. (Darley)
5. Ibid., pp. 1867-72. 12 May 1886.
as a formal motion, and moved to delay it for three months. He supported his amendment by going into details about Milton's shameful marriage, which he considered was the only reason the poet wrote his treatise on divorce. Dr. Creed claimed that Piddington had no personal experience of either marriage or divorce, and went on to attack the way signatures to petitions were collected from children as they came out of church. Charles, J. B. Suttor, who thought that the bill was against the law of God, Dodds who denied the right of Parliament to pass a measure of this kind, J. Smith, Macintosh, and Knox all opposed the bill in fairly moderate terms; only Mackellar spoke in favour of the measure. Even at this early stage the supporters of divorce extension were leaving it to Stephen not only to propagate their cause, but also to defend it. A Private Member's Bill, unless completely unimportant, was always racing against time. The supporters only spoke when stung into it, and rarely at length; the opponents' speeches got longer and longer.

When Stephen replied, he stressed that only after the marriage had already been desecrated by "savage cruelty, long continued drunkenness, desertion, or incarceration for crime" should the law offer the victim release. Nothing he could say would alter the opinion of those who believed that the measure was against the law of God, however children were worse off when neglected, or with the example of a dissolute parent before their eyes. He did not consider serious the

1. N.S.W.P.D., 20, pp. 2023-38. 19 May 1886. (Third Reading)
2. Ibid., p. 2036. (Stephen)
objection that the measure would lead to hasty marriages; in fact the existing state of the law, which gave no protection from terrible dangers, led women among the labouring classes in England to prefer concubinage to marriage. His appeal to the House to carry the measure, which alone could relieve the poor and helpless, was not made in vain. The Third Reading was carried by three votes, 19 to 16.

The day after the Divorce Extension Bill passed in the Legislative Council, an open-air meeting was held at the top of King Street. Mr. William Webster presided over a large gathering. Mr. Miller opposed Mr. J. Selby's motion to express approval of Sir Alfred Stephen's endeavour to free from vice and brutality, loveless marriages, on the ground that the measure would promote immorality, and that it was premature as women as yet were unfranchised. Thomas Walker, well known as a spiritualist and a Freethinker, warmly supported the original resolution. Despite Mr. Miller it was carried almost unanimously, and the decision was forwarded to Stephen, Sir Patrick Jennings, the Premier, and the Governor.¹

During May, Stephen conferred with Dr. Creed and Dr. Remwick² about the Divorce Bill, and corrected it for Sir Henry Parkes to use in the Assembly.³ Somewhat reluctantly Parkes moved the first reading of the Divorce Bill on 19 May, but would not commit himself to taking

². Dr. Remwick was Chairman of the State Children's Relief Board and President of the Benevolent Society. He never spoke on the Bill, but was strongly in favour of it, and very active behind the scenes.
charge of the bill. In July Stephen was able to hand him a petition in favour of the measure having 4,800 signatures, and had a long conference with John Cash Neild about the bill. Parkes had recommended Neild to take charge of the bill in the Assembly, when he decided against doing so himself, after he had become leader of the Opposition. The second reading was not moved by Neild till 13 August. Ninian Melville, an undertaker by profession, protested that as Parkes had moved the first reading, he ought to be in charge of the bill. Parkes denied that he had ever been in charge of the bill and the Speaker, Edmund Barton, at length gave Neild permission to continue. He regretted that someone abler than himself was not in charge of the bill. He was concerned about the petitions both for and against the bill. Although the Anglican Primate and the Bishop of Armidale and Grafton had come out against the measure, the Bishops of Newcastle, Bathurst, and the Riverina were silent; the only Protestant Church to protest was the Wesleyan Conference; and the Presbyterian Church was in favour in so far as it related to desertion.

All the petitions against the bill exceeded the one petition in favour by 1,288 signatures, "these were largely of children, or at any rate persons of tender years. ... and in very many cases the signatures were obtained by the pressure of clerical persuasion from the pulpit".

2. John Cash Neild had entered the Legislative Assembly in 1885, and had first been noticed after he had spoken for nine hours against the proposed ad valorem duties. He was a humanitarian reformer, and during the next decade was to devote himself to the question of old age pensions.
4. N.S.W.P.D., 21, pp. 4031-48, 13 August 1886. (Second Reading)
5. Ibid., 21, p.4033. (Neild)
An interruption occurred when Melville accused Neild of reading his speech. The latter continued that all the petitions emphasized the religious issue, which was irrelevant when the country acknowledged civil marriage, and in any case "this House acknowledges no religious dogmas". He then quoted from John Milton, Wycliffe, and Archdeacon Paley to show the advantages of divorce as opposed to judicial separation. No one with religious objections need take advantage of the bill, but it would alleviate a great deal of human misery.

The opposition to the Divorce Bill in the Assembly was led by four Roman Catholics, O'Sullivan, Slattery, Heydon and Daniel O'Connor. However, they were ably backed up by devout Anglicans, like A.J. Gould, who could be quite as unyielding on the religious protest as any Roman Catholic, and Ninian Melville, a Nonconformist. They now gave a demonstration of how difficult they were going to be to get the better of. Slattery introduced a favoured argument of the opposition, that the Bill would not have received the support it had in the Council or the country but for the position and influence of Stephen, and then heaped praise on the head of Bishop Barry for his noble stand. Of course it was unnecessary for his Church to interfere, as no Catholic could take advantage of the bill. Garrard called for the House to be counted, and Slattery claimed that the

1. N.S.W.P.D., 21, p. 4034. 13 August 1886. (Second Reading)
small numbers present indicated lack of interest in the subject, before claiming that the tendency of the present age was to return to paganism.

Edward O'Sullivan, a "democrat", and also a splendid orator, launched into a tirade against the measure, which was "antagonistic to the spirit of Christianity upon which our civilisation is founded", and reeked of materialism. His high flown oratory was at its best when he emphasised the superiority of the Christian civilisation.

The splendid mythology of Greece, the pompous idolatry of Rome, the poetical ravings of the Mahomedan prophet, the mystical teachings of Brahminism, and the semi-materialistic inculcations of Buddhism, rest on no such solid bases as these. ... No doubt our civilisation is still imperfect - still disgraced by many a vice, many a crime, and many a cruelty; but when we compare the condition of things which prevails in Christendom with that which prevails in Mahomedan, Buddhistic and pagan countries, we find all the evils we have to complain of prevailing there in a greater degree; while they are subject to others so dreadful that it makes us ready to think that it would have been better for the mass of the population if they had never been born.

1. This was probably an incorrect deduction by Slattery as Private Members' Bills were usually debated on Fridays, and if they continued late many members had departed for the weekend. Furthermore the opponents of the bill never hesitated to walk out if there was any chance of a count out.

2. For O'Sullivan's career see:--
Professor Mansfield, in discussing the Irish Catholic strain in O'Sullivan's politics, mentions his opposition to the divorce bills in the light of the Christian convictions of a Catholic layman. His religious beliefs were undoubtedly the fundamental reason for his opposition to the measure; also he saw it as destructive of Christian civilisation, and undemocratic as women had no say on a question which concerned them vitally. But for a liberal and a democrat, there was a conflict on the one hand between religious beliefs and the principles of humanity and social reform, and, more important, between religious beliefs and the independence of the Legislature. A serious constitutional question was raised when the Royal assent was withheld in 1887. Other Catholics made different decisions.

3. N.S.W.P.D., 21, p. 4037, 13 August 1886. (O'Sullivan)
He went on to argue that no person professing to be a Christian could contemplate passing the bill, but Inglis interjected that O'Sullivan was reading his speech. Having denied this unparliamentary behaviour, O'Sullivan went on to say that the bill struck at the family, that polygamy in society would be demoralising, would promote sexual intercourse with more than one person, and encourage libertinism, as easy divorce had, in America and Prussia. He then proceeded to attack Stephen himself.

The box of Pandora, when opened, set free a host of troubles on the world, and so will the passing of this law. Standing, as he does, upon the brink of the grave, Pandora's box was certainly a somewhat singular gift for New South Wales to receive from one who has served it so faithfully and so ably for many years. The spinsters of our community will have just cause of complaint against the bill if it passes into law, owing to the increased competition they will have for matrimonial prizes, in a land where their sex already predominates.

O'Sullivan rounded off by adding that men would indulge in drunkenness, adultery, cruelty and crime to get rid of an unwanted partner. It took two pages of debate to cover the licentiousness of Rome, and France, during the Revolution when Divorce was easy. Finally it would be unfair to alter any part of the Marriage Law without the consent of the female members of the community.

Heydon raised all the legal objections of the law being different to that of England, a line which had been prominent in

1. N.S.W., P.D., 21, p. 4039. 13 August 1886. (O'Sullivan)

In fact the women of N.S.W. have never outnumbered the men. The opponents of the bill frequently used the opposite argument to O'Sullivan's, that no man would want to marry another's leavings, and divorced women would have no alternative but prostitution.
the Upper House. He considered that Satan had found work for the
idle hands, belonging to the old men in the Council, to do. He then
denied the right of the House to legislate on the matter. It was a
question of the direst cruelty to women, and did away with all their
security. Wives aged by childbirth could be discarded for a young
and pretty woman. "If drunkenness and a wife's neglect of her house-
hold duties are to be reasons for the dissolution of the marriage tie,
it would be better to abolish the punishment for bigamy."\(^1\) O'Connor
promptly interjected that "The object is to get up a plantation for
the followers of Brigham Young".\(^2\) At this stage the debate dissolved
into chaos. Heydon got repetitive and confused, perhaps distracted
by the laughter coming from the members, and from increasingly fre-
quent interjections. Eventually the debate was adjourned until 24
September, on the motion of O'Connor. The *Sydney Morning Herald*
deplored the frivolous manner with which the Assembly had treated
a serious subject, and thought that the difficulty in keeping a
quorum was evidently due to a desire to get rid of the bill by a
count out, while the three critics "objected to divorce under any cir-
cumstances, and condemned the bill without attempting to answer the
arguments which have been advanced in its favour, or the powerful
reasons brought forward by its framer in justification of the pro-
posed alteration of the law."\(^3\)

During the inactivity of the winter the divorce issue was

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1. *N.S.W.P.D.*, 21, p. 4044. 13 August 1886. (Heydon)
2. *Ibid.*, (O'Connor)
Sir Alfred and the Sword of Divorce:

Will They Let Him Do It?
diligently kept before the public eye, by the Press, which was aided by three very different cases. The first was Sir Charles Dilke's involvement in the Crawford divorce case in England. Its significance in New South Wales, apart from its timing, was that even a paper like the Daily Telegraph, while revelling in the sordid details, was at one with the more conservative papers in condemning immorality in a public man. More important, however was the attention focused in a brutal way on maltreated wives, by the Newtown Murder. Alfred Reynolds, an intemperate man, forced his wife, at the point of a knife, to drink a cup of opium. The mother of Mrs. Reynolds said at the inquest that "the parties did not live on good terms - they never lived happily together, she was always afraid". Reynolds confessed to the murder - his wife ran up bills and he wanted to frighten her. Here was first hand evidence of what could happen if there was to be no release from an unhappy marriage. The supporters of divorce extension in Parliament were not slow to point out that the unfortunate woman might not have lost her life had she been able to divorce her husband. The leading papers let the facts speak for themselves and were silent in their editorial columns. The Freeman's Journal, however felt impelled to put forward its own view of the murder:

...yet it may almost be said in one view the kindest thing he could have done for her was the very cruel act that freed her from him. This, indeed, is one of the worst features of the case - that this merciless murder was itself a mercy, in so much as sudden death is more merciful.

1. S.M.H., 16 August 1886, p. 3.
2. Ibid., 18 August 1886, p. 4.
than lingering agony. Her whole married life of some seven years seems to have been little more than one long misery.

The same month at Redfern, Elizabeth Blanche Kent was poisoned by her husband with laudanum.

Early in September Sydney was shocked by the case of Splatt versus Splatt. Splatt, not content with treating his wife with violence, advanced to the ultimate cruelty of torturing his child to hurt his wife. Judge Windeyer did not hesitate to make his judgment on the case a vehicle for his views on the present divorce law.

The inhumanity of the respondent to his child, displayed with the intention of wounding the mother's feelings, refinement of cruelty though it was, and resulting as it did in the prostration of her nervous system and an inability to nurse her child, would still not have entitled the petitioner to a release from her misery and the brutal tyranny of her husband to whom she was legally married, unless she had been fortunate enough to succeed in detecting him in adultery through his inadvertently calling her by the Christian name of his paramour.

Nor would the Judge accept the plea of the defence that the wife had conducted to the adultery by wilfully deserting the respondent, "as it is absurd to suppose that a wife is bound to consort with a man who treats her with brutality, and with savage ingenuity tortures her by the laceration of all her noblest maternal instincts".

The Herald which had no compunction about publishing the full

and detailed evidence of the Divorce and Criminal Courts, was shocked. They quoted from Mr. Justice Windeyer's judgment and in addition to saying that the present law was inadequate, maintained that Stephen's bill did not go far enough.¹

...Now in a case of the Splatt kind, ill-treatment of the sort contemplated by the bill might not be capable of proof, although the husband might have been cruel in the extreme to the wife. Killing her by inches, with every refinement of brutality, would not in itself be a sufficient ground for divorce. The only chance of escape would be found in an assault which imperilled life or inflicted a grievous injury upon the person. It seems to us that a woman who is treated with continuous and gross cruelty so that her life is made a burden to her, should be able to find a way of escape before she has been maimed or half killed. When marriage is made a mockery by one of the parties to the contract, why should the law perpetrate the sham? ²

When the debate in the Assembly was resumed on 24 September³ Daniel O'Connor led off by attacking the petition in favour of the bill, and while not intending the slightest reflection on the eminent men who had signed the petition, he maintained that it was "an undoubted fact that the people who have worked hardest in favour of the bill are those belonging to the secular associations, the free thinkers, the infidels of the city⁴ who did not hold the marriage tie sacred, and whose aim was to destroy christianity. Fortunately he had forgotten his notes so was unable to quote Gibbon on the immorality of

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1. Clause 1, sub-clause 4, of the Divorce Bill allowed a wife to petition for a divorce on the ground that: a) within two years previously her husband had been convicted of an assault on her occasioning actual bodily harm; b) her husband had attempted to murder her; or c) her husband had assaulted her with intent to inflict grievous bodily harm.

2. S.M.H., 10 September 1886, p. 6.

3. N.S.W.P.D., 23, pp. 5096 - 5109, 24 September 1886. (Second Reading)

4. Ibid., p. 5096. (O'Connor)
Sir Henry Parkes warmly supported the measure and maintained that marriage had been secularised for thirty years, by a great lay member of the Roman Catholic Church, "... and my conclusion is that if we are justified in the length we have gone in affording facilities for the dissolution of marriage, we are equally justified on any one of these secular grounds". He then gave a picturesque description of the plight of the deserted wife, the deserted husband, the wife of a drunkard, who even with the protection of judicial separation, was not safe from her husband laying his hands on any little property she might have acquired. Of course he had no desire to destroy stability of the family, and the relief afforded in a number of cruel cases was quite consonant with the spirit of Christianity.

The judge had the power to dismiss a case if he did not think it proven, or suspected collusion. He denied the supporters of the bill were free thinkers: many were loyal members of great churches.

Ninian Melville ascribed the strong support that the bill had received not only to the high standing of Stephen, but also to the fact that it was a non-party measure. He was another who thought that the subject was beyond the powers of the legislature. He shrank from it not only because it would open the floodgates of immorality, but also because of the satisfaction it gave the free thinkers.

There were many matters on which the leaders of Reformation had been

1. _N.S.W.P.D._, 23, p. 5099. 24 September 1886. (Parkes)
decidedly wrong, and divorce was one. There were other remedies: a deserting husband should be compelled to work to support his wife while in gaol, and it would be better to abolish the drink which caused such ill-effects. He became very repetitive.

J.P. Abbott was one of the few men who changed their minds on the issue after hearing the arguments put forward in its defence. After reading Stephen's speeches he had come to the conclusion that the bill involved no damage at all to society. His great objection to divorce was the opportunities provided for collusion, and the ground which offered the most opportunities for this duplicity was desertion. He spoke with rare good sense about the suffering children.

A good deal has been said about the danger to children. At first sight that seems to be a good reason against divorce; but is it not far better that children should be taken away from the control of a bad person and placed under the care of a good person? Wherever a decree for divorce is granted, the judge has power to direct which of the parties shall have custody of the children, and this power gets over the difficulty altogether, as the judge is not likely to place the children under the control of the wicked person of the two.

A.J. Gould reflected the division within the Church of England. While not concurring in the opinion that the supporters of the bill were freethinkers, he did think that Stephen had "allowed himself to be carried away by cases of individual hardship ...", without considering the interests of the community. He thought the reference to Milton unfortunate as he only expounded his views after

1. N.S.W.P.D., 23, p. 5104. 24 September 1886. (J.P. Abbott)
2. Ibid., p. 5105. (Gould)
tiring of his wife. Marriage was more than a civil contract, a
fact which no one had denied, and judicial separation gave all the
relief of a divorce except that the parties were not allowed to re-
marry. He had the lawyers dislike of making the law different to
that of England and quoted from the despatches of the Secretary of
State. To back up his arguments he then quoted from the article by
Judge Davis in the North American Review 1884,¹ about the confusion
caused by the diversity in the law among the American states, and
prophesied that the same situation would arise among the Australian
Colonies. To add weight he followed this with quotations from Lord
Penzance, Gladstone, and Lord Stowell. He pointed out that the judi-
cial separations referred to by Stephen were in reality cases of pro-
tection orders granted to women either deserted by their husbands,
or compelled to desert them, which not only protected her from him,
but also secured her property from him and his creditors. If ne-
cessary this law could be amended to give more protection. Much as
he disliked the whole bill he thought it was conducive to immorality
to debar the guilty party from remarrying for two years.

Mr. Henson in a confused manner repeated Melville's plea to
prohibit alcohol. Only three members spoke in favour of the bill and
seven against, nevertheless it was carried by a majority of fourteen
votes: 25 to 11.

Stephen wrote to Parkes, thanking him and Mr. Neild for the

¹ See Chapter I, p.46.
skilful and successful conduct of the Divorce Extension Bill. Your speech was all that could have been said; and like yr usual utterances - appropriately & well said. Mr. N. was judicious, considering, the state of the House - & the imbecility of the opposition - in not condescending to reply. - What now about the Committee? - I want good counsel as to the amendments - for some are necessary. Yet any wrangling, over even one, might be fatal to further progress. And ere long, I suppose, if ever, the session will close. 1

The Herald noted an improvement in the way the House dealt with the bill, though it still detected signs of an attempted count out, and even secularists and infidels had the same right to petition as anyone else. 2

However the Herald's approval was not destined to outlast the treatment the bill met with in Committee. They did not get far on 1 October and time was running out. Dr. Renwick, when the discussion was resumed on the eighth, 3 tried to get the time of residence increased to three years, which was the time required for desertion, which could be difficult to prove if residence was only two years. Dibbs, who had been absent during the debate, took the opportunity of stating that he was in favour of the Bill, in the interests of public morality. He was convinced that the Newtown Murder would never have happened, or the extreme penalty been inflicted on the unfortunate criminal, had this bill been law. The proceedings then dissolved in chaos and insult. Mr. Gibbes interjected "he beats his wife", 4 which caused confusion as the members were uncertain to whom this referred, but were

1. Stephen to Parkes, undated, but from internal evidence about 1886, P.C., A905, p.215..(M.I.)
3. N.S.W.P.D., 23, p.5587-91. 8 October 1886. (Committee)
4. Ibid., p. 5588.
all incensed. There was great difficulty keeping a quorum, the
House was counted four times before a kind of musical chairs began.
Seven times (in one and a half pages of Hansard) did the Chairman re­
port no quorum and seven times the House resumed. Neild accused the
opposition of using unusual methods to defeat the bill, which was the
signal for Toohey to insult Neild by saying that"the bill was laughed
to scorn because of the hands in which it was placed".\(^1\) Surprisingly,
no one came to physical blows, which were not beneath the dignity of
the House at times. Finally the bill was counted out at three in the
morning and Parliament was prorogued on 25 October.\(^2\)

The Herald was furious with the discreditable behaviour of the
House, and declared that the tactics employed to defeat the bill were
"a scandal upon Parliamentary government".\(^3\) It was evident that the
obstruction had been planned as Williamson had announced that he had
promised to talk against the bill for twenty-four hours if necessary,
and Melville, to stay in the House till the Day of Judgment. It was
the culmination of a disgraceful week. "A serious and painful subject
was treated with unbecoming levity, and the members left in the House
seemed to vie with each other in showing disrespect for everything and
everybody."\(^4\)

1. N.S.W.P.D., 23, p.5591. 8 October 1886.
2. A Private Member's Bill, if it had not passed through all the
stages of the parliamentary process before Parliament was pro­
rogued was lost, and, if re-introduced, had to start from scratch
in the next session.
4. Ibid.
It was not surprising that the Divorce Extension Bill should have foundered in the Legislative Assembly in 1886, even though it had survived the shoals of the Legislative Council, and even less that it should have foundered in the manner it did, for in that year the pessimists thought that the forms of parliamentary government were collapsing. The second reading of the Divorce Bill had been on the order paper for 2 July but insufficient members turned up to make a quorum, which the Herald charitably ascribed to the natural reluctance of the members for a serious debate after their recent all-night sittings. ¹

Until the 1887 election, "the dominant aspect of politics was the struggle of rival faction leaders for power". ² The political ideal of a member was that of independence, "to support every government so long as its actions squared with the dictates of his conscience". ³ The Dibbs-Jennings Government was weak, and had been faced with a large deficit. Soon after the Divorce Bill had been counted out, it fell. Parkes, faced with a minority government asked for a dissolution of Parliament.

1. S.M.H., 3 July 1886, p.11.
3. Ibid., p.58.
THE RIGHT REV. DR. BARRY, THE NEW PRIMATE OF AUSTRALIA.
"I would record the fact that it deliberately sets aside what as a Christian, I must hold to be the Divine Law."  

Bishop Barry - 1886.

While the Divorce Bill was being fought over both inside and outside Parliament, the Churches did not stand by in silence. Their leaders made every effort to influence public opinion against the measure, and used every weapon that they possessed to fight the further secularisation of society. At the beginning of the decade they had lost the battle over education. It was no wonder, if at the end of the nineteenth century, the Churches felt that religion and society were threatened. In Europe as well as in the Anglo-Saxon countries, education was being secularised; it was barely thirty years since Darwin's *Origin of Species* had been published; higher criticism of the Bible, particularly in Germany, was throwing doubt on fundamental beliefs; and the high divorce rate and lax laws regarding marriage in some American States and in Germany were causing concern, and were seen by some as evidence of declining moral standards. The Victorian idea of the family was being challenged.

The Church of England leaders were put in an invidious position over the divorce issue. For them there could be no question about the interpretation of Christ's words: "That whosoever shall

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1 Alfred Sydney; S.M.H., 8 April 1886, p.7.
put away his wife, saving for the cause of fornication, causeth her to commit adultery, and whosoever marrieth her that is divorced committeth adultery". \(^1\) To extend the grounds of divorce was against the law of God. Beyond the religious issue, the Churches had traditionally been the guardians of morals, and there seemed to be evidence that moral standards were declining - the high divorce rate in America, in literature, in the growing impatience with restraint, in larrakinism. Was the law to change with changing moral standards? Moreover the Church leaders sought the "greatest good for the greatest number", and the proposed grounds for divorce, while damaging to society as a whole, merely catered for individual cases of hardship.

For the Church of England leaders there could be no choice, but to oppose the divorce bill to the utmost limit of their power. In so doing, however, they laid themselves open to charges of fighting progress, interfering with politics, ignoring a great deal of misery, and, perhaps most serious of all, of failing in charity. \(^2\)

Divorce was an issue where the Christian Churches could find common ground, but the positions taken up by the Churches were not identical, and the struggle to retain specific Christian principles in the laws of the community devolved largely on to the Church of England. The Roman Catholic Church, believing marriage to be indissoluble and denying the State the right to legislate on it, stood aloof from the controversy. The Protestant Churches, with their pre-

mium on a man's right to interpret the Bible for himself, had more room in which to manoeuvre.

Hence the most vocal and determined opposition came not from the Church of Rome but the Church of England, although within its ranks opinion was divided. Its attitude had been equivocal in the past to divorce, but was now becoming more intransigent. Many of the clergy had been reluctant to accept divorce on the ground of adultery and they refused categorically to accept any further grounds for divorce. In Sydney the attack was led by the Primate of Australia, Bishop Barry, who was a learned man with high church principles. He received strong support from the majority of Anglican clergy and from most of the laity who were members of Synod. Nevertheless their position was made more difficult by the number of supporters of divorce extension who were devout Christians and Anglicans. Apart from Stephen himself, G.C. Cox, Darley, Windeyer, and J.P. Abbott were loyal members of the Church of England.

The religious arguments among Anglicans revolved round the meaning of Christ's injunctions on divorce in reply to questioning by the Pharisees. Was He expressing the ideal of Christian marriage, or were His words meant to be binding on all Christians for all time? Or were they merely limiting a Jew's right to put away his wife arbitrarily, without the intervention of any tribunal? On a more scholarly level the discussion centred around the translation of pomeia, the one exception for which a man could put away his wife

1 See Chapter I,
mentioned by St. Matthew. Although Bishop Barry was aware that some authorities believed that "fornication" was limited to impurity before marriage, he considered that not even accepting post-nuptial adultery as a ground for divorce was against reason and the "general consensus of Christian opinion". The basis for the controversy was that some scholars believed that the Gospel was originally written in Hebrew, and as it was missing, if it ever existed, there could be no way of telling what was the Hebrew word translated by the Greek porneia. In general Anglicans held that porneia meant adultery, while the Roman Catholic Church believed it meant fornication.

The most frequently quoted passages on which the Church of England made her stand are the words in St. Matthew: "That whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery; and whosoever shall marry her that is divorced committeth adultery." Later the same injunction is repeated by St. Matthew with the additional words: "...and they twain shall be one flesh." St. Luke and St. Mark both describe the questioning of Christ by the Pharisees, but omit the exception of fornication. St. Mark added "what therefore God hath joined together let not man put asunder".

1. S.M.H., 8 April 1886, p. 7. (Alfred Sydney.)
2. The Orthodox Church also understood porneia to mean adultery, but Leo Tolstoy thought that the correct meaning was "dissoluteness". Leo Tolstoy: What I Believe, Works, vol. 11, O.U.P. 1933, p. 383.
   St. John makes no mention of divorce.
the Anglican Prayer Book was held to forbid divorce. A bridegroom solemnly promises "...to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part".¹ No matter to what extent these vows had been broken by a deserting husband, no matter how far the cause for which matrimony had been ordained, namely for "mutual society, help and comfort", had been transgressed, many believed that no second marriage was allowable if there was a living spouse.

It was only after the second reading of the Divorce Extension Bill had been carried in the Legislative Council that Bishop Barry was moved to protest. He sent a long letter to the Editor of the Sydney Morning Herald. Stephen he acquitted of malicious intent but his heart was too sympathetic to cases of hardship and misery, and he overlooked the fact that the bill deliberately sets aside what, as a Christian, I must hold to be the Divine Law. There is no question here of mere ecclesiastical regulation, or of the decree of council, or Pope, or bishops; of the canon law of this or that branch of the Church of Christ. The authority put aside is the distinct authority, as regarded in the New Testament, of the Divine Master himself. ²

If Bishop Barry's main objection to divorce extension was religious, he also thought it extremely injurious to society, as it would weaken the marriage tie, in addition to the obvious dangers of abuse and collusion. At the end of his letter he appealed to all Christians:

¹. The Book of Common Prayer, Marriage Service, (Church of England)
². S.M.H., Alfred Sydney to the Editor, 8 April 1886, p. 7.
I will gladly take part in any movement for resistance, by petition or otherwise, to the bill now before the Legislature, and I venture to invite communication from any one, whether belonging to our own or other Christian Communions, who will be ready to co-operate in such a movement. The matter is urgent, for the bill has already considerably advanced; and whatever is done must be done earnestly and at once.

Unlike many of the other opponents of the bill, the Bishop was prepared to accept the good intentions of its promoters. "Many of them, I know, reverence as much as I do the sacredness both of marriage and of the Christian faith."

This was a reasonable protest from the Bishop, and one that it was his duty to make. The following Sunday he preached to a packed congregation at St. Andrew's Cathedral on the law of divorce. He chose for his text the Gospel of St. Matthew, chapter 19, verses 3-9. He made the usual criticisms that the bill was against the law of God, but his main theme was the secularisation of society.

The growing tendency to secularise their political and social system, so far as it depended on law, had there shown itself in this fatal direction. Departing from the simplicity of the law of the text, it had gradually opened the door to conceptions and practices which went far towards making marriage a temporary contract, easily to be dissolved by mutual consent or collusion, by incompatibility - as the phrase went - of temper, or by misconduct which had no bearing on the marriage vows.

It was the time to make an exception and speak of a legislative subject from the pulpit. He must protest against the indirect assumption that they were to lay aside their Christian faith and

1. S.M.H., Alfred Sydney to the Editor, 8 April 1886, p.7.
2. Ibid., 12 April 1886, p.4.
SIR ALFRED: "Don't stop me! He'll kill her—let me help her, I say."

CHORDS OF GOSPEL-SHARPS: "No, you must not interfere. It's the Will of the Lord."
and obedience when they dealt with political legislation
and that the law of the State and the faith of the Churches
could be left without danger of painful and fatal collision,
to move as if on different planes, and each to take its own
uninterrupted course.

Furthermore, anything which impaired the unity of the family, or dis-
turbed the children's trust in their parents was of fatal effect not
only to individuals, but also on "the true, moral and social life of
their country". 2

The next day the Bishop sent out a circular letter inviting
all who were in harmony with his views on the divorce issue, to a
Conference at the Church Society's House. 3 It took place on April
16, and was well attended by members of most denominations. Among
those present were three members of Parliament, T.M. Slattery and
Louis Heydon, both Roman Catholics, and Ninian Melville, the Reverend
Dr. Kinross, (Principal of St. Andrew's Presbyterian College), the
Reverend Richard Sellors, (President of the Wesleyan Conference),
Archdeacon King, Canon Gunther, the Reverend Dr. J.C. Corlette,
Judge Docker, and the Hon. Edward Knox. The Primate addressed the
meeting at length and apologised for repeating much that he had said
before. He again emphasised the argument that desertion for three
years would be asking for collusion and pointed to the awful warn-
ing given by the relaxed divorce laws in some of the states of the
American Union.

The Primate was strongly backed up by Archdeacon King, who

1. S.M.H., 12 April 1886, p. 4.
2. Ibid.
3. A copy of the circular letter is among the papers of Edward Knox,
Uncat. MSS, Set 98, box 9. (M.E.)
thought that if petitions failed to prevent the bill being passed by the Legislature, they should appeal to the Governor and to the Queen herself to prevent it being granted the Royal Assent. He moved that

This meeting desires to record its disapproval of the Divorce Extension Bill now before Parliament, as containing provisions, first, at variance with the general interpretation of Christian law, as laid down in the New Testament; and secondly, as likely to impair the sense of the sacredness of marriage, and of the responsibility of entrance into the marriage state, and so inflict serious injury on the domestic and social welfare of our community.

In due course a petition was drawn up virtually embodying the words of the resolution, and signatures were widely canvassed.

Principal Kinross did not think that the bill would do anyone any good, but he was a Scot, and Scotland had had divorce for desertion for over three hundred years. Slattery quoted the figures on the American divorce rate that he had prepared for his parliamentary speech, and claimed that even Americans were worried about their own divorce laws as a Divorce Reform Association had been set up in Boston. Furthermore, since 1868 the Episcopal Church in America had refused to marry any divorced person, except for the innocent party in a suit for adultery. Heydon claimed that it was futile for Parliament to pass the measure as it could not render the marriage of divorced persons legal, while Ninian Melville was convinced that public sentiment only had to be awakened to stop the rush to paganism. Judge Docker called for a petition, and among the first to volunteer to collect signatures were Slattery and Heydon. It was, to say the least, un-

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usual for two Roman Catholic members of Parliament to collect signatures for a petition drawn up by the Anglican Primate. The Meeting itself was reported in detail by the Freeman's Journal.¹

The Roman Catholic Church leaders did not express nearly so much concern over the Bill as the Church of England. The question did not vitally involve Catholics as they were forbidden, on pain of excommunication, to take advantage of any divorce law passed by the State. To a great extent, this was a lawyers bill; it had been introduced by an ex-Chief Justice, the present Chief Justice gave it his full approval, and many of its strongest supporters were judges and other lawyers. This does not mean that the bill was not opposed by any lawyers, for it was, but they were not so prominent in their profession, with the exception of the Attorney-Generals, as the supporters of reform. Many of the few prominent lay members of the Roman Catholic Church were members of the legal profession and, no doubt, did not want to get out of step with their colleagues. The most important Roman Catholics in the community were prepared to serve the State, as Plunkett and Dalley had, and did not feel themselves debarred by religious considerations from doing what they considered was best for society. Some had voted for secular education, Plunkett had introduced the Marriage Act which had decreed that the State held marriage to be a civil contract, and Dalley, who was one of the most revered men in the Colony, had gone even further and had introduced a Divorce Extension Bill. A few Roman Catholics were to vote for the Divorce Bill, notably J.P. Garvan and J.D. Fitzgerald.

¹ Freeman's Journal, 24 April 1886, p. 8.
Nevertheless Roman Catholics could not remain entirely aloof from the controversy. Cardinal Moran in a Pastoral letter stated the official Catholic position.

Our separated Anglican brethren deserve a due meed of praise for the earnest opposition which they have been giving to the proposed legislation. But they find themselves in a false position. They recognised long ago the power of the State to deal with sacred things and to dissolve the marriage bond for adultery. ... The Catholic Church does not recognise any authority on the part of the Civil State to trench upon the Christian sacrament or to dissolve the marriage bond; and we can only regard the present attempt of Parliament to legislate on the proposed subject as another instance of the downward course invariably pursued by Civil Governments when they arrogate to themselves an authority in spiritual matters which Christ did not confer upon them.

Moran then backed up his argument by quoting the relevant passages from the New Testament and the Council of Trent's definition of marriage as an article of faith. The sanctity of the marriage tie broken only by death was the same relationship that Christ chose for His union with His Church. If the bill did become law his flock would regard it in the same light as they regarded the already existing divorce law.

The Cardinal refused to organise any campaign against the bill, or even to participate in one. He categorically refused either to petition against the bill himself or to join with Bishop Barry in so doing, on the ground "that it would be a quasi acknowledgment of the power of Parliament to alter the commandments and the pages of

1. S.M.H., 22 April 1886, p. 6.
   "If anyone saith that matrimony is not truly and properly one of the seven sacraments of the Evangelic Law, instituted by Christ the Lord, but that it has been invented by men in the Church, and that it does not confer grace, let him be anathema." Quoted by Cardinal Moran, Op.Cit.
scripture which he could not admit. T. M. Slattery provided further illumination on this point in 1892.

Before Bishop Barry went to England he called upon me and asked me if I would interview the Cardinal with regard to the presentation of a joint petition from them against the bill. I called upon his Eminence at the request of Bishop Barry, but he at once told me that the question was one in which Catholics had no concern whatever. I say now, publically, that Catholics have no concern in this bill, because no Catholic in communion with his church can take advantage of any divorce law.

Therefore Roman Catholics who wished to oppose the bill were limited to opposition in Parliament, or to join with the Church of England on an individual basis. Moreover many tried to oppose the bill on grounds of the irreparable harm it would do to society, rather than to attack it for religious reasons.

The Freeman's Journal showed considerable zest in attacking the Divorce Bill in 1886, but thereafter the issue was overshadowed by the struggle for Home Rule in Ireland, and it contented itself with an occasional editorial. In April and May the Editor came out with two very hostile leaders. "The more Sir Alfred Stephen's Divorce Bill is examined the more wicked does it appear. ... It legalises adultery, and goes far to undo the great good that Christianity has done for mankind." The paper then stressed the arguments that the bill would prove to be an incitement to the committing of crimes,

1. N.S.W.P.D., 57, p. 6136. 8 March 1892. (Louis Heydon)
2. Ibid., 56, p. 4925. 8 February 1892. (Slattery)
harm the children, and provide opportunities for collusion.

A month later, the Cardinal referred to the divorce issue for the last time in an address to the St. Vincent de Paul's Church school. On this occasion he claimed that it had been the mission of the Church to raise woman to dignity, after generations of degradation, to become the companion and helpmate of her husband.

For 1800 years the Church had never ceased to guard the sacredness of Christian marriage - and this was no easy task. The fierce passions of the rude conquerors of Europe had to be curbed; the corrupt morals and unbridled lust of despotic monarchs had to be subdued. This he claimed was proved by the Church preferring to lose one of her fairest provinces rather than give way to Henry VIII. Inevitably he referred to Napoleon's divorce, claiming that Pope Pius VII had, in the face of Napoleon, "proclaimed to the world that no seduction, no threat could induce him to dissolve it, the marriage, though the mightiest ruler on earth was the postulant, and a Protestant of humble degree the wife assailed." Moran omitted all the annulments which various Popes had granted, for example, Henry of Navarre. He pronounced that divorce was merely a fashionable name for polygamy.

The Freeman's Journal was baffled by the attitude of women to divorce. The Christian marriage law had protected women from being the slave of men. It was understandable that infidels, socialists and libertines should attack marriage, but the apathy of the women to

1. S.M.H., 10 May 1886, p. 4.

Among those the Church had had to subdue were Philip Augustus of France, who had been made to receive again his divorced wife, and Henry IV of Germany who had been humbled and forced to acknowledge his guilt to the world.

2. Ibid.
The new bill was inexplicable.\textsuperscript{1} The paper published another editorial in May attacking the Herald for throwing Christianity overboard altogether, and the Protestants for dissension among themselves, even when fighting for a principle. The very fact that there was a controversy at all over the divorce issue only showed "how greatly Christianity has lost its hold on the masses of the people".\textsuperscript{2}

The Methodists supported the Primate, and were almost outraged by the provisions of the bill. The Wesleyan Committee of Privileges met on 20 April. Its President, the Rev. R. Sellors, sent a letter to the Weekly Advocate informing Methodists of the Committee's decision to petition against the bill. Petitions would be distributed to ministers as soon as possible, and were to be signed by adults only. He was anxious that the Wesleyans should, if possible, unite with the Primate in this matter. The thanks of the community are due to the Primate for the able manner in which he has placed his views on this important question before the public, and for the liberal spirit with which he has manifested in asking the different Christian bodies to co-operate with him in petitioning the Parliament not to pass the Divorce Extension Bill.\textsuperscript{3}

Sellors himself recognised the existence of the evils which the bill hoped to deal with. However he did not think that increased grounds for divorce would solve any problems, but only succeed in multiplying them, by destroying the sense of the sacredness of marriage.

The Weekly Advocate, the organ of the Wesleyan Methodists,

1. Freeman's Journal, 3 April 1886, p. 12.
2. Ibid., 8 May 1886, p. 13.
showed interest in the divorce question in April. The Editor was willing to accept Stephen's figures of 1200 broken marriages since 1860, but was far from being certain that divorce was the best means of dealing with the problem. The paper was preoccupied with marriage rather than divorce.

Whatever may be said as to the necessity of providing for some way of escape from the intolerable burden of an unfaithful or unkind husband or wife, it is clear that very much more needs to be done to tone up the heart and conscience on the question of marriage. Everybody knows how thoughtlessly and jauntily that some unions are entered into. The most sanguine can hardly help stammering as he tries to wish happiness to the couple. It is like a profanity to bless them in the name of the Lord. Our pulpits need to speak out more clearly on the matter.

A week later the same point was elaborated, but the Advocate did not come out directly against the measure.  

Meanwhile the Primate returned to the attack in the columns of the Herald, which was to end in a verbose dispute with Stephen lasting as long as the Bishop was to remain in the Colony. Little was said that was new, and the old arguments were repeated, if perhaps better expressed. Barry could laugh off the attacks made in the Freethinker as flattering, but the formidable attack coming from Christians was more serious. Stephen maintained that the famous words in the Bible were made by Christ in response to taunting by the Pharisees. They referred to the right of a man to repudiate his wife arbitrarily, and

2. Ibid., 17 April 1886, p. 30.  
to the controversy among the Jews themselves over the question of
divorce. They were not meant for all time, under changed circum-
stances, or to any laws introduced by the State and carried out by
the Courts. Judicial separation was nowhere sanctioned in the Scrip-
tures, while the Pope and the Ecclesiastical Courts, by permitting di-

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orce *a mensa et thoro*, upheld the letter of the law but destroyed its

spirit. Stephen published nine pamphlets during the next six years,
many of them being first printed in the *Herald*. It could not

be said that this public discussion achieved much. The Primate de-
scribed one of Stephen’s defences as

only the skilful speech of an advocate, not the judicial
and statesmanlike utterance of one who weighs both sides of
the question. Of fresh argument, and of serious attempt to
grapple with our opposing argument, I find little; of power-
ful rhetorical writing and appeal to authorities, much;
and, I must add, more of invidious reflection on his opponents
than is, I think, justified by the facts of the case. 2

Stephen was to make a similar complaint, that his answers had “rarely
been noticed, - but certainly never met - while again and again ob-
jections are repeated, as if nothing had ever been said against them.” 3

The defence of the clerical position was not left only to

the Primate. Early in June, Bishop Pearson delivered a bitter attack
on divorce to the Newcastle Synod. Apart from the Bill being direct-
ly opposed to the true idea of marriage, it was also utterly con-
trary to utilitarian principles. The Bishop of Newcastle, in attack-
ing the divorce bill, put forward his own ideas on temperance, and was

1. S.M.H., 4 May 1886, p.6. (Stephen)
2. Ibid., 15 May 1886, p.9. (Bishop Barry)
3. Stephen: *Australian Divorce Extension Bills - A Reply to Synod*,
   Sydney 1886, p.3.
full of advice for the legislature. They should reform the liquor laws, for although he was not a total abstainer, he was "positively appalled by the number of youths and young men who crowded the bars of the public houses and dramshops, growing excited in their looks and boisterous in their talk". The marriage law should also be reformed as it seemed designed to encourage rash marriages by ignoring the safeguards of notice and residence. He attacked the bill from the pulpit as well as in Synod. As late as August, the Reverend J.H. Debenham was preaching against the bill at St. James' Church. The measure, if passed, "would be as prejudicial to the morality of the nation, as was ever the act of a philanthropic legislator - and that was saying a good deal".

On the advice of its Standing Committee, the Bishop did not wait for Synod to meet to petition Parliament against passing the bill. The petition signed was that drawn up at the meeting at the Church Society, in April. The Primate instructed the clergy that copies were to be put in the vestries for people over the age of sixteen to sign. Petitions were a traditional and important way of expressing

1. S.M.H., 12 June 1886, p. 8. (Bishop Pearson of Newcastle)
2. Ibid., 16 August 1886, p. 3.
3. N.S.W. V. & P., 1885-1886, vol. 8, p. 1159. The relevant portion of the text of the petition is:

"1. Because the proposed extension of the conditions of divorce is at variance with the general interpretation of the Christian Law as laid down in the New Testament,
2. Because they believe it is likely to impair the sense of the sacredness of marriage and of the responsibility of entrance upon the marriage state, to introduce dangerous facilities for the disruption of the marriage tie, and so to inflict a serious injury upon the domestic and social welfare of the whole community."
public opinion on matters on which legislation or no legislation were
wanted. But their very importance made them subject to propaganda
efforts by pressure groups who wanted to impress Parliament with a
show of public opinion. The supporters of divorce extension in Par-
liament regarded petitions organised by the Churches with the great-
est suspicion, and there was even some discussion of them in the press.
By 28 May, 2500 and 2308 Residents of the Colony had signed the
Church Society petition. These were followed in July, August and
September by 1019 Residents in the City and Surrounding Districts of
Newcastle, 954 and 1080 Residents of the Colony and 837 and 1138 Cer-
tain Residents of the Colony.¹ The petition in all the cases was the
same except that from the 95 Residents of Singleton who drew up their
own petition.² All the signatures only added up to 6902, which was not
a very large number considering the controversial nature of the issue,
or in relation to other public issues of the time. One petition from
the Public of New South Wales against the imposition of a Tobacco
Duty had 31,213 signatures, another upholding the decision of the
Government to prohibit licensed buildings being used for lectures and
entertainment on the Lord's Day, 36,200 signatures,³ and one to ab-
solutely prohibit the employment of females in the bars of public
houses, 12,056 signatures.⁴ This indicates that either the divorce

1. N.S.W. V. & P., 1885-1886, 8, pp. 1159-1179.
2. Ibid., 1885-1886, 8, p. 1167.
3. "... as contrary to the spirit of the British Constitution and
   the revealed will of God, and injurious to the people of this
   Colony."
4. Ibid., 1887-8, 1, p. 743.
issue was not of such burning significance to the general public as
the protagonists thought, or that there were considerable numbers of
people who were silently in favour of extension. Stephen did point
out that "the unhappy and cruelly wronged people" whom the bill hoped
to relieve, "can get up no petitions, as so many of the clergy in their
zeal are doing; for who are to bring them togeth 1er, even did they de-
sire to publish their individual wrongs."

The clergy not only exhorted their congregations to sign the
petitions from the pulpit, but also sent in petitions of their own.
The Bishop of Sydney, on behalf of the Standing Committee of Synod,
added a third ground of objection to the formula drawn up at his meet-
ing, 2 and a similar petition was received from the Bishop of Newcastle.
Newcastle was particularly hostile as the Synod also petitioned on
its own behalf, together with 23 ministers of Religion from that area.
On behalf of the Synod of Grafton and Armidale, the Bishop and
Archdeacons followed suit. At this stage the Bishops of Goulburn and
the Riverina were silent. The Committee of Privileges appointed by
the Wesleyan Conference sent in the same petition.

A few petitions were received in favour of the bill. The
Moderator of the Presbyterian Church was prepared to petition both

1. S.M.H., 4 May 1886, p.6. (Stephen)
2. N.S.W., V., & P., 1886-7, 8, p. 1165.
"3. Because he considers that variation on so important a matter
from the law established in England and in other Colonies of the
British Empire is in itself undesirable, and is likely to intro-
duce serious difficulties into family and social life."
Houses of the Legislature to extend the grounds of divorce to cover desertion, and was silent on the other grounds.⁠¹ The Residents of Sydney and Suburbs amassed 4,800 signatures headed by Sir John Robertson⁠² and 105 Presbyterians, Wesleyans, Anglicans, and others from Queanbeyan District prayed that Parliament would pass the measure. Edward Skinner was too willing to petition Parliament as often as required on behalf of the Liberal Association in support of the bill, but was restrained by Stephen to a large extent. However he could not be prevented from defending his position in August, after Mr. Melville had promised to take his blankets to the House if necessary in the cause of obstruction. Skinner claimed that the Church petition had been broadcast throughout the land, and even the gates of Darlinghurst failed to keep it outside the prison walls. The Liberal Association seeing how active the Churches were in the matter, resolved to hold a public meeting, and agitate in favour of the bill. A deputation had waited on Sir A. Stephen to consult his wishes on the subject. They reluctantly abandoned the idea in deference to his wishes, and consented to trust to public opinion and the good sense of the legislators.

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¹ N.S.W. V. & P., 1886-7, 8, p.1179. David Smith, Moderator of the Presbyterian Church:— "Your petitioners believe wilful desertion to be a valid ground of divorce, and in agreement with the teaching of Holy Scripture, and the confession of faith received by the Presbyterian Church."

² N.S.W. V. & P., 1886-7, 8, p. 1175. The Residents of Sydney, "...believing the Divorce Bill before your Honourable House is calculated to promote the highest interests of the community, by its tendency to restrain brutality and crime, to uphold the sanctity of marriage, and relieve a large amount of suffering otherwise hopeless of redress."

³ S.M.H., 21 August 1886, p. 12. (Edward Skinner)
The whole-hearted support of the Freethinkers with whom Skinner was closely associated, was of doubtful value. It is also a matter of considerable doubt if much weight can be attached to the petitions as evidence of public opinion in general, although they are quite informative about the Church of England's methods of fighting this legislation. The petitions were frequently mentioned in Parliament by both sides. Neild alleged that signatures were collected from minors under pressure, which the Primate denied.

Individual clergymen added to the number of letters to the Editor of the Herald. The Reverend J.C. Corlette wrote four letters in April and May. On the last occasion he attacked the editorial policy of that paper. Corlette, in common with many others, was particularly concerned by the rising divorce rate in America and quoted statistics to this effect from an article in Century Magazine, probably from the same source used by members of Parliament. Other clergymen were to become more vocal at a later stage. From the start of the controversy the Reverend Dr. Zachary Barry was the only known Anglican clergyman to come out openly in favour of divorce extension. He was usually reluctant to accept the dictums of the English Bishops and was always more than willing to give the State what he considered its due authority. In 1886 he wrote three letters to the Editor of the Herald, strongly supporting the bill on religious and social grounds.

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1. S.M.H., 13 May 1886, p. 6. (The Rev. Dr. J.C. Corlette)
2. Ibid., 10 April 1886, p. 10; 26 April 1886, p. 8; and 1 May 1886, p. 11. (The Rev. Dr. Zachary Barry)
He argued that a literal interpretation of the Bible could prove extremely awkward if carried too far. Zachary Barry was not afraid to attack his fellow ministers, and made more than one illuminating comment about the social conditions. "The demand for relief is somewhat overwhelming, and the clergy know it. The suffering, and scandal, and wrong are simply disgraceful to a Christian country."¹

It was the vociferous opposition to divorce extension made by the Churches which swung the most conservative papers over to reform. The Sydney Morning Herald had greeted the bill with caution, and in April Bishop Barry was commended for stressing the serious nature of the subject.² However from that point it became steadily more hostile to the pretensions of the clergy, and deplored "the obvious incongruity of any question of State policy becoming a theological one."³ The Editor of the Herald during the years of divorce controversy was the Reverend Mr. William Curnow, an ex-Methodist minister.⁴ He appealed for a true understanding of the words of Christ that had been so stressed, in the light of an understanding of the times and conditions under which they were spoken. Christ did not take away a man's right to divorce himself, but most people now would be shocked at a man divorcing himself.⁵

From May the editorials began attacking Bishop Barry more pointedly for changing the basis of discussion from social expediency

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1. S.M.H., 1 May 1886, p. 11. (The Rev. Dr. Zachary Barry)
2. Ibid., 17 April 1886, p. 13.
3. Ibid., 24 April 1886, p. 8.
5. S.M.H., 24 April 1886, p. 8.
based on the experience of a learned judge, who had witnessed the
wretchedness of those held in bondage by marriage ties when utterly
frustrated as completely as by infidelity, to the ground of theolog-
ical considerations alone. This was more unjustifiable as not only
did the three Gospels differ in what Christ did say, but also the
three greatest Churches differed in their interpretation of the Scrip-
tures.\textsuperscript{1} Not a week later Sir Alfred Stephen came in for more praise,
and the Church of England for more criticism.\textsuperscript{2}

The same day as Barry's answer to Stephen was published it was
accompanied by an editorial inquiring if the Bishop failed to see that
his theological position did not shake Stephen's position. The edi-
tor also defended America, as even if some people there aimed at
reforming some of their laws, there had been no move to go back on
their legislation.\textsuperscript{3} The Herald reserved its greatest displeasure for
the Bishop's remarks connecting the move for divorce extension with a
growing impatience with restraint and larrkinism.\textsuperscript{4}

To the Primate this was the last straw. He wrote to the
Herald complaining that his remarks had been taken out of context,
a fact which could easily be seen from the fuller report in the Daily
Telegraph. He was feeling maligned, but unrepentant.\textsuperscript{5} The Herald
was the most conservative newspaper in New South Wales, so it is not
surprising to find that the other papers, with the exception of

\textsuperscript{1} S.M.H., 5 May 1886, p. 9.
\textsuperscript{2} Ibid., 10 May 1886, p. 7.
\textsuperscript{3} Ibid., 15 May 1886, p. 13.
\textsuperscript{4} See Ch. I, pp. 47-8.
\textsuperscript{5} S.M.H., 28 May 1886, p. 5. (Bishop Barry)
expressly religious organs, were even more hostile to the clerical assailants of the measure, although the evening papers were far more interested in reporting the squalid details from divorce cases than in waging an editorial campaign for the improvement of the law. After 1886 they paid scant attention to the matter before Parliament. The Daily Telegraph, more liberal than the Herald, had greeted the Divorce Bill with approval in February. In April it began protesting about the ecclesiastical objections displayed at the Church Society meeting. A second leader on Dr. Moran followed, appealing to Roman Catholic M.P.'s to treat the measure fairly. "If it is, in their opinion, due to the Church to vote only against the extension of the law, it is surely due to the State not to vote at all." In August the paper launched a bitter attack on the Church petitions, decrying the double code of morality which existed: that of the Churches and that of the World. The Evening News was also provoked into attacking the stand made by the Churches. The Globe came out with a main leader, entitled the "Two Alfreeds." It stressed the fact that the Church was ignorant about the fate of a bride and groom as soon as they left the church door. "What wonder that the Church having no knowledge of anything that happens after once the sacrament is complete, is unable to realise the tragedy which too frequently succeeds its ministrations."  

2. D.T., 19 April 1886, p.4. (Topics of the Day)  
3. Ibid., 22 April 1886, p.4.  
4. Ibid., 18 August 1886, p.4.  
5. E.N., 20 April 1886, p.4.  
7. Ibid.
The editor also emphasised the premium put on the commission of
adultery.

As a good Christian, it is not surprising that Stephen was
pained about the strong opposition from the Churches. At the beginning
of July he sent another long answer to the ecclesiastical objections
to the Herald, before publishing it as a pamphlet, which made no
effort to disguise his feelings. He felt that by continued repeti­
tion the clerical assailants might have the effect of dripping water.

And here we have not the pulpit alone, with all the
following which sacerdotal authority can command, but
published letters and addresses from the same source, and
petitions signed in vestries under priestly solicitation,
arrayed against us. 1

He accused his opponents of misunderstanding, if not misrepresenting
the objects of the bill.

The idea seems to have taken possession of the female
mind that this is a measure for enabling husbands (and on
very slight temptation too) to get rid of their wives; and
that it is but the prelude to other flagitious experiments
in the same direction. The bill, on the contrary, is essen­
tially in aid of woman, and for her protection. 2

In addition he thought it "a cowardly abandonment of duty to shrink
from doing what is right, because possibly some day somebody else
may do, or try to do what is wrong." 3 Nor should a wife be called
upon by God to bear her wrongs. Stephen once more pointed to the
article by G.H. Lewis in the Fortnightly Review, in which the author
dealt with the shortcomings of the English Divorce Law of 1857, which
were largely the result of clerical opposition. It was palpable non-

1. S.M.H., 5 July 1886, p. 5. (Stephen)
2. Ibid., 5 July 1886, p. 5. (Stephen)
3. Ibid..
sense for Mr. Gladstone to maintain that "the indissolubility of marriage was an idea never shaken in England." Lewis did not include drunkenness, but this was a prominent ground in the new divorce law of the French Republic.

By the end of 1886 the only major church which had not spoken out on the divorce question was the Presbyterian Church, and it was not to make any authoritative comment until 1887. The position of the minor Protestant Churches is rather hard to follow, for if the Anglican and Presbyterian leaders were divided, their congregations were even more so. The Reverend Charles Bright, a leading Baptist minister, seemed to be a man of compassion and strong common sense. He wrote on the divorce issue for the Echo in 1886, and wholeheartedly approved of the proposed measure. He believed that statistics were valueless when used to support an argument.

From the cases that come before the court, from the applications made to charitable people, and charitable institutions, from the facts furnished by orphan asylums, from the testimony of those in authority whose business it is to deal with this matter, there is a body of evidence that points to the pressing need for a change in the law relating to marriage. If it can still be called class legislation, the class under consideration is so large that it cannot be ignored, and the evils so great that the welfare of the State demands that something be done, in order, if possible to remove them. He thought that Christ's words pointed to an ideal. Moreover he deplored the laissez faire attitude taken by the Churches when confronted by social evils; offering medieval theology rather than adapting themselves to modern circumstances. Bright went further than

1. *S.M.H.,* 5 July 1886, p. 5. (Stephen)
Stephen and wanted incurable insanity included in the bill. However, all Baptists did not agree with Bright. Joseph Palmer wrote to the Editor of the Herald in 1890 regretting that some years previously the Baptist Union had passed a resolution in favour of the bill. At least one minister had preached against it, and he was sure that Baptist women, like others of their sex, would disapprove.¹

The well known Congregationalist minister, the Reverend Dr. Jefferis, in an address on "Celibacy and Marriage" condemned divorce.

Divorce was desecration. He did not suppose that any could be so infamous as to look forward at the time of marriage to the possibility of separation; but if after marriage they took advantage of the present or of future laws to put asunder by mutual and wicked compact what God had joined, be assured there would be a judgment of fiery indignation. ²

The Telegraph took exception to these remarks.³

The Protestant Standard, the organ of the Orange Lodges, was chiefly devoted to baiting the Roman Catholics. It rarely mentioned the divorce question, (being fully occupied with the "Escaped Nun", Edith O’Gorman), except when it provided an opportunity to attack Cardinal Moran's views. Naturally it made much of Napoleon’s divorce and subsequent re-marriage. Even on this occasion it got its facts wrong, but was possibly typical of ill-informed Protestant opinion.⁴

A good many hard things were said about the Jewish Divorce Law at the time of Christ, especially by the churchmen. Rabbi Davis

¹. S.M.H., 17 June 1890, p. 4. (Joseph Palmer)
². Daily Telegraph, 17 May 1886, p. 6. (The Rev. Dr. Jefferis)
³. Ibid., 18 May 1886, p. 4.
⁴. The Protestant Standard, 1 May 1886, p. 3.
remained aloof from the controversy until he felt called upon to defend his race from the assertion made by the Primate, to a large congregation at the Cathedral: "That marriage had ceased to be the sweet influence of the home which it was designed in heathen and, to some extent, in Jewish civilisation." Naturally the Rabbi was incensed at being bracketed with the heathen, and maintained that the Jews had an exceptional and sacred regard for the marriage tie, looking upon it "as a holy sacrament, as a religious institution, sanctioned by God's blessing". He endeavoured, with difficulty to define Ervath Dabar, the means for loosening the marriage bond. The Jews seemed to have had as much trouble defining Ervath Dabar, as Christians with porneia. The Rabbi explained that the Hillel followed a wide and diffuse interpretation, while the Shammai followed a stringent one. Modern Orthodox Jews follow the Shammai. The Rabbi pointed out that Jews at the time of Christ could not simply write out a bill of divorcement, but had to get a scribe to do it, hence the matter came to the attention of the authorities. In modern times a person seeking a divorce had to go to the chief of the Beth-Din, who tried to effect a reconciliation. In point of fact there were very few divorces among Jews, which Rabbi Davis attributed to their sober habits. He then called for an apology from the Bishop for his hasty utterance. Bishop Barfy's letter of apology was duly published in

1. S.M.H., 3 May 1886, p. 5. Sermon by Rabbi Davis.
2. Ibid.
3. Ervath Dabar was variously translated as 'some uncleanness'; 'a scandalous thing'; literally as 'a matter of nakedness'; in some places 'ervath' was associated with abominations, according to Rabbi Davis.
On the whole, however, the Jews were strongly opposed to the Divorce Extension Bill, which had few more bitter opponents than Sir Julian Salomons, the Government's representative in the Upper House for most of this time.

The Freethinkers were a small but extremely vocal group who raised the ire of all Christians. Led by Thomas Walker, M.P., and Edward Skinner, who was also President of the Liberal Association, they were frankly and openly atheists and uncompromising in their attitude to "that enemy of progress, the Christian Religion". There was great pressure on Parkes from the non-conformists to prevent them using the Theatre Royal for lectures on Sunday nights. For a few short months in 1886 they published a paper in which they gave whole-hearted support to the divorce bill. However they combined their support with savage attacks on Christianity.

It is only a still further exemplification of the consistent opposition which the Church has ever meted out to every movement calculated to bring about the amelioration of social conditions. Christian theology is still the stumbling block in the pathway of reform. Helpless women must forsooth remain helplessly tied to brutal drunken husbands, honest and virtuous women must be consigned to perpetual widowhood through the criminality of their husbands, with no hope of redress, without a single gleam of happiness to illumine their dark and bitter path; trials embittered, and a thousand times intensified, because of the utterances attributed to a man who never himself entered the matrimonial state, whose every utterance proves him to have been unable even to grasp the hem of the sociological problem, and most of whose advice and commands are flagrantly disregarded by the Bishop himself, as well as by all others who profess to base their conduct entirely upon his doctrines.

Their subsequent articles became even more open attacks on Christianity and more hostile to the Bishop. They drew up a petition in favour of the bill, to be signed by people over the age of eighteen. W.W. Collins, the Editor of the paper, wrote an open letter to Barry which was personally abusive. It must remain very doubtful if they rendered much, if any, aid to the cause of divorce extension, for their atheistic utterances alarmed the respectable, offended the devout, and lent colour to the assertions that the only people who wanted divorce extension, with a few inexplicable exceptions like Stephen himself, were infidels and freethinkers, a highly suspect group. Perhaps the only surprising aspect was that Stephen could control them as well as he did.

After the controversy of the previous months, the divorce question was high on the agenda when the Anglican Synod of the Diocese of Sydney met at the end of July. The Primate referred to the matter

1. Freethinker, 9 May 1886, p. 36.
"That your petitioners are conscientiously and earnestly agreed as to the wisdom and justice of passing into law the provisions of the Divorce Extension Bill now before your Honourable House. 1. Because the proposed extensions will tend to purify the marriage state. 2. Because it will improve the moral tone of the community by removing many temptations to immorality. 3. Because it will bring untold relief to many unfortunate women now bearing afflictions enforced upon them through the vices of others, and for which the present inadequate state of the law offers no relief."

2. Ibid., (W.W. Collins)

3. When the General Synod met in October 1886 the Divorce Bill was again condemned. Mesac Thomas, Bishop of Goulburn, accused the Herald of reporting him "wrongly and wretchedly". His motion deprecating the Divorce Bill was carried almost unanimously. M. Goulburn, to Hon. Charles Campbell, M.L.C, Scotland, 3 February 1887.

in his opening address. It had been his painful duty to enter largely into public discussion of the measure. Their opposition could not be dismissed by denunciations as ecclesiastic prejudice or clerical influence.¹

In seeking to relieve individual cases of hardship with what may prove a questionable boon of relief, it sacrifices the good of the whole community; and, though its promoters may not desire it, it panders to the growing impatience of legal restraint over individual desire, and tends to the fatal misconception and degradation of marriage, as simply a matter of mutual contract, to be dissolved as soon as it becomes burdensome.²

Dr. Corlette delivered a paper to the Synod on the subject, expanding on the theme of marriage as the sacred cornerstone of society, and the successive polygamy that was current in Germany, which made a mockery of marriage.³ Judge Wilkinson thought up as many legal objections as possible. He harped on the likelihood of the measure degrading the position of women, and introduced a novel argument:

All the Roman Catholics will not consider themselves justified in using this law, and it is quite clear that another and serious advance will have been made to make them a separate and distinct body. Surely this is unwise. As it is, the law to some extent works in this way, and justifies the objection entertained by Roman Catholic authority against all mixed marriages; but the new law is a very great advance in making them a separate community.⁴

The Judge also thought that the reason why lawyers made such bad legislators was because: "'Their experience is largely with the abnormal incidents of social life, its quarrels and its crimes.'"⁵

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² Ibid., p. 31.
³ S.M.H., 5 August 1886, p. 7.
⁴ Ibid.
⁵ Ibid.
The Hon. G.H. Cox was the only member of the Synod who openly supported divorce extension, and warned the Church "that those who would not support the bill, and go with the spirit of the age, would be left high and dry". The Rev. Mr. C.F. Garnsey took umbrage at this. Synod agreed to petition against the bill, once more.

The Primate made an attempt to influence the political aspect of the divorce question when he wrote to the Editor of the Herald to say that it was disgraceful for the Assembly to discuss such an important matter at the end of a long and tiring session. Only 25 out of 112 members had voted for the second reading, and only 14 against, while only 20 more members had bothered to pair. Therefore as less than half the members had expressed an opinion at all, the vote could not be considered representative of legislative opinion.

From the end of the parliamentary session until March 1887 the divorce question was quiescent and unresolved. The Presbyterians were in a quandary over the issue, for Scotland had had divorce for wilful desertion since 1573. The Presbyterian Church based its belief that divorce for desertion was in accordance with the Scriptures on an Epistle of St. Paul to the Corinthians: "But if the unbelieving depart, let him depart. A brother or sister is not under bondage in

1. S.M.H., 5 August 1886, p.7.
2. Ibid., 27 September 1886, p.3. (Bishop Barry)
such cases: but God hath called us to peace".¹ This position was reinforced by the Confession of Faith by the Westminster Divines who sat from 1642 to 1647.² In accordance with the general opinion of their Church, most Presbyterians wanted the grounds for divorce extended to cover desertion, but there agreement ended. Some were reluctant to petition Parliament in favour of desertion as they feared that such a petition might be used to support the whole bill, which some of them disapproved of strongly. Others felt equally strongly that the bill did not go far enough, particularly with regard to insanity. The Standing Committee on Religion and Morals of

1. I Corinthians, 7, 10-16.
A scholarly article in the Melbourne Argus makes the Presbyterian position clearer. "Professor Charles Hodge, in his well known work Systematic Theology, a recognised text-book among Presbyterians writes as follows:- "The Romanists, indeed, rest their sanction to remarriage in the case supposed on the ground that there is an essential difference between marriage where one of the parties are heathen, and marriage where both parties are Christians. This however makes no difference. Paul had just said that such unequal marriages were lawful and valid. Neither party could legitimately repudiate or leave the other. The ground of divorce indicated is not difference of religion but desertion!" The writer went on to explain that some took a middle course and thought desertion justified separation, but not re-marriage, however this was inconsistent with Paul's words that neither party was to be in bondage. Argus, 1887, Stephen Press Cuttings, p. 81.

2. S.M.H., 17 March 1887, p. 6. Article of Westminster. Confession, quoted by Dr. Steele:-
"Although the corruption of man be such as is apt to study arguments, unduly to put asunder those whom God hath joined together in marriage; yet, nothing but adultery, or such wilful desertion as can in no way be remedied by the Church or civil magistrate, is cause sufficient of dissolving the bond of marriage, wherein a public and orderly course of proceedings is to be observed, and the persons concerned in it not left to their own wills and discretion in their own case."
the Presbyterian General Assembly appointed a sub-committee con­
sisting of the Reverends Andrew Gardiner, 1 the Moderator; Dr. Gil­
christ, J. Henderson, J. Copeland, and T. J. Curtis, to report on the
proposed divorce bill in 1886. The sub-committee resolved:–

That this committee express a general approval of all
the provisions of the Bill, with the exception of the one
relating to aggravated assaults by the respondent, which
 provision the committee regard as calculated to encourage
 collusion between the parties. The committee further think
that hopeless insanity from whatever cause should be added
to the grounds of divorce recognised by the Bill. 2

The only action taken was that the Moderator, the Rev. David Smith,
petitioned in favour of extending the grounds to cover desertion. 3

In March 1887 when the Presbyterian General Assembly met, it
was the only major church which had not officially pronounced on the
divorce issue, and the Assembly was firmly told by Dr. Steele4 that
it was becoming for it to do so, and in a positive fashion. He moved
that the Assembly should petition Parliament to extend the grounds of
divorce to include wilful desertion.

1. Andrew Gardiner was to be Moderator of the Presbyterian Church in
1888. In 1890 he created a scandal by fleeing abroad, when his
wife instituted divorce proceedings against him. He had been
paying too much attention to a lady member of his congregation.
He was asked to resign from the ministry. D.T., 22 May 1890, p. 5.
3. V. & P., 1885-1886, 8, p. 1179.
4. "Your petitioners believe wilful desertion to be a valid ground
of divorce, and in agreement with the teaching of Holy Scripture,
and the confession of faith received by the Presbyterian Church."

The Rev. Dr. Steele had in 1886 written an article for one of the
newspapers in which he had explained the Presbyterian position
regarding desertion, and also implied that there was nothing in the
Scriptures against the law of a civilised country affording re-
lief to married persons on other grounds. Dr. Steele was minis-
We have the opportunity of asserting what we believe to be scriptural, what we believe to be moral, and what therefore must be of advantage to the morality of the community, that persons wilfully deserted may have their marriages lawfully dissolved, and be at liberty to marry again. In a new country like this there are many cases of such wilful desertion, and a considerable amount of hardship has resulted, especially to respectable and virtuous women, and a great amount of temptation has been presented to the weak to enter into immoral relations. This is quite notorious.

Steele was warmly seconded by the Rev. Dr. Gilchrist who said that personally he was prepared to go beyond Dr. Steele, and wanted incurable insanity to be included in the bill. The Rev. Dr. Kinross, Principal of St. Andrew’s College, thought that the whole bill was evidence of a "downward tendency". He advised against petitioning in favour of desertion and was horrified at the idea of incurable insanity being a ground for divorce. There was a good deal of discussion on Dr. Steele’s motion; the Rev. Mr. A. Miller thought that in addition to petitioning in favour of desertion, they should petition against the other grounds proposed in the bill, while the Revs. Auld and W. Neill feared that if they petitioned at all, it would be used as support for the whole bill. Eventually the motion was carried by a vote of 27 to 15, and a petition duly presented to the Assembly.

However vocal and sure of their opinions were the ministers of the various Churches, their own opinion was not necessarily that


The petition from the Rev. Dr. William Bain was very similar to that of David Smith. Neither mentioned any cause other than adultery, though subsequently, other clauses were to be petitioned against.
of the rest of their flock. This is particularly true of the Protestant Churches which put a premium on a man's right to interpret the Bible for himself. Between 1886 and 1892 two hundred members of the Legislative Assembly voted on the Divorce Extension Bill out of which the religious denomination of one hundred and twenty-four is known. Anglicans divided 24 ayes to 17 noes, despite the known opinion of the Primate. More surprisingly, 8 out of 27 Roman Catholics voted for the bill, including J.P. Garvan, a Minister. The Methodists and Presbyterians both had a majority in favour, 12 to 7, and 8 to 4 respectively. Of the 17 Protestants of unknown denominations, only 2 voted against the bill. In addition there were 3 Congregationalists, 3 Jews, 1 Quaker and 1 Mormon who all supported the measure. Members of Parliament may, perhaps, be expected to be less bound by religious beliefs than other people, but even so the Churches probably had less control over their congregations than they would have liked.¹

¹ See Appendix III.
"Is it likely that her Majesty will be advised to desecrate her jubilee year by assenting to such an atrocious bill?"

Mr. Piddington, in the Legislative Council.¹

Jubilee Year in N.S.W. opened with a General Election and a visit to Sydney of the Chief Justices of the Australian Colonies. Both were to affect the divorce issue. After the collapse of the Dibbs-Jennings government, Sir Henry Parkes, at the head of a minority government, had no hesitation in asking for a dissolution. If the passage of the divorce bill had been hampered by the factional nature of politics and the irresponsibility of the members in 1886, in the long run its chances of success were not improved by the emergence of a new political system. The election of February 1887 was fought on the issue of free trade versus protection. This was the beginning of the end of the "faction" politics that had characterised the New South Wales Parliament since its inception, in the Assembly, if not in the Council to the same extent. For the first time the Colony was split by an important issue, and some effort was made to organise party machines. Under the leadership of E.W. O'Sullivan, who was deeply struck by the prosperity of Victoria under Graham Berry, the Protection Council was formed.² If it did not achieve the success so confidently expected, it did secure the return

¹ N.S.W.P.D., 25, p.1089, 28 April 1887. (Piddington)
² Bruce Mansfield: Australian Democrat, Sydney 1965, p. 57.
of over forty of its official candidates. The Free Trade Association was formed largely in self defence, but was more loosely organised, and had less influential representation in Parliament. Parkes failed to include any members of the Free Trade Association in his Cabinet after he had won a convincing victory. To a great extent the Free Trade party in Parliament was "merely the Parkes faction in another guise," and still as undisciplined as ever.

The Divorce Extension Bill's progress through Parliament coincided with six years of change in the political structure. The appearance of a two party system was only to last for four years before the emergence of the Labour Party in the 1891 Election. Even when the original tariff labels of the two parties were stretched by the younger men to include some of their political philosophy, the older men retained their ideals about the independence of members. Some issues, principally those of education, divorce and federation cut across any nominal party divisions. The divorce question was decided by individual members on the basis of conscience, and although both Parkes and Dibbs supported the bill, their Cabinets were too divided on the issue for it ever to become a government measure, for it would assuredly have split the new parties. In consequence it was subject to all the hazards of a Private Member's Bill. It was

2. With the exceptions of Edmund Barton and B.R. Wise, all the Attorneys-General were strongly opposed to the bill, particularly W.J. Foster and G.B. Simpson. In Parkes's Cabinet it was also opposed by Daniel O'Connor and A.J. Gould. Under Dibbs the main opponents were T.M. Slattery and H. Copeland. Sir Julian Salomons, who was the Government's Representative in the Legislative Council under both Parkes and Dibbs, was another opponent.
rare for Private Members. Bills to be given any time apart from their customary Fridays, which meant that these measures were open to the dangers of count outs, filibusters, and other methods of obstruction, or merely lack of interest, all leading to the loss of the bill when Parliament was prorogued. This meant that the bill had to be abandoned or started from scratch in the next session. Fortunately in 1887 the Parliament was new, and at first, imbued with some ideas of responsibility after the near anarchy of the previous session.

The new Parliament was opened on 8 March 1887. John Cash Neild wasted no time in introducing the Divorce Extension Bill into the Assembly. It was read for the first time on 16 March, and two days later Neild moved the second reading. He appealed to the honorable members to treat the bill as a serious question. Neild then made the old replies to the religious arguments raised against the measure: that except for the Quakers Christ's words, "thou shalt not swear" were not taken literally, the Bible authorised slavery, and, in fact, many marriages were performed by registrars. The bill should be passed for the sake of the suffering children.

Gould was the first man to suggest waiting for federation before introducing such a bill. He also managed to find a new argument against one clause: he disliked the judge being given power to suppress the publication of evidence in divorce suits, as it might enable the rich to use their influence to avert a scandal. Otherwise the debate produced little that was new. W.J. Foster, the Attorney-

1. N.S.W.P.D., 25, pp. 269-297, 18 March 1887, (Second Reading).
Genetal, opposed the bill on religious grounds, but admitted that he was prepared to extend the grounds of divorce to give relief to a wife when her life was endangered, or if a wife was cruel to her husband. O'Sullivan was the self-appointed leader of opposition to the measure in the Lower House, and preferred to base his opposition on the ground that the measure was "undemocratic" since it would infallibly do harm to the position of women who had no say in the matter. Hence he moved that "the bill should be read for the second time this day three months, in order to allow a poll of females over the age of 18 years to be taken on this highly important question."¹ Thomas Walker, a new young member and an ardent Protectionist, made an able and moving speech in defence of the bill. He spoke of personal experience in the homes of the poor, whose misfortunes had to be seen to be imaginable. He thought that provision should be made to cheapen the process of the law. But his assistance was of doubtful value for not only was he an atheist, and notorious as a spiritualist and a leader of the Freethinkers, but also he went farther than any other member of the House in his advocacy of divorce extension, for, in the interests of happiness, he submitted that mutual consent should be a sufficient cause for a divorce to be granted,² a principle which has not been admitted in British law to this day.

Attempts were made to count out the House, and Melville agitated for the adjournment of the debate, but Parkes was determined

¹. N.S.W.P.D., 25, p. 289, 18 March 1887. (O'Sullivan)
². Ibid., p. 288. (Walker)
to speak in favour of the bill, and did so. His main point was that by confessing that the grounds of divorce might be extended to include attempted murder, the Attorney-General was admitting the principle of divorce extension. Melville carried his agitation for adjournment to a division, which was lost by 33 votes to 13. Alfred Allen spoke before Neild finally consented to adjourn the debate, on the firm understanding that there would be no more moves to adjourn the debate, or any obstruction in the Committee stage.

The debate was resumed on the following Friday, 25 March.¹ The bill was then attacked by Melville, Garrard and O'Connor, at length. It was supported by Fletcher, Stevenson, and J.S. Farnell, who pointed out that there had been divorces before there had been any divorce law at all. Wentworth had introduced a bill to divorce Miss Blake from the butcher's boy, and he, himself, had introduced a bill to divorce John and Elizabeth Short. Farnell was another who urged the inclusion of incurable insanity. Before the vote was taken on the second reading the opposition walked out, but on this occasion there was no danger of not having a quorum, as the vote was one of the most convincing. The second reading was carried by 43 votes to 5.²

The bill went straight into committee the same night.³ It was introduced in similar form to that in which it had been received

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2. Foster, O'Connor, Toohey, Brunker and Gould voted against the bill.
3. *N.S.W.P.D.*, 25, pp. 431-437, 25 March 1887. (Committee)
from the Upper House during the previous session, and requiring "residence" instead of "domicile". This was not questioned, which in the event was perhaps unwise. The opponents of the bill kept their promise not to obstruct, and only minor amendments were made in the wording of various sub-clauses, largely by the Attorney-General. The bill was reported with amendments the same night. Neild moved the third reading on the 29 March.¹ There was a short debate in which Mr. Seaver was to make for the first time his frequently reiterated remark that "the bill is a measure which will simply legalise adultery; for the marriage of a woman with another man while her first husband is still living will be adultery, whether the law allows it or not."² The third reading was carried by 31 votes to 10. John Cash Neild had done a remarkable thing: he had successfully piloted a Private Member's Bill through all the stages of the parliamentary process in the Assembly in a fortnight, which was almost a record in itself, quite apart from the controversial nature of the bill. The Divorce Bill was never again to have such an easy passage. Six out of the twenty, including Parkes and J.P. Abbott, who had voted against Buchanan's Bill for desertion in 1884, now voted in favour of a far more radical measure. Five more voted for the Divorce Bill in 1888. Ninian Melville had been in favour of Buchanan's Bill.

The Legislative Council was not prepared to let it pass without a struggle. Nevertheless everything started smoothly enough.

¹ N.S.W. P.D., 25, pp. 471-477, 29 March 1887. (Third Reading)
² Ibid., p. 473. (Seaver)
The Divorce Extension Bill was read for the first time on 30 March, and Sir Alfred Stephen moved the second reading a week later. But first he found it necessary to explain the presentation of a petition from the Secular Association, with whose members he claimed to be unacquainted, "but who, I understand, are a very intelligent body of persons, entertaining peculiar opinions". G.B. Simpson, a lawyer, had been absent when the bill had previously been before the Council, and now felt obliged to make known his strong objections. It was against the Christian religion, would be for the benefit of "profligate and designing men, and of bad and designing women". He thought the worst feature of the bill was that it allowed the husband to remarry as many times as he liked. Besides, the bill provided one law for the rich and another for the poor: if a rich man was an habitual drunkard, but did not leave his wife without the means of support, she could not get relief.

Piggott was a new and youthful member of the House, and was to prove extremely provoking to Stephen over the divorce question. He was prosy; he did not disapprove of divorce extension in principle, nor did he think it against the Christian religion, but unless his special amendment was in the bill he would not vote for the third reading. After he had had his say, Stephen was forced to adjourn the debate for three weeks.

1. N.S.W.P.D., 25, pp. 630-637. 6 April 1887. (Second Reading)
2. Ibid., p.630. (Stephen)
3. Ibid., p.632. (Simpson)
Up to this point events had moved too fast for any public outcry to have been made. However now that the bill was before the Council, letters began to flow in to the Editor of the Sydney Morning Herald, and the Church of England was roused into making strong protests. This year they lacked their leader, for Bishop Barry had sailed to England for a holiday early in March.

In March some of the Chief Justices were in Sydney. Stephen certainly met them and probably discussed the divorce question. Later that year Chief Justice Darley wrote to Stephen on the subject, and permitted him to publish the letter in the Herald. He congratulated Stephen on the Bill's large majorities in the Assembly, and thought the measure beneficial.

I have read with great interest your last pamphlet, and I may as one who has well considered and taken a deep interest in the measure, be permitted to say that your arguments are not to be answered. Granting everything to the churchmen, there is apparent to any reasoning mind a vast distinction between a man of his own mere motion putting away his wife - against which our Saviour spoke - and a wise and beneficial law being passed by the State to relieve the innocent of the most intolerable wrongs. ... I cannot conceive how it is that the ecclesiastics, while placing a forced, and, as I believe, a wholly erroneous construction upon Christ's words relating to divorce, overlook the fact that a portion of His mission on earth was to 'heal the broken-hearted,... (sic) and set at liberty them that

1. Sir Alfred Stephen: Journal, pt. 23. MSS 777/2... (M.L.)
"13 Mar. "C.J. Way - C.J. Onslow - C. Justice Darley - Sir W. Mann's - M.H.S. Justice Faucett /and/ M.H.S. /his son, Matthew Henry Stephen, recently appointed to the Bench of the Supreme Court/ - also Sir J. Hay - /in my/ L.C. Room at a friendly gathering - 2 hours chat."
are bruised', which is the very aim and object of that which I rejoice to think shortly will become law. This law will also tend to diminish the number of judicial separations - divorce *a mensa et thoro* - which is in my opinion, the worst species of divorce, as possessing the most immoral tendency, and, therefore, being most pernicious to the general welfare. 1

Darley was strongly criticised by members of both Houses for participating in a political controversy, which was unbecoming in a Chief Justice. He spoke both as a lawyer and as a Christian, and occupied a position in which his words carried weight. Stephen also received letters supporting divorce extension from the Chief Justices of Victoria, South Australia and Queensland, and from the Governor of Queensland, Sir Anthony Musgrave. 2 It might be expected that Chief Justice Higinbotham of Victoria would be in favour of the measure, for he was well known to have radical ideas, but Sir Charles Lilley of Queensland, and Chief Justice Way of South Australia were equally definite in their support. They all shared the opinion that the provisions of the bill would not be injurious to morality, or to the sanctity of the marriage state, and would in effect prevent "the illegal and immoral alliances, which are the inevitable consequences of the present state of the marriage laws." 3 Stephen quoted from these letters in Parliament, and subsequently included them in an appendix to a pamphlet that he published in the following year.

2. *West Australia* had not yet been granted responsible Government, so it is reasonable to suppose that the Chief Justice of Tasmania was not in favour of divorce extension, as no letter from him was mentioned.
The case for divorce extension in New South Wales was strengthened by the introduction of Divorce Extension Bills in the Legislatures of Victoria, Queensland, South Australia and New Zealand, modelled on the New South Wales Bill, in 1887. Stephen's collection of Press cuttings on the divorce question contained many clippings from the Age and the Argus. Stephen wrote to Sir Archibald Michie asking him to pay for some copies of the article from the Argus, and whether if, in Victoria, a wife could "obtain a divorce (as in Scotld) for the Adultery - pure & simple - of her husband".\textsuperscript{1}

Later the same year he considered it necessary to write to the Editor of the Argus to defend himself from the charge of inconsistency made by the Victorian Attorney-General, Mr. Wrixon, during the debate on the Divorce Bill.\textsuperscript{2} The effect of the introduction of the Victorian Bill on public opinion in New South Wales is impossible to estimate, but it did have two important results: New South Wales would no longer be a pariah among the colonies, a place where all the riff-raff who wanted a divorce could settle. Furthermore it stilled some of the doubts in the minds of lawyers about the inadvisability of having different divorce laws in the various colonies. Uniform legislation was still almost impossible to achieve, as even if four identical bills were introduced, it was impractical and almost impossible to prevent them being altered, at least in details, in committee.

\textsuperscript{1} Stephen to Sir Archibald Michie, 10 August 1887. (State Library of Victoria)
The Sydney Morning Herald published twenty-four letters on the divorce issue before it claimed on 19 April that it was quite impossible to print all the letters that they had received and henceforth correspondence on this topic was closed. Only eleven of these were in favour of the measure, but against this, nine of the hostile letters came from clergymen. David Buchanan was again quick to defend the bill, and wrote three letters in the space of ten days. "A Wife, A Mother, and A Sufferer" considered that Sir Alfred Stephen would "be remembered with unspeakable gratitude." "A.F." thought that the evidence of the previous year's wife poisonings and suicides by unhappy couples cried aloud for different divorce laws. The most interesting letter came from E. Pariss Nesbit, who not only quoted from the English clergyman, H.R. Haweis, who in addition to favouring divorce for hopeless insanity or drunkenness, wrote: "I am not anxious to see divorce made over-easy, but it should not be dependent on crime, and made next to impossible for the poor!; but also from Matthew Arnold's trenchant criticism of the law as it stood.

1. S.M.H., 19 April 1887, p.4.
2. Ibid., 5 April 1887, p.6; 12 April 1887, p.8; 15 April 1887, p.4; (David Buchanan)
3. Ibid., 9 April 1887, p. 6. ("A Wife, a Mother, and a Sufferer")
4. Ibid., 19 April 1887, p. 4. ("A.F.")
5. The Rev. H.R. Haweis was the incumbent of St. James's Church, Marylebone. He discussed the divorce question in his book, Picture of Jesus, p. 185. He was very much quoted both inside Parliament and by correspondents to the Herald. He was included in Stephen's Appendix, op.cit., n. 19, Ch. IV.
6. S.M.H., 19 April 1887, p. 4. (E. Pariss Nesbit)
Mr. Nesbit was in favour of rational amendment on grounds of intuitive morality and utilitarianism. Only literature might be the poorer: "while it may lessen the occasions for such pathetic romances as Goethe's 'Elective Affinities' and Maitland's 'Higher Law', and such touching poems as those addressed by Mathew Arnold 'To Margaret', it will much increase substantial happiness in our midst."

Mr. John W. Hurst put forward a new argument against the bill, for he considered that judicial separation was a better deterrent to a bad husband than a divorce which would leave him free to marry another. "Presbyter Anglicanus" took issue with Dr. Corlette over the old question of the meaning of porneia, stating that there was no evidence whatsoever that it meant adultery.

The religious controversy in 1887 was largely started by Stephen himself, when he published a long letter in the Herald addressed to "The Right Reverend the Bishop and Clergy of the Anglican Church Synod". He made some caustic remarks about that Church's evasion of an untenable position by relying on separation which was both unholy and immoral. The main purpose of his letter was to draw to their attention the Reformatio Legum Ecclesiasticarum. Stephen took great pains with the accuracy of this pamphlet and discussed it with the Presbyterian minister, Robert Steele. Steele told Stephen of a new edition of the work published in 1850, and that Dr. Burrow in his book, The Summary of the Christian Faith and Practice.

1. S.H.H., 19 April 1887, p. 4, (E. Pariss Nesbit)
2. Ibid., (John W. Hurst)
3. Ibid., (Presbyter Anglicanus"
4. Ibid., 31 March 1887, p. 4, (Stephen)
had literally translated large tracts from the *Reformatio*. He pointed out that this work should be available in the Diocesan Library. "I quite agree with you on the immoral tendency of Separation *a mensa et thoro*. It is unscriptural, and inconsistent with reason. Whatever justifies that, and the alleged pleas are adultery, apostasy, crimes and vows, justify legal divorce and the dissolution of the tie."¹ In a second letter he discussed the similarity of the Scottish law to the opinions generally held by the Divines at the time of the Reformation. In private Steele was to go further than the orthodox Presbyterian beliefs. In spite of their agreement, Steele would not allow Stephen's argument about the original Hebrew text of St. Matthew, which, he claimed, was disputable. "Greek can be proved to have been generally understood & used, and a strong case can be made out that St. Matthew wrote in Greek."²

In his letter Stephen gave the history of the *Reformatio* and claimed that it had never been repudiated. He doubted not its validity. The distinguished men who drew it up were willing to extend the grounds of divorce beyond the provisions concerning desertion which were acceptable later to the Scottish divines.³

1. The Rev. Robert Steele to Sir Alfred Stephen, 18 March 1887, Stephen, Uncat. MSS 211/2 ... (M.L.)
2. Ibid., Only the second half of this letter survives. It is in Steele's writing, and is undated, but from internal evidence must have been written about the same time as the one above.
3. In addition to adultery and desertion, the framers of the *Reformatio* advocated divorce for open or secret hatreds, designed to take the other's life, (which was worse than adultery or desertion) and, after the failure of all attempts at reconciliation, cruelty to a wife by harsh conduct or language, when the husband was a tormentor.

*S.M.H.*, 31 March 1887, p.4.
moment of exasperation Stephen felt that it would be well if "our criminal law provided punishment, as projected in the one cited, /the Reformatio/ for the offence of desertion. We should then at least hear no more about collusion".\(^1\) He hoped that at least public knowledge of the contents of the code would moderate the attacks of the clergy and the religiously minded laity.

For myself, while I reject, I protest against your dogmatizing. If you refuse to accept the decisions of men so eminent to whose labours we owe substantially the very *Articles of Faith* of our Church, established in 1561, refrain at least from imputing to us on this question the charge of heresy, until you have met and refuted the arguments by which our views are sustained.\(^2\)

In the absence of the Primate, Archdeacon King replied to Stephen's open letter. He greatly regretted that the Primate was on his way to England as he would have found it easy enough to have answered Stephen about the *Reformatio Legum*. King thought that it was probably because of its lax attitude to divorce that the *Reformatio Legum* had never become law. Notwithstanding Cranmer and his learned companions, we were bound to yield to the higher authority of Christ himself. The Legislature could ensure that a divorced person who remarried was not sued for bigamy and the children would be legitimate, but he or she would still be adulterous in the eyes of God.\(^3\) Archdeacon King wrote a second letter to answer the Chief Justice. "But our contention is that, whatever be the effect of the Bill in some cases, it will, on the whole, bruise a far greater num-

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1. S.M.H., 31 March 1887, p.4. (Stephen)  
2. Ibid.  
3. Ibid., 1 April 1887, p.8. (Archdeacon King)
ber than it will set at liberty, and break more hearts than it will heal." In any case a question involving the morality of the community was not to be decided by appealing to the majorities.\(^1\)

That year the religious controversy raged around the Reformatio Legum and Stephen's letter. The Rev. George Spencer dismissed it as "the private opinions of some of its compilers", for whom the Church was in no way responsible. Acceptance of the Reformatio Legum would entail her acceptance of the imposition of the death penalty on anyone who denied the Christian religion or believed in witchcraft. Moreover Spencer took it upon himself to challenge the authority of Parliament. "Lawyers and legislators may assume that Parliaments have the power to authorise the dissolution of marriage for causes other than adultery: but to act upon this assumption is an invasion of the prerogative of God."\(^2\) The Rev. Dr. J.C. Corlette could not let Stephen's letter on the Reformatio Legum go unanswered. He considered that its compilers must have misunderstood the passage in St. Paul.\(^3\) A few days later he produced more figures about the American divorce rate.\(^4\) Canon Selwyn's complaints were of a more practical nature. The bill was being rushed through Parliament, and not all its laws could whitewash an adulterer or an adulteress. "Nothing to my mind, has been much more shocking than the deliberate statements of almost every member of Parliament that he approached this subject there, not from a religious standpoint,\(^5\)

1. S.M.H., \(T\) April 1887, p. 7. (Archdeacon King)
2. Ibid., 12 April 1887, p. 8. (The Rev. George Spencer)
3. Ibid., 12 (The Rev. Dr. J.C. Corlette)
4. Ibid., 15 April 1887, p. 4. (The Rev. Dr. J.C. Corlette)
but from one purely secular or social. 1

These letters did not end the controversy about the

Reformatio Legum. A long article entitled "A New Interest in an

Old Book", and signed "Historicus" appeared in the Herald the following

week. He outlined its history in great detail before dealing with the

efforts of the clergy to gloss over this very inconvenient document.

It has recently been stated, and with a consciousness of

triumph, that as this work did not become law, it merely

contains the opinions of its authors. It was for this very

purpose that it was cited. The opinions that it expresses

are not those of private parties, but the combined judg­

ments of some of the eminent divines and laymen of the Church

of England in the reigns of Henry VIII, Edward VI, and

Elizabeth. They were the chief authors of the Protestant

Reformation in England. ... The men who prepared the

Reformatio Legum belonged to the Puritan party, who were

distinguished for their rigid adherence to scripture in

doctrine and practice. 2

The Herald published another long article called "Scripture

and Divorce", signed by "Nova Cambria", which was the pseudonym of

Dr. Andrew Garran. 3 He wrote in a clear, simple style that was easy

to understand, even for those who had no interest in theology. The

article was a convincing commentary on the disputed Biblical texts

by a man who was himself a considerable scholar.

Nothing except the superstition of the letter, against

which Scripture expressly warns us, could lead to the

1. S.M.H., 12 April 1887, p. 8. (Canon Arthur Selwyn)
2. Ibid., 18 April 1887, p. 4. ("Historicus")
   Andrew Garran was one of the strongest supporters of divorce ex­
   tension, and finally piloted the bill through the Council in 1892,
   after Stephen's retirement. He was the son of a Congregationalist
   minister and had been editor of the Sydney Morning Herald till
   1887. He was appointed to the Legislative Council by Parkes in
   1887. During his journalistic career he became a Doctor of Laws.
interpretation that all marriages - due as they so often are to the folly of the young and to the contrivance of the old, - are in a mysterious way the direct handiwork of God, and are tabooed to all considerations of justice to the wife and kindness to the children. To use the language of Milton, "Shall we say that God has joined together error, fraud, unfitness, wrath, contention, perpetual loneliness, perpetual discord; whatever lust or wine or witchery, threat or enticement, avarice or ambition hath joined together, faithful and unfaithful, Christian with anti-Christian, hate with hate, or hate with love; shall we say that this is God's joining?"

Even the disciples had demurred at Christ's words forbidding divorce, save for the cause of adultery, and were told: "All men cannot receive this saying save those to whom it was given." Garran argued that this was evidence that the words on divorce were not intended to be taken literally, for no one could announce a national law making such qualifications. The Lord was pointing to an ideal state of marriage.

Meanwhile the Press had been comparatively quiet in its editorial policy. The Daily Telegraph had no editorials on the divorce question in 1887, and the Sydney Morning Herald, despite the letters and articles it had been printing, only had two leaders. In March they had questioned the wisdom of alterations in the wording of the Bill being made in Committee as this frequently only made difficulties for the lawyers interpreting the law, and at the same time doubted the advisability of the clause which permitted banning the publication of the evidence in divorce suits by the judges.

1. S.M.H., 30 April 1887, p. 9. ("Nova Cambria")
2. St. Mathew, 19, II.
could the Herald ignore the Rev. George Spencer's attack on Parliament, which the Editor saw as a direct attempt at ecclesiastical interference with the State.

Under our Constitution, the Church has no political or even semi-political status whatever, and consequently it has no more authority to interfere with the business before Parliament - whatever the issues involved may be - than any other section of the community.

Although this leader was largely directed against the Rev. George Spencer he was not in the least chastened, and again attacked the Reformatio Legum, and was himself bitterly castigated in the Herald column, "As You Like It."

In the absence of the Primate, Robert Lethbridge King, on the advice of the Standing Committee of Synod, and Mesac Thomas, Bishop of Goulburn, petitioned the Legislative Council not to pass the bill. Nineteen Ministers in the City of Newcastle and surrounding Districts drew up their own petition protesting against the bill and the suggestions that had been made that the ministers of religion could not agree over divorce. The new Moderator of the Presbyterian Church

2. Ibid., 2 May 1887, p.4. (Rev. George Spencer)
3. Ibid., 4 May 1887, p.7.
5. Ibid., p.537.

"That whereas the supporters of the Divorce Extension Bill now before your House affirm continually that the Ministers of the Christian religion are hopelessly divided in opinion on the subject of divorce, and that they cannot agree as to the interpretation of the Holy Scriptures with reference to the subject, and therefore that no regard need be had to what is said by them, and the whole question must be settled on the grounds of what is expedient in social matters: Now we, the Ministers of all the leading denominations of Christian people residing in the city and districts, do most heartily agree in opposing the Bill, because we are entirely agreed in believing that it will be, if passed by your House, absolutely opposed to the teaching and commands of the Lord Jesus Christ and His Apostles."
petitioned Parliament to extend the grounds of divorce to cover wilful desertion.¹

Throughout May the Divorce Extension Bill met with obstruction in the Legislative Council. When the debate for the second reading² was resumed on 28 April, Knox moved to delay it for three months, and made an almost identical speech to the one he had made the previous year. The bill would introduce the wholesale pollution of society. Despite misgivings about the fate of the children, Vickery thought the bill would provide relief from thraldom. Andrew Garran, with his flowing white beard, spoke in support of the bill for the first time, directing his attack against the religious arguments used against the measure. Those who claimed that the bill was hostile to Christianity, used the word Christianity to mean the varying opinions held by certain theological authorities. Piddington castigated all the supporters of divorce extension: Vickery for his gross paraphrase of scripture, Stephen for changing his mind, chameleon-like, but his greatest displeasure was reserved for Chief Justice Darley.

I do not understand how it is that the Chief Justice of this colony can descend from the judicial bench, and mix himself up in a controversy of this kind, coming before Parliament, as a matter of current politics. I have always understood that as soon as a gentleman is raised to the judicial bench his connection with all political strife ceases.

2. N.S.W.P.D., 25, pp. 1079-1092, 28 April 1887. (second reading, cont.)
3. Ibid., p. 1087. (Piddington)
Moreover it was absurd for the Chief Justice to say that judicial separations were immoral when they left the door open to reconciliations. Stephen admitted changing his mind and claimed he had done so because previously he had not been sufficiently well acquainted with the law relating to the recognition of divorces. Moreover he had felt that a wife's right to a divorce on the ground of simple adultery opened the door for collusion. Gladstone, who was a greater man than himself, had changed his mind on divorce, supporting it in Cabinet then opposing it in Parliament. The Bill was carried on its second reading by 16 votes to 10.

It went into Committee the same night, but despite Sir Alfred's appeal for no amendments since he felt that it would be preferable if the Bill did not have to be returned to the other Chamber where such violent opposition had been shown it, and where it had been counted out in an effort to defeat it, little progress was made. The prominent lawyers in the House, notably Sir Julian Salomons, Sir John Hay, the President, and Dr. Garran were concerned about the different interpretations that could be applied to the words "Habitual drunkenness" in sub-clause II. The discussion on this was continued when the Committee resumed on 4 May. The Attorney-General, Simpson; Piggott, Lucas, Salomons, and S.A. Stephen had a long discussion on whether a wife should be able to get a divorce for a single act of cruelty, and whether it should be linked

1. N.S.W.P.D., 25, pp. 1092-1098, 28 April 1887. (Committee)
2. Ibid., 26, pp. 1295-1308, 4 May 1887. (Committee)
to habitual drunkenness or be put in sub-clause IV, which concerned assault. Mr. Want thought it desirable to prevent the respondent from re-marrying for two years. After considerable pressure the Committee was forced again to report progress. When it was resumed the next day, Simpson supported Want, and carried an amendment to this effect. However Piggott and W.H. Suttor were frustrated in their desire to prevent a judge granting a divorce decree if the petitioner knew that at the time of the marriage the respondent was a drunkard, or had already been divorced for any cause.

Stephen moved the third reading of the Divorce Extension Bill on 19 May. At no time during the seven years that it was before Parliament did it come closer to a defeat on a division. Knox again moved that the third reading be delayed for six months. He took the opportunity of pointing to the division among the Bill's supporters on some of its provisions. He produced more statistics on divorce in America, to prove that the greater the facilities for divorce the greater the demand for further facilities, and to show that an increase in the divorce rate was accompanied by an increase in the

1. H.S.W.P.D., 26, pp. 1311-1313, 5 May 1887. (Committee)
2. Ibid., p. 1311.
"Provided always that in any suit under the provisions of this act in which the court shall have pronounced a decree dissolving a marriage it shall not be lawful for the respondent therein to contract another marriage before the expiration of two years from the time when such decree has been made absolute, and if any respondent in such suit shall contract a marriage within the said time such respondent shall be guilty of bigamy and the said last marriage shall be void."

3. Ibid., pp. 1605-1622, 19 May 1887. (Third reading)
crimes against chastity and infant life. De Salis then attacked the Bill and demanded the repeal of the present divorce laws which were antagonistic to the doctrines of Christ. Dodds and J. Smith also opposed the Bill. The most serious trouble came from two supporters, who had voted for the second reading, but now announced their intention of voting against the third because their amendments had not been carried. Piggott tried to justify himself. He particularly objected to the second half of sub-clause II which gave the husband the right to divorce his wife for habitual drunkenness joined with neglect of her domestic duties, which was not equivalent to leaving a wife and children to starve. The wording was too uncertain to be any guide to juries as to what constituted neglect of domestic duties.¹

W. H. Suttor also felt impelled to explain why he too intended to vote against the third reading. He disapproved of unlimited divorce, and under this Bill there was no limit to the number of times a person could be divorced and remarry. Piddington also protested against the Bill. Except for Stephen's introduction and reply there were no speeches in defence of the measure.

As on a previous occasion, Sir Alfred was extremely displeased by the time he came to reply. He cared very little for charges of inconsistency; he then, and still, believed that no divorce should be allowed unless the marriage was practically put an end to by one of the parties. In line with this he was horrified at the idea of

¹ N.S.W.P.D., 26, p. 1613, 19 May 1887. (Piggott)
divorce for incompatibility of temper, or insanity, which was a "visitation of God".\(^1\) He strongly resented the defection of W.H. Suttor and Pigott, who both admitted the principle of divorce extension, and now placed it in jeopardy.

I thank heaven that I am here in the cause of mercy, and I believe, of truth, of morals, and for the benefit of society at large. If the bill be not carried, I shall lament and mourn over it, but do not you think that while God spares my life, I shall drop this subject. \(\ldots\) I hope that the bill will be passed; and if it be rejected, you may depend upon it that it will be introduced again, and introduced with enormous public support.\(^2\)

The House then divided on the question "That the word [now\(\) proposed to be omitted stand part of the question?" The division went Ayes 13, Noes 15; Pigott and Suttor voted with the noes. The bill was in grave danger of Knox's motion to postpone the third reading for six months being carried, which would have meant the loss of the bill for the session. It was saved by its supporters resorting to the tactics of its opponents in the Assembly. When the second question, "That the words this day six months proposed to be added, be added\(^3\)" was divided on, the vote was Ayes 15, Noes 5 - which was insufficient to make up a quorum. The bill was counted out.

It was 9 June before Stephen could get the bill restored to the order paper. On 16 June he once more moved that the bill be read for the third time, and Knox again moved his delaying amendment, which was this time defeated by one vote. The division on the third

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1. *N.S.W.P.D.*, 26, p. 1617, 19 May 1887. (Stephen)
reading was the same, 19 votes to 18.\(^1\) Knox later tabled an official protest\(^2\) against the bill.

The Divorce Extension Bill was not yet safe. It had to be returned to the Legislative Assembly for approval of the Council's amendments, and the Assembly did not get around to discussing them till 12 July. Neild took a firm line, but it was not until after five divisions, over each amendment, that the bill was accepted by 37 votes to 3.\(^3\) The very next day the Governor reserved the Act for the Royal Assent and prorogued Parliament. The supporters of

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> "On Thsday last 16th [my] Divorce Bill passed by one only; Mr. Suttor voting agt it because of an amdt [we] carried. \(^2\) [And his] own amdt lost - & two supporters (Barton \(\text{and}\) Eales) being absent \(^3\) [from the] division, \(\text{and}\) two more (Dangar Mackellar) absent \(^3\) [from the] Colony."

2. N.S.W.P.D., 27, p. 2117, 16 June 1887.

> "1. Because it affords dangerous facilities for the dissolution of the marriage tie, and is likely to impair the sense of the sacredness of marriage, and to inflict serious injury on the domestic and social welfare of the community. 2. Because the proposed alteration in the law of divorce is at variance with the law of England and of every other colony. 3. Because, unfortunately, in essentials on so vital a subject as divorce, it is of the deepest importance not only on social but on national grounds. 4. Because the proposed alterations being opposed to the sentiments of an overwhelming majority of the British people ought not to be sanctioned unless by a universal law applicable alike to the United Kingdom and to every other portion of her Majesty's dominions."

3. Ibid., 27, pp. 2892-3, 12 July 1887.

Walker felt impelled to explain that he once voted with the gaggers in error.
divorce extension had now nothing to do but wait for a reply from London, and to tease themselves with Mr. Piddington’s angry question: "Is it likely that her Majesty will be advised to desecrate her jubilee year by assenting to such an atrocious bill?"¹ Attention could only be directed to Westminster and Victoria.

The Church of England, however, had not had her last word for the year. The Anglican Synod of Sydney met in August, and once more condemned the Divorce Bill. They also took the opportunity to express their deep obligation to the Hon. Edward Knox for able and steadfast resistance to the bill in the Legislative Council, thereby reducing the majority by which it was carried by one. The Primate, (now returned) spoke out.

The Synod will, I cannot doubt, approve the course, which, in common with some of my brother Bishops of this Province, I have taken, in petitioning the Queen to withhold her assent, until at least the public opinion of this colony has been far more decisively propounded, on a change so momentous in itself and in its consequences, that it ought to be accepted by a virtual consensus, or overwhelming majority, of the whole members of our Legislature. What may be the issue of this last protest, we cannot tell. But at least, before God and man, we shall have "delivered our souls".

¹ N.S.W.P.D., 25, p. 1089, 28 April 1887. (Piddington)
² Church of England Synod of the Diocese of Sydney (Seventh) 2nd. Session, V. &. P., 30 August 1887, pp. 22-23.
THE HONOURABLE EDWARD KNOX, M.L.C.
"The greatest and deepest of all human controversies is the marriage controversy. It appears to be surging up on all sides around us; ..."

W. E. Gladstone 1889.

The years between sending the New South Wales Divorce Extension Bill to London in July 1887 and the Royal Assent being granted to the Victorian Divorce Bill in March 1890, were years of frustration at home, and years of increasing interest in the divorce question overseas. A divorce bill was four times before the New South Wales Parliament, and four times failed to pass all stages in both Houses. There was very little public controversy in New South Wales during these two years; even the Church of England was comparatively silent. Outside New South Wales, Victoria managed to pass her divorce bill; an article by an Englishwoman, Mrs. Caird, on marriage, sparked off a controversy in the English journals on marriage and divorce, which was not without repercussions in Sydney; in America, the National Divorce Reform League, under the leadership of its energetic secretary, the Rev. Dr. Samuel Dike, succeeded in 1887 in getting a grant of $10,000 for a Congressional enquiry by the Bureau of Statistics into the operation of American divorce laws.

The leading protagonists in the divorce issue in New South

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2. The enquiry was conducted by the Hon. Carroll D. Wright.
Wales now directed their attention to endeavouring to influence
the Colonial Office towards their own views. Bishop Barry was in
London, where he was believed by the Colonial Press to be exercising
"backstairs influence".1 He petitioned the Queen directly to refuse
her assent to the bill, as did Canon Selwyn, Commissary of the Bishop
of Newcastle. Bishop Campbell of Bathurst and Archdeacon King sent
petitions to Lord Carrington against the bill which he forwarded to
the Colonial Office. These four petitions were in time forwarded to
the Law Officers of the Crown, together with a letter from Bishop
Barry.2

Bishop Barry wrote one important letter to the Secretary of
State for the Colonies, Sir Henry Holland,3 to bring to the notice
of Her Majesty's Government certain facts concerning the bill.4 In
the first place he considered that there was strong opposition to the
proposed changes in the divorce law among large classes of the people
on the ground that it was at variance with the law of the New Testa-
ment and the teaching of the Christian Church. The bill had been con-
demned by the Anglican Synod, the Wesleyan Conference, and it was
well known that the Roman Catholic Church was strongly opposed to any
extension of the grounds of divorce. Secondly, the majority which
carried the bill in the Legislative Assembly constituted only a third
of its members, and under half voted on the measure. "But for the

2. C.O., 201/606-607.
3. Sir Henry Holland became Lord Knutsford before his despatch was
received in Sydney.
4. C.O., 201/607, pp. 615-621; The Bishop of Sydney to the Secretary
of State for the Colonies, 6 June 1887.
deserved respect in which the proposer of the Bill (Sir Alfred Stephen) is held by all classes in the Colony, it is certain that it would not have obtained even this measure of support." Thirdly, the Bishop mentioned the difference between the bill and the law in the other Australian Colonies. He thought that, at least, there ought to be some consensus of opinion between them. Fourthly, the bill provided for cases of hardship, and there was nothing exceptional in the social condition of the Colony to make this relief desirable.

I do not of course trouble you with any opinion of my own on the merits of the question. I merely submit to you certain facts of which Her Majesty's Government may be unaware, which may possibly in their opinion justify a withholding of the Royal Assent until the opinion of the Colony of New South Wales has been more decisively and unanimously pronounced, & until the question has received the consideration of the other Colonial Legislatures in Australia."

The supporters of the Divorce Bill also did their best to influence the Colonial Office. Sir Alfred wrote to Lord Carrington asking him to forward to the Colonial Secretary his latest pamphlet on the question: "The New South Wales Divorce Extension Bill; with Reply to Protest Against the Measure". He was not able to resist presenting certain facts: in the first place, the bill was supported in principle by Scotch Presbytery and in entirety, by a petition of 4,800 Colonists, largely from the Professional and other educated classes. Secondly, that the bill had virtually been passed twice

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1. C.O., 201/607, p. 618.
2. Ibid., pp. 620-621.
3. Ibid., 201/606, pp. 257-258; Sir Alfred Stephen to Lord Carrington, undated copy, received at the Colonial Office, 30 August 1887.
by the Legislature, only losing in the Assembly because of a count
out. Thirdly, the measure was now before the Victorian Parliament,
and likely to be introduced in at least one other Colonial Legisla-
ture.

Mr. Justice Windeyer was in London during 1887. In November
he wrote to Mr. Bramston, in the Colonial Office, after speaking to
him on the question of the New South Wales Divorce Bill, enclosing a
letter from Sir James Hannen, who was the Judge of the English Divorce
Court, and also another pamphlet from Sir Alfred Stephen.¹ Windeyer
claimed that Stephen's paper confirmed his opinion that there was no
doubt about the legitimacy in England of the offspring of persons
divorced under the Act. He trusted that on his return to the Colony,
he would have been placed in a position to administer a law, "which
I believe to be not only calculated to give relief to a large num­
ber of unfortunate persons but to promote the best interests of
morality".² Sir James Hannen had read a paper by Stephen

with great interest, and I may say generally that I
approve of the Bill, and hope that it will become law in
New South Wales. I am not prepared at present to advocate
a similar change in the English law, because I think in
such matters a strong public opinion should precede legis­
lation; and that, I do not think yet exists in this country.
But I go thus far – that the sentence of judicial separation
is open to serious objection; & that it would be better that
whatever would justify a court in authorising married persons
to live separate should lead to a dissolution of marriage, if
required. I have no apprehension that this extension of the
law of divorce would cause greater immorality: that depends

¹. C.O., 201/607, pp. 630-1; William Windeyer to Mr. Bramston,
14 November 1887.
². Ibid.
on the habits, & general character of the nation. There
is no greater immorality in Scotland among married people
than in England, though the grounds of dissolution of
marriage have always been so much more extensive in the
first named country. 1

In December Alexander Gordon wrote to the Colonial Office
requesting that assent to the bill should be delayed until an oppor-
tunity could be afforded in the Colony for the expression of a more
decided opinion on the proposed changes in the law of divorce. His
reasons for this request were the opposition from the two largest
religious denominations, the Churches of England and Rome, and "the
comparatively small amount of interest taken in the matter either by
the Colonial public or by the members of the Legislature in dealing
with the question". 2 Such a course of withholding assent would be
in line with the policy followed by the Crown in regard to the De-
ceased Wife's Sister Bill and other Divorce legislation.

The Colonial Office sent on most of these letters and other
relevant documents to the Law Officers of the Crown and asked for a
report. The Attorney-General, Richard Webster, was confident that
a sentence of divorce pronounced by a competent court on two persons
domiciled in New South Wales, notwithstanding that the dissolution was
granted on grounds not recognised in England, would be recognised by
the English Courts. 3 Consequently any children by either party in a

1. C.O., 201/607, pp. 631-2; Sir James Hannen to Mr. Justice
    Windeyer, 9 November 1887.
2. Ibid., pp. 575-7, p. 577; Alexander Gordon, late of Sydney and
    member of the Legislative Assembly, and Chancellor of the Diocese
    of Sydney, to the C.O., 9 December 1887.
subsequent marriage would be legitimate in England. He felt that it was doubtful if anything short of domicile\(^1\) would enable a Court to pronounce a decree recognisable in England, although under exceptional circumstances English Courts had dissolved a marriage between parties who were not domiciled in the country, but were bona fide residents. In answer to the second question asked by the Colonial Office, Webster considered that the bill was within the competence of the Colonial Legislature, "and that so far as legal considerations are involved, and apart from questions of policy, no sufficient reason has been assigned for advising Her Majesty to withhold Her assent."\(^2\) Moreover the Attorney-General deemed that apart from a desire to prevent collusion, it was hard to justify the provision preventing the respondent from remarrying for two years, which was almost contradictory.

The Solicitor-General completely concurred with the answer given by the Attorney-General to the second question, but he did not agree about domicile. "I am of the opinion that as the law now stands it is sufficient that there should be a bona fide matrimonial residence within the jurisdiction of the tribunal pronouncing the decree."\(^3\)

The Colonial Office, dissatisfied with this report, asked further if the Law Office would advise if the bill should be submitted to Her Majesty to sanction. In their second report, the Law

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1. The legal spelling is "domicile", whereas in the debates "domicile" is used.
3. Ibid., p. 606.
Officers stated that they thought it very undesirable to interfere with Colonial legislation, but they considered it to be of the greatest importance that there should be no doubt about the universal recognition of the validity of the decree of dissolution, and two years residence without any further safeguard or provision does not, in our judgment, afford sufficient security in this respect.

They thought that the Queen's assent should be withheld until provision for domicil had been enacted, similar to that existing in the Matrimonial Causes Act of 1881.¹

Although the report of the Law Officers was dated 27 November 1887, the Colonial Office deferred sending their despatch until January 1888, and, unfortunately, when it was finally sent, too much attention was paid to the objections of the Bishop of Sydney and Alexander Gordon. There would have been little cause for complaint if the despatch had stuck to the legal provision concerning domicil, but the added suggestion about ascertaining whether the changes were the resolve of the people of New South Wales met with strong resentment in the Colony. It must be said, however, that the Colonial Office considered that they were acting with the greatest restraint. They had not advised the Queen to veto the bill, but had merely suggested that three conditions should be complied with before assent would be granted.

It was March before the despatch reached Sydney.² Sir

¹ C.O., 201/606, pp. 611-620; p. 618.
² See Appendix II for the Despatch in full.
Henry Holland concluded:

I have only to repeat that Her Majesty's Government would strongly urge upon your Advisors the inexpediency of enlarging the grounds upon which a divorce can be obtained, until it has been fully established that the general feeling of the Colony is decidedly in favour of the change, and until after communication with the other Australian Colonies it is made clear that they are prepared to adopt a similar alteration in their laws. Her Majesty's Government, however, attach still greater importance to the necessity of securing that legal domicil, and not a transitory residence, such as that of two years, laid down in the Bill, should be a condition of the exercise of the jurisdiction of the Court in decreeing a divorce.

The reception of the news that the Divorce Extension Bill had been shelved was mixed. The Herald had two editorials on the subject, both of them mild. They thought that it was not a question which ought to be decided in a hurry, and furthermore, that no good would come of re-introducing the bill during the present session, especially if accompanied by "wild and foolish talk about Imperialism and self-government". Any accident which befell the bill would only strengthen its opponents. This was prophetic. In a sub-leader, entitled "A Backstairs Triumph", the Telegraph professed themselves aware that backstairs intrigue had been resorted to in the past, and undoubtedly had been resorted to on this occasion.

What has happened is an insult to a self-governing community. We are pretty plainly told that the measure is distasteful to the Imperial Government, and that it has been put aside in the hope that at the next general election in the colony the constituencies will declare against the extension of the divorce law. ... And the humiliation is that it is done at the instance of a beaten minority amongst ourselves.

The *Daily Telegraph* followed up its initial attack by an even more savage leader accusing the Imperial Government of aggression, and its politicians of being sycophantic, servile, and out of touch.¹ This was followed by another leader, a week later, on the judgment in the Bethell marriage case in England. If the only qualification to the validity of a marriage being determined by *lex loci* was that it should be a Christian marriage, then, no matter what the Secretary of State claimed, there could be no problems of bigamy, illegitimacy, and inheritance after a colonial marriage permitted under the *Deceased Wife's Sister Act* or the *Divorce Act*.²

The *Bulletin* was even more outraged and wrote a leader that made the *Telegraph's* seem tame. They railed against the treatment received by English wives, who were as slaves, the English Press for observing with regret that Australia seemed to be following in the footsteps of America, and against the ignorance of the modern British Tory. The full fury of their scorn was reserved for the Church which would marry any "moral leper" for a fee. The clergy in New South Wales were accused of trying to override the majority and of sending "mysterious deputations to earwig mouldy officials in Downing St... The cloven hoof of this holy minority is visible in the childish ignorance of *Sir Henry Holland's* despatch".³ The Colony must shake

2. *Ibid.*, 30 March 1888, p. 4. This case was tried before Mr. Justice Stirling, who decided that Captain Bethel's marriage to Tee-poo, the daughter of a Bechuanaland chief, was not valid as it was not a Christian marriage. The case came to court over a question of inheritance.
off "the double incubus of Imperialism and Clericalism".

The general public did not appear to be much concerned with the arbitrary conduct of the Imperial Government. The only letters to the Editor of the Herald came from David Buchanan, who once more sat in the Legislative Assembly as the member for Cumberland. He was chiefly concerned with his efforts to get the Royal assent for his own divorce bill giving women equal rights with men in divorces for adultery.\(^1\) Letters to the Editor of the Herald fell off sharply in 1888 and 1889, although the number in favour of the measure made up a larger proportion of those published. In 1888 there were only 8 letters in favour of the bill and 3 against, one of the latter coming from H. Tenant Donaldson; in 1889 there were only 2 letters for the bill and none against it.

When the news of the despatch reached Sydney, Parkes told Neild of its contents, in confidence. Stephen recorded in his journal: "Sundry conforees respectg Divorce Ext'n Bill wh: the Secrety of State will not submit for H.M.'s assent".\(^2\) This terse entry indicate Stephen's worry. He also found it impossible to prevent Neild from making a rash move. Neild, on 20 March, asked Parkes, without notice, if it was true that he was in possession of the despatch. Parkes said that he was, and gave the gist of it, without, however, tabling it. He emphasised that "the despatch all through speaks in a respectful tone of this legislature".\(^3\)

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1. S.M.H., 22 March 1888, p. 5; 23 March 1888, p. 4. (Buchanan)
Parkes then passed the despatch across to Neild to read, as, he later stressed, a matter of courtesy, but perusal of the paper made Neild blazingly angry. At the end of question time he moved the adjournment of the House to discuss the despatch. Five members rose to support him. He then delivered a tirade. The reasons of the Secretary of State for refusing to give the bill to the Queen for assent were puerile. He was most incensed against the suggestion of consulting the other Colonies, and the condition of not returning the bill until it had been passed by another Parliament. The bill had already been passed for the second time after a general election; with the full knowledge of what the Legislature had been doing, the supporters of the divorce bill had come back stronger than before, when the matter "was discussed at the hustings throughout New South Wales". He made a final fling at the backstairs intrigue of certain ecclesiastical gentlemen.

Parkes had not had time to consider what line he would take over the despatch. Taken off balance, and furious with Neild for putting him in an awkward position, he defended the constitutional right of the Home Government to consider the British Empire, and to use the veto if they deemed it justified. Nor had any member the right to accuse the Imperial Government "of acting in the interests

2. Ibid., p. 3387. Neild exaggerated the importance of divorce as an election issue, and did not mention it in his own address to the electors of Paddington.
of immorality". All they had done was to suggest, quite temperately, certain amendments, and no one doubted that a uniform divorce law was desirable, if possible. He was deeply hurt by Neild's behaviour in referring directly to the despatch which was not yet in the hands of the members. McElhone did nothing to improve anyone's temper by four times repeating that "he was very glad the Queen had used her powers and refused to assent to the bill". Neild ended with an apology and the motion was resolved in the negative.

The next day Neild moved the first reading of the Divorce Extension Bill. It was identical with the one sent to London. Parkes was still cool when Neild moved the second reading in a milder manner, on 15 May, and wanted to wait until the resolutions protesting against the Imperial Government's action had been dealt with. He thought if the Bill was proceeded with the Resolutions would be abortive. He and the Colony as a whole were preoccupied by the Chinese question and the proposed Chinese Restriction Bill. This preoccupation allowed the Divorce Bill to pass through the Assembly with very little difficulty, and no notice whatsoever was taken of it by the Press. Only Gould put up much opposition. Allen and McElhone muttered about the despatch, and Jeanneret announced his implacable hostility, but the second reading was easily carried by 32 votes to 18.

Stephen was aware that, in the light of the despatch from the Secretary of State, strong pressure would almost certainly be brought to bear on Neild to accept an amendment substituting "domicile" for "residence". Accordingly, he tried to organise concerted action among the supporters of the bill. Having discussed the matter with Neild, and Garran, he wrote to J.P. Abbott and sent a copy of the letter to Parkes. "It is hardly necessary to say that I vehemently disapprove of the substitution of 'domicile' for 'residence' — which has always meant residence in good faith"; he hoped that it would be possible to retain "resided", but drew up a qualifying clause to silence the critics. In case this failed he drafted a clause qualifying "domicile". To silence captious critics he was prepared to state explicitly that the Act only referred to offences committed in the Colony. He was also concerned about the misunderstanding of the sub-section on drunkenness.

We do not legislate in that clause against drunkenness per se — (& perhaps we have no right to do so:) but only when the drunken habit is long continued, and leads to "overt acts" (so to speak) inflicting injustice and cruel wrong on the innocent wife or husband. If the husband, tho' a drunkard, maintains his wife, — or the wife, altho' a sot, still keeps her home in order, — the law does not touch them. It is mainly the poor, or the class of wage-getters, that suffer from drunken habits at home, ...

In the Committee stage Gould's motion to substitute "domicile" for "residence" provoked a technical discussion of the legal meaning

2. Ibid., pp. 139-140.
of "domicile". Eventually Neild was forced to accept the amendment, but succeeded in watering it down by adding Stephen's drafted clause to the bill qualifying the meaning of "domicile" for the purposes of this act. For the first time the bill was carried on its third reading without debate and without a division on 13 June.

The bill was read for the first time in the Legislative Council on 13 June. The same day Dr. Renwick moved eight Resolutions against Lord Knutsford's despatch. The most important of these were: that the bill had been passed by the Council in 1886, and had been lost only by prorogation after it passed its second reading in the Assembly, before being passed by both Houses in 1887 after a general election. The measure had received ample and reiterated discussion in the public press since its introduction.

This House protests therefore against any assumption or suggestion, by whomsoever made, that the bill was not the result of deliberate resolve by the community which Parliament represented; and protests against the decision, founded apparently on that assumption, not to advise Her Majesty's assent to any like measure, unless passed by a future Parliament.

The House equally repudiated the idea that the measure could be defeated if not supported by the other Australian Colonies. The debate

1. N.S.W.P.D., 32, pp. 4703-4708, 15 May 1888. (Committee)
2. Ibid., 33, pp. 5424, 12 June 1888. (Committee)
   Clause IV explained the meaning of "domicile" within the Act:
   "A domiciled person, shall for the purpose of this Act, be taken to be one who for the period specified has resided in the colony as his or her home, although such person's domicile of origin, or other legal domicile be elsewhere. Provided that no person shall be entitled to petition under this act, who shall have resorted to the colony for that purpose only."
3. Ibid., 33, pp. 5485-5499, 13 June 1888. (Resolutions)
   See Appendix VII for the Resolutions in full.
4. Ibid., p. 5485.
that followed largely ignored the merits and demerits of divorce extension, but was concentrated mainly on the constitutional question that had been raised. Dr. Renwick was deeply offended by the imputation in the despatch that the measure had been passed without due consideration, and was most perturbed by the insistence by the Secretary of State on the use of "domicile," which was "a word of such mysterious meaning, a word the interpretation of which the most learned lawyers cannot agree upon, and which has caused difficulties in important cases in the mother country as well as in the colonies".1

Stephen acknowledged his responsibility for the placing of the resolutions on the table of the House. He thought that the Secretary of State was grossly mistaken in his law, and had also not paid attention to the facts. All the misunderstanding about "residence" and "domicile" arose out of the Lolley case in England, when a Scottish divorce had not been recognised because the marriage had taken place in England. But Lolley desiring to get rid of his wife had gone to Scotland for the purpose of getting a divorce. It was clear from the case of Harvey v. Farnie, said Stephen, that the reason for Lolley's divorce being held invalid was that it was fraudulently obtained. Having dealt with the legal inadequacies of Lord Knutsford, Stephen took up a position on the constitutional issue diametrically opposed to the one he had held when he had opposed

1. N.S.W.P.D., 33, p. 5488, 13 June 1888. (Renwick)
Buchanan's bill ten years before.

All these decisions [of the English Courts] are utterly ignored, and endeavoured to be upset, in Lord Knutsford's despatch. I think it is to be regretted that the Secretary of State in writing to the Governor in respect of a measure which had passed this legislature on two occasions, the last being after a general election, should dictate on what principle, and under what circumstances, we, an independent legislature, shall exercise our rights. I submit to the House, and to the country at large, that it is a great constitutional question, and it ought to be taken notice of, and disposed of, as far as we have the means in both houses of the legislature. It strikes at our independence, I think, vitally."

This was far from the stand he made in 1879 after Buchanan's bill had been refused the Royal assent:

That the power and duty of disallowing Bills deemed by the Queen's advisors to be on any such grounds objectionable, were essentially portions of the Constitution under which they lived; and that it was unconstitutional, as well as unseemly, to endeavour to force the Home Government to abandon that prerogative and duty by the reiterated carrying of the same measure in the face of often repeated explanation of the grounds of objection.

But at the same time Stephen strongly resented being forced into the position that in the discharge of the duty to his country, he was apparently in antagonism to authority. He was outraged by Knutsford's condition that the other Colonies were to be consulted. This, he claimed was an unconstitutional limit on the sovereignty of New South Wales.

Knox attacked the resolutions, which were misleading, while the Home Government was only doing its duty. He was one of the few speakers who revealed his attitude to the divorce issue as opposed

1. N.S.W.P.D., 33, p. 5491, 13 June 1888. (Stephen)
2. Ibid., 1, p. 311, 26 November 1879. (Stephen)
to the constitutional one, by his horror at: "The idea of calling this a great measure! - a measure which only licenses the drunkard, the criminal, the wife-deserter and the wife-beater to get married again, and secure fresh victims on whom to exercise their cruelty." ¹

Julian Salomons, the Government Representative in the Council, wanted the Resolutions withdrawn as misleading. Sir William Manning thought that the despatch was temperate, for the Crown was an essential part of the Constitution, with grave responsibilities to the British Empire as a whole. He thought there was room for doubt about the bill and that there was nothing in the despatch to protest against.

Andrew Garran openly claimed that the reasons given by the Secretary of State for not advising the Queen to assent to the bill were specious, and like many specious arguments, did not hold water. For, unless he was using specious reasons, Lord Knutsford would not have bothered to instruct the Government of New South Wales on public opinion in New South Wales. Garran maintained that another general election, which might be fought over free trade or the Chinese question, would not tell anything about public opinion on divorce. He saw the request to consult the other colonies as an attempt to coerce New South Wales into Federation, which "will come not when the Colonial Office thinks the proper time has come; but when the different colonies all feel that the hour and the man have

¹ H.S.W.P.D., 33, p. 5494, 13 June 1888, (Knox)
Garran frankly ascribed the lack of favour the bill met with in Downing Street to "the hostility of the ecclesiastical influence". The Resolutions were carried by 15 votes to 13 which corresponded to the voting on the divorce bill.

The constitutional issue was raised in the Legislative Council before Parkes had taken up any position on the matter. From this point a growing number of people became less concerned over the merits of the divorce question, but increasingly with the question of how far the legislature really was independent, and, not less important, with the relationship of Church and State. Was Parliament to be dictated to on a question of social reform, not only by the Churches in the Colony, but by the Church of England in England? The opponents of the bill were in a difficult position. To oppose divorce extension now meant approval of the veto. This was tenable for conservatives, but it was getting close to being against the principles of men like O'Sullivan, who were liberals and democrats. Nevertheless, despite their dilemma, few men ceased their opposition to the divorce bill because of the Imperial action. Religious beliefs were too strong. A new issue had been raised in the debate which was to cut across the divorce issue, and overshadow it. The despatch was interpreted by some as an attempt to force Federation on the colonies.

The same resolutions were introduced in the Assembly by Neild.  

1. N.S.W.P.D., 33, p. 5498, 13 June 1888. (Garran)  
2. Ibid., p. 5497. (Garran)  
3. Ibid., pp. 5634-5640, 19 June 1888.
but the debate did not produce much discussion on the Constitution question, for Parkes was determined to adjourn the debate, and Buchanan, newly returned to Parliament, was equally determined to have his say. He was at his worst and preoccupied with his own correspondence with Gladstone and Disraeli, who he claimed was ignorant of the law of Scotland. "I believe that I ultimately overcame, by sheer force of arguments, the objections of Lord Beaconsfield to the bill, and the bill received the royal assent".\(^1\) He also claimed that Beaconsfield had approved of the bill in principle. After Buchanan had come to the end of his self-praise, Parkes got his adjournment, and the debate was not resumed.

The opposition to the Divorce Bill in the Upper House was organised by Edward Knox, who went to a great deal of trouble to do so as efficiently as possible. His papers contain numerous lists of members of the Council, marked in his hand according to how they were likely to vote. He received letters from E. Webb and L. Fane De Salis in 1888, apologising for being unable to come to Sydney to record their vote against the bill on its crucial third reading. De Salis was optimistic in the light of the nearness of prorogation, and desired Knox to find a pair for him, which he did not think would present any difficulty, for if the third reading came on at all, it would "doubtless be prolonged into the small hours of Friday morning".\(^2\) Knox’s speeches were carefully prepared, even if coloured by a

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1. *N.S.W.P.P.* 33, p. 5640, 19 June 1888. (Buchanan)
certain sameness as the years went by. He seems to have corres-
ponded with the Rev. Samuel Dike, who had consulted with Judge
Bennett, Chairman of the Executive Committee of the National Divorce
Reform Association. Knox made notes from Dike's reply.

Free to say allow some causes of divorce to remain on the
Statute Book. Doubtful what we should feel ourselves called
on to do if called upon to act on the matter in your Country: Expe-
rience makes us distrustful of even the most careful
extension of legal cause for divorce. - Facts as put support
your Bill at same time would suggest caution. 1

Knox possessed official pamphlets and statistics from America which
he distributed to Victorian politicians.

The bill was to have little trouble in the Upper House on
this occasion, except in Committee. Knox insisted on debating the
second reading in full as there were thirteen new members of the
House and five old members, who had been in England when the bill had
previously been discussed. 2 He virtually repeated his speech of the
preceding year. Stephen promptly forced a division on Knox's de-
laying amendment, and the second reading was carried by 19 votes to
9. He wanted to go straight into Committee, but Salomons was
furious about being denied an opportunity to speak, so tried to delay
the committee stage for six months. He only succeeded in putting it
off from 20 June till 17 July, 3 when there was only one more week of
the session to go. The shortness of time forced Stephen to accept
certain amendments that were unpalatable, if there was to be any

MSS 98/9.
2. N.S.W.P.D., 33* pp. 5691-5719, 20 June 1888. (Second Reading)
3. Ibid., 34* pp. 6459-6565, 17 June 1888. (Committee)
chance of getting the bill through. Simpson, in an ill humour, accused Stephen of trying to influence the House by telling it how much time and trouble he had taken over the bill. He subsequently withdrew his amendment omitting habitual drunkenness on the insertion of W.H. Suttor's pet clause which had been negated the previous year. Knox succeeded in inserting a clause preventing the respondent from remarrying for two years. The third reading was not till 23 July, and was carried without debate by 19 votes to 9. It was sent down to the Assembly at once where Neild tried to get the amendments considered forthwith, but the House refused on a curious division, 23 votes to 39, Parkes voting with the ayes. O'Connor frustrated another attempt later that night to deal with them. At this eleventh hour Parkes made an effort to dispose of the resolutions because they raised the constitutional issue. He had made a previous effort to have them considered on 16 July, moving the postponement of several orders of the day to do so, but McElhone had objected. Parliament was prorogued on 24 July, and the Divorce Bill had been lost.

Stephen visited Adelaide to stay with Chief Justice Way before the October Session in 1888. He wrote twice to Creed to say that Neild would have to begin the Bill in the Assembly, and that he had lots of pamphlets.

1. N.S.W.P.D., 34, pp. 6586-6596, 19 July 1888. (Committee)
2. Ibid., pp. 6728-6729, 23 July 1888. (Third Reading)
3. Ibid., pp. 6758-6760.
I hope that you have found the draft Bill — in re Divorce Extension — all that you & Garran and I agreed at our Thsdy evening conference. Renwick came on Friday morn'g — and we carried out the resolutions of the said conference then & there — and I rushed off with the blotted & interlined result to Mr. Potter. Neild will have sent you copies — & sho. I not return to Sydney in time for the L.C. skirmish, Renwick has undertaken the post of coach. — Gratefully do I acknowledge the assistance of all my friends — and I wish we co. have had the presence also of Norton and Dangar — either of whom is equal to a host of our opponents.

Neild duly introduced the Divorce Extension Bill at the beginning of the short October session. The debate was unremarkable, except that Parkes had completely altered his position on the rejection of the bill by the Secretary of State.

I cannot admit that the Secretary of State, with all the respect I have for that high functionary of her Majesty's Government, has any right, time after time, to negative the deliberate decisions of this Parliament. It is on that ground that I give my vote freely to send this bill back, because it is within our constitution.

The rest of the debate was uninteresting except for Slattery who referred with horror to an article by a society lady in London, named Mrs. Caird, who asked the question "Is marriage a failure?" and had suggested that divorce should be obtainable at the pleasure of the two parties concerned. Thomas Walker referred to the recent case of an unfortunate Newtown Woman who had been stabbed by an intoxicated husband.

1. Stephen to Dr. Creed, 20 October 1888, Creed MSS, A682, (Political) .. (M.L.)
3. Ibid., p. 133. (Parkes)
4. Ibid., p. 135. (Walker)
This time the bill did not get beyond its second reading in the Lower House. This was partly due to the shortness of the session, but more to the confused state of politics at the time. The Government was getting caught up in a rising tide of popular discontent and suspicion. There had been all too many scandals recently: a Royal Commission on the alleged bribery of members of Parliament had been inconclusive; there had been a good deal of mud thrown about the alleged tramway frauds; Fehon's appointment as Deputy Commissioner of Railways was said to be the result of patronage or corruption; and finally Parkes had tried to extradite the vocal Protectionist, Thomas Walker, to Canada, where at the age of sixteen he had failed to answer a charge of murder. He refrained from publishing the letter from the Canadian Government saying that they had no desire to reopen the case. On 9 January 1889, in a half empty House, Parkes lost a no confidence motion by 37 votes to 23. It was over a minor matter and therefore it caused considerable surprise when Parkes resigned. Dibbs took office with a minority government.

Thomas Walker, already notorious as a spiritualist and a Free-thinker, thoroughly enjoyed his new role of injured innocent. The Freeman's Journal, commented: "We have no objection to his being deported, if he would have the goodness to deport himself, and in fact, murder or no murder, rather think he ought to be. But we do object to any man being deported by any Government, as unquestionably Mr. Thomas Walker, M.P., was attempted to be by the late Parkes Government, ostensibly in the interests of justice, but really in their own as an easy way of getting rid of a specially obnoxious opponent." F.J., 16 March 1889, p. 13.
unearthed the Walker scandal and went to the country. The election of 1889 was fought over the Protection versus Free Trade issue. It was contested by two parties with central organisations, which tried to discourage candidates likely to split the vote. Although the Protectionists won in the country and Newcastle, they lost in Sydney and overall. Parkes came back with a bare majority and was forced to reorganise his Cabinet, which for the first time included active members of the Free Trade Association, notably W. McMillan, J.H. Carruthers and B. Smith.

The cause of divorce extension was not assisted by the election, as John Cash Neild, suffering from a broken leg, failed to make his position on free trade versus protection clear, and was not re-elected for Paddington. His absence was a great loss. Other men could be found to introduce the measure, but none gave it the same attention, or were so effective in ensuring that it kept its place on the order paper. In April 1889 it was entrusted to J.P. Abbott. The speakers for the most part remained the same: O'Sullivan leading the opposition, backed by Copeland, Molesworth, Seaver, Edmunds and Gould. It was supported strongly by Paddy Crick, (against his religious conscience - so he said), Cullen and Parkes, who, more hostile

2. A.W. Martin, p. 283.
4. N.S.W.P.D., 38, pp. 1594-1629, 28 May 1889. (Second Reading)
than ever against the Secretary of State, called on members to vote for the bill whatever they felt about it, as a protest. Ninian Melville was in a quandary, for he still disapproved of the bill as much as before, but felt that he could not offer any further opposition due to the action taken by the Secretary of State. O'Connor agitated for adjournment, as he had not had time to prepare a speech, (which no one believed in view of the number of times he had already spoken on the subject). Parkes considered adjournment unwise, and the motion was defeated on division. For the first time the bill got through Committee without amendment, although J.P. Abbott had wanted to extend the grounds to cover insanity, after the respondent had been confined in a lunatic asylum continuously for three years. 1

Although the second reading and Committee stages were safely negotiated on 28 May, the third reading was postponed. Stephen urged Parkes to do something about the delay: "On this my 88th birthday -(I shall not live to see another -) I write to ask one favour & kindness. - Do give Mr. Abbott an early day for the Divorce Bill. It is in its 4th year of struggle - virtually three times passed - And let me know its fate while I am in the flesh." 2 Evidently Parkes exerted himself for the third reading was carried as a formality on 27 August. The division on the message to the Council was the largest ever, 43

1. N.S.W.P.D., 38, pp. 1629-1635, 28 May 1889. (Committee)
2. Stephen to Parkes, 20 August 1889, P.C., A905, p.476. (M.L.) Stephen, born in 1802, was a little confused about his age.
votes to 24. ¹

While in office Dibbs had strengthened the Protectionists in the Council, and now, when Stephen introduced the Divorce Bill it was to hear Buchanan at his blustering worst on divorce, ending with a rousing attack on Roman Catholicism. ² The debate had to be adjourned. When it was resumed³ Sir William Manning, a life-long friend of Stephen, after great difficulty and indecision, came out against the bill, not because he thought it was against Christianity, but because he strongly disapproved of diversity in the law. Although he was in favour of the measure in essence, he thought it should wait for a federal parliament. He also warmly defended Stephen from the unfair attacks that had been made. The debate had to be adjourned once more, and its second reading was not carried until 27 September.⁴

However, time had almost run out, so Stephen decided not to press the bill in committee, as he had good reason to know that it would be talked out.

During 1888 and 1889 the religious opposition to the bill had calmed down to a great extent. The Sydney Synod met in March 1888, before the Primate left once more for England,⁵ this time to attend the Lambeth Conference. He denied all the reports of

1. N.S.W.P.D., 41, pp. 4451-3, 27 August 1889. (Third Reading)
2. Ibid., 41, pp. 4789-4801, 5 September 1889. (Second Reading)
3. Ibid., 41, pp. 5005-5017, 12 September 1889. (Second Reading cont.)
4. Ibid., 42, pp. 5595-5597, 27 September 1889. (Second Reading cont.)
backstairs intrigue and expressed dissatisfaction with the action taken by the Home Government, which had not even refused its assent to the bill. "I can of course understand, though I cannot for a moment sympathise with, the desire to cut all connection with England and to establish Australia, or, for aught I know, New South Wales, as an independent republic, managing all its own affairs for itself." What he could not understand was the unwillingness to recognise obligations to Britain. The Legislature felt itself insulted by the Bishop's references to its handling of such an important subject.

For my own part, in spite of the vehemence, and what seems to me the intolerance with which our action has been assailed, I do not think that we need to be ashamed of having contributed in any degree to this result. If the effect shall yet be to prevent, or even mitigate the serious evil which it seems to us would be done by the Bill, against our Christian faith and the moral and public welfare of our society, we shall thank God; if not before Him, we shall at least have "delivered our souls".

Stephen was, of course, furious about this attack and wrote two papers which were first published in the Sydney Morning Herald, and later as a pamphlet. He strongly objected to the two level argument, and did not think it just that

after twice satisfying Parliament and the country of the righteousness of our cause, we should be exposed to a third ordeal at the instance merely of one section of the community, not more interested in its welfare, more conscientious, or (with due respect be it said) more competent to deal with the question than ourselves.

2. Ibid., p. 24.
In the first letter Stephen dealt with the religious objections of Synod, but as both sides claimed that neither side paid the slightest attention to arguments raised by the other, it was merely a repetition of all that he had said earlier. The second letter dealt with the social and moral objections. He thought it ridiculous to abstain from redressing existing wrongs because in the future a bad measure might be carried, and, in any case, reforms had to start somewhere. The Weekly Advocate slated Stephen's defence as a "feeble, inconsequential piece of argument."  

In the absence of Bishop Barry, Dean Cowper was Commissary of the Bishop of Sydney. On the advice of the Standing Committee of Synod, he twice petitioned against the bill in 1888, on the same grounds as previously. He was backed up by Ministers of Religion of various denominations, who began to concentrate on remarriage, 174 of whom sent in the same petition at the end of the year. Dean Cowper did his best

3. Ibid., 1887-8, vol.2, p. 1059; 1888-9, vol.3, p. 1279. "That while entertaining other strong objections to the provisions of the said Bill, by which Divorce is facilitated, your Petitioners are still more strongly opposed to that which provides for the remarriage of the persons divorced - the guilty as well as the innocent. That your petitioners feel the greatest repugnance to this provision, in as much as it gives to those who have been guilty of the greatest cruelty and sin, opportunity to repeat their offences upon fresh victims of their licentiousness. That your petitioners - accepting the solemn declaration of our Lord Jesus Christ, that 'Whosoever marrieth her that is put away commiteth adultery', as the law of the Christian Church - are of the opinion that any legislation which provides for the remarriage of one who is put away affords direct sanction to sin, and is opposed to the Divine Law in the Seventh Commandment."
to keep people aware of the Church of England's attitude to divorce, He preached two sermons on the subject in June 1888, to a large congregation in St. Andrew's Cathedral.\(^1\) He followed the narrow Anglican line and merely repeated what had been said so often before. He only differed as to the extent that New South Wales had sunk into corruption.

It cannot, I think, be gainsaid that nations have prospered in proportion as they act in accordance with those laws. And the worst thing that can befall a people, especially one that has been taught to obey them, is that they should cast them aside, and legislate and administer their affairs upon the principles of human policy, without regard to those immutable principles of truth and justice which He has given us in His Word for our guidance and direction. I fear, my Brethren, that we in this colony have fallen very much into this condition; and that in many ways we are reaping the fruits thereof.\(^2\)

He also quoted some fresh figures on divorce in Massachusetts taken from an address of the Bishop of Long Island, and from Joseph Cook.\(^3\)

The Dean published his sermons and sent a complimentary copy to Stephen.

Until 1888 the Presbyterian Church had given qualified support to the divorce bill, but the same Church in Victoria was extremely hostile to the Victorian efforts at divorce extension, with the result that when the Presbyterian Synod of Eastern Australia met

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1. William Cowper, Dean of Sydney: "Two Sermons upon Marriage and Divorce", 1888, on 10 and 24 June.
2. Ibid., p.9. (Second Sermon)
3. Ibid., p.8. Cowper in a note acknowledged the source of statistics as coming from the Rev. Samuel Dike, Secretary of the New England Reform League, via the Bishop and Joseph Cook; the population had increased by 44\%, marriage by 62\%, and divorce by 147\%.
in 1888, the majority drew up a strong petition against the bill as a whole.¹ The Sydney Morning Herald was not impressed by the petitions from the clergy. The formidable number of ministers who had petitioned against the bill, became far less formidable when it was realised that at least 547, or two-thirds of the ministers, excluding Anglican ministers, who were not represented, did not sign the petition, which was indicative of diversity of opinion. Further, unless remarriage was permitted after divorce, it was not divorce. The Editor hoped that one day the clergy would find that it was possible to be mistaken.² They published another leader hostile to the Church a fortnight later.³ After these protests the religious controversy in New South Wales was quiescent until 1890.

It is evident that in London Bishop Barry was able to waken

1. N.S.W. V. & P., 1888-9, vol.3, p.1281. "That your petitioners believe that the facilities for obtaining Divorce, already legalised, cannot be further increased or extended, save in direct opposition to the word and will of Christ, who, as 'Governor among the Nations', claims the homage and allegiance of all our rulers and legislators. That your petitioners believe that the inevitable tendency of affording increased facilities for dissolving the marriage tie will be as it always has been, to create and foster loose views and practice as to the sacredness of marriage vows and the purity of family life. That your petitioners regard the principles on which the passing of the said bill is advocated as devoid of finality, and are of the opinion that should the said Bill become law its adoption would pave the way for further demands in the direction of increasing the facilities for obtaining divorce. That your petitioners strongly object to the provision in the said Bill which allows the remarriage of persons divorced, the guilty as well as the innocent, as being in direct opposition to the explicit declaration of the Divine Law-giver, that 'whosoever marrieth he that is put away committeth adultery', and also to the spirit of the Seventh Commandment."

2. S.M.H., 14 June 1888, p. 7.

3. Ibid., 26 June 1888, p. 6.
his fellow Bishops to the dangers of divorce extension.\(^1\) The
question was referred to a Committee consisting of the Bishops of
Chester, Bombay, Dover, Durham, Exeter, Huron, Maryland, Mississippi,
Quincy and Singapore. After considering their report, the Lambeth
Conference passed three resolutions against divorce and remarriage.

In his Encyclical letter the Archbishop of Canterbury explained:

In vital connection with the promotion of purity is the
maintenance of the sanctity of marriage, which is the centre
of social morality. This is seriously compromised by
facilities of divorce which have been increased in recent
years by legislation in some countries. We have, therefore,
held it our duty to re-affirm emphatically the precept of
Christ relating thereto, and to offer some advice which may
guide the clergy of our own communion in their attitude to­
wards any infringement of the Master's rule.\(^2\)

The Bishops of the Episcopal Church of America had long been concerned

1. D.T., 14 September 1888, p. 5. The Special Correspondent wrote
a long article on the Lambeth Conference and provided a liberal
number of quotations from the Encyclical letter. The resolutions
adopted by the Conference on divorce were: X, "They think it
necessary to call attention to the fact that in very many Christian
nations there is evidently a growing laxity of principle and of
practice with regard to divorce, and that in some countries strong
attempts have been made to afford further facilities for it, with
the result of weakening and lowering, both in law and popular sen­
timent, the idea of the sanctity of marriage. \(^1\) They therefore
consider it important to declare that, inasmuch as our Lord's
words expressly forbid divorce, except in the case of fornication
and adultery, the Christian Church cannot recognize in any
other than the excepted case, or give any sanction to the marriage
of any person who has been divorced contrary to this law, during
the life of the other party. \(^2\) They would add that under no
circumstances ought the guilty party, in a case of divorce for
fornication or adultery, to be regarded, during the lifetime of
the innocent party, as a fit recipient of the blessing of the
Church on marriage. \(^3\) They recognize the fact that there always
has been a difference of opinion in the Church on the question
whether our Lord meant to forbid marriage to the innocent party in
a divorce for adultery; and they recommend that the clergy should
not be instructed to refuse the Sacraments or other privileges of
the Church to those who, under civil sanction, are thus married."

2. Ibid..
about the question of remarriage, but it was largely the upsurge of colonial legislation that directed the Lambeth Conference to consider the whole problem.  

Bishop Kennion of Adelaide succeeded in annoying the Daily Telegraph in Sydney. The Bishop gave a sermon in London, mentioning the divorce question, and claimed that "colonial legislators as a rule were able men, but that they were devoid of the underlying principles of religion and the necessary steadiness in times of political excitement". As an instance of this he quoted the Divorce Extension Bill, which he described as an outrageous measure, and one which had passed the New South Wales Legislature by a narrow majority. He was proud to say that the Crown had boldly withheld its assent from this measure, and he prayed to God that this refusal would be maintained. The next day he was denounced by the Telegraph as "Another Episcopal Backbiter".

At about the same time as the Lambeth Conference was meeting in London, intellectual circles were discussing an article published

1. D.T., 14 September 1888, p. 5. The Telegraph's Special Correspondent was very impressed with the hitherto unrealised but pervasive strength of the Church of England, and found the recent action of the Secretary of State more comprehensible. "What the indirect representations to Lord Knutsford or his advisors were I can only surmise, but the result, as we know was a compromise - a reference back to the colony for further consideration by the people and the Legislature. I am compelled to admit that I do not see that the Secretary for the Colonies could have adopted any fairer compromise."

2. Ibid., 5 October 1888, p. 5.

3. Ibid., 6 October 1888, p. 4.
in the Westminster Review entitled "Marriage", by a society lady, Mrs. Mona Caird. She reached the conclusion that "the present form of marriage - exactly in proportion to its conformity with orthodox ideas - is a vexatious failure". Her ideas in dealing with the problem were utopian: marriage was to be completely free. This could be achieved if woman ever became economically independent, which was next to impossible, while boys and girls should be educated together, avoiding artificial restrictions. The storm reached Australia in October 1888. The Daily Telegraph printed a long article called "Is Marriage a Failure?" by their Special Correspondent. In addition to outlining the article by Mrs. Caird, he gave details about her private life discovered by the Press in England, and comments on the article by Zola and Alexander Dumas, fils, who did not have anything original to add on the marriage question. The London Daily Telegraph had opened its columns to correspondence and was apparently flooded with twenty-seven thousand letters. The public of New South Wales did not display a similar interest, for the Telegraph only received one letter, but the question was irresistible to the Press. Even the conservative Herald could not refrain from publishing an article taken from the Scotsman, while reference was made to the subject in the column "As You Like It". The Evening

2. Ibid., p. 197.
5. Ibid., 13 October 1888, p. 9.
News, although they were very critical of Mrs. Caird's "eccentric arguments," had two articles on her. In the second they launched into some plain speaking.

Mrs. Mona Caird and the Daily Telegraph have carried pollution into thousands of English homes. To plan a deliberate attack on the sanctity of the marriage tie, or rather to adduce specious arguments to show that if a man and woman wish to cohabit, marriage, or even the intention of a permanent union, is unnecessary, is a worse crime against morality, against man, and especially against woman, than is the writing of openly obscene books.

The Bulletin considered the question idiotic, but was inclined to think that the British nineteenth century version of matrimony was a failure, as all marriages were, when children were thought of as a nuisance.

Even the Sydney Mail had to say something about the marriage question: young men had become slow to rush into marriage.

Mrs. Caird's article started a great debate in the journals on the questions of marriage and divorce, which lasted throughout 1889 and into 1890 in the Westminster Review alone. Articles appeared by Elizabeth Rachael Chapman, Mrs. Caird again, Jane Hume Clapperton, H.G. Keene, Lee Meriwether, Alice Bodington, Jeanie Lockett and Ap Richard. Unlike the situation in New South Wales where responsible men had seen the necessity for extending the grounds of divorce, in England it was mostly women who wrote on the question, and their views did not usually go farther than a general idea that divorce

1. Evening News, 22 October 1888, p. 3.
2. Ibid., 14 November 1888, p. 7.
4. The Sydney Mail, 12 January 1889, p. 73.
should be facilitated, but with one exception that will be considered later, they made no concrete suggestions for legislation.

On the other side of the Atlantic, in February 1889, the Hon. Carroll D. Wright presented his "Report on Marriage and Divorce in the United States, 1867-1886", to Congress. At the end of that year, the Rev. Dr. Samuel Dike wrote a summary of the material contained in the 1070 pages of the report. Wright's statistics confirmed that there had been a very large increase in the number of divorces, which had grown from 9,937 in 1867 to 25,535 in 1886, a rise of 156.9%, while the population had only increased by a little over 60%. However Mr. Wright had discovered a striking parallel movement in European countries. But the statistics did not show more than 10% of divorces were obtained by migration for that purpose. Wright's Report provided ammunition for the opponents of divorce extension in New South Wales, and statistics from it were prominently quoted in the debates of 1890.

In December 1889 the North American Review prepared four questions, with the aid of Samuel Dike, on divorce, and sent them to prominent people to answer for publication. Cardinal Gibbons


The Editors desired "a thorough discussion of the subject in its moral, social, and religious aspects and some of the most eminent leaders of modern thought have contributed their opinions". The four questions were:
1. Do you believe in the principle of divorce under any circumstances? 2. Ought divorced persons be allowed to remarry under any circumstances? 3. What is the effect of divorce on the integrity of the family? 4. Does the absolute prohibition of divorce where it exists contribute to the purity of society?"
presented the orthodox Roman Catholic opinion,\(^1\) and Henry Potter, Bishop of the American Episcopal Church, who put forward the usual response of the Church of England, except that he was honest enough to say that he did not think the prohibition of divorce would contribute to social purity.\(^2\) Colonel Robert Ingersoll, a prominent atheist, thought that it was not in the interests of society that good women should remain bound, but that the man should never be released unless the woman had broken the contract.\(^3\) Dr. Dike, who had been studying the divorce problem for twelve years, also contributed to the discussion. He thought that the loose administration of some of the Courts was a worse evil than the wide grounds of divorce, and that it would be wise to go slowly in legislative reform. In view of Wright's figures he did not know that a federal law was justified.

The controversy continued in December between a Senator, a Judge of the Supreme Court and Mr. W.E. Gladstone. Both Mr. Justice Bradley and Senator Joseph Dolph considered that divorce should be allowed for grave causes other than adultery, and that remarriage should be allowed. The Senator was strongly in favour of amending the Constitution and introducing a Federal Law.\(^4\) Except for the two churchmen, all had favoured limited divorce and remarriage. Not so

\(^{1}\) North American Review, vol. CXLIX, November 1889, pp. 517-24. (Cardinal Gibbons)
\(^{2}\) Ibid., pp. 524-29; p. 527. (Bishop Potter)
\(^{3}\) Ibid., pp. 529-38. (Colonel Ingersoll)
\(^{4}\) Ibid., December 1889, "Is Divorce Wrong?", pp. 641-652.
Mr. Gladstone, whose paper was to create a storm. He skirted round the first question and appeared to class divorce *a mensa et toro* [sic] as divorce, but was unequivocal on the question of remarriage and the integrity of the family: "...The answer appears to me to be that remarriage is not admissible under any circumstances or conditions whatsoever. ... While divorce of any kind impairs the integrity of the family, divorce with remarriage destroys it root and branch." These words were to be quoted many times in New South Wales, both inside Parliament and out. Gladstone went farther than most ardent churchmen on the subject. He thought divorce and remarriage, even after divorce for adultery, totally forbidden by the Scriptures; that not even the Church could cancel a vow made before God of marriage for life. He was convinced that the Anglican Church had never tolerated remarriage, and dismissed the *Reformatio Legum Ecclesiasticarum* as disapproved by Queen Elizabeth and her advisors. From his own experience, he thought that prohibition of divorce was conducive to morality. "In the year 1857 the English Divorce Act was passed, for England only. Unquestionably, since that time, the standard of conjugal morality has perceptibly declined among the higher classes of this country, and scandals in respect to it have become more frequent." 

In December 1889, *Forum* published an article by the late American Ambassador to London. Mr. Phelps, began by quoting figures from Carroll D. Wright's Report to illustrate the evils of the rising

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divorce rate,\(^1\) He thought that the only remedy was to abolish completely absolute divorce, then attacked the position of the Anglican Churches which allowed divorce for adultery.

But even if the report of St. Matthew is to be taken as the true one, the proposal to base legislation at this day on its words, without regard to the very different circumstances under which, and the very different purpose, for which, they were spoken, is one which will scarcely survive serious examination. ... It was not at all in reference to any proceeding under the civil law that Christ uttered the language in question.\(^2\)

Mr. Phelps was using the identical arguments as those who wished to extend the law in New South Wales. He considered that there were graver offences against marriage than adultery. Far too many divorces were fraudulent, and he thought it worse than useless to forbid the remarriage of the guilty only. He scorned the argument that to prohibit remarriage was to encourage immorality, which was a gross aspersion on virtuous American women. In any case it was well known that people wishing to be rid of their spouses had deliberately committed adultery.

Interest in the divorce question revived in New South Wales in December 1889 with the passing of the Victorian Divorce Amendment Act. It had first been introduced in the Victorian Parliament by William Shiels, who was later to become Premier of that colony. As in New South Wales, it had received strong opposition from the Churches and from the Attorney-General, who had pointedly attacked Stephen. From

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the first, and independent of the Colonial Secretary's recommendation, there had been close co-operation with New South Wales. Edward Knox, the organiser of opposition to the measure in the Upper House had supplied Wrixon, the Attorney-General with pamphlets and advice. Later he performed the same service for Samuel Winter Cooke. Finally it was carried by very large majorities, particularly in the Upper House where the majority was five to one.

The most immediate results of the Victorian Bill's success occurred in Sydney, where it was greeted in an editorial in the *Sydney Morning Herald*, which also expressed some apprehension about its fate in London. Stephen felt that some immediate parliamentary action was called for in view of the Victorian success and wrote to Creed.

It is now essential to have a meeting of a few supporters here to determine on our course of action during the approaching session. For this purpose I want to select three members from the Assembly (Dibbs, e.g., Abbott, and J.F. Burns) and three or four from our House (Norton Garran, and either Dangar or Renwick) to meet on Friday 22 inst. in one of our Committee Rooms at 3 o'clock. Could you give us your attendance also? There is great difference of opinion 1st as to the House in which the Bill ought to be introduced, and 2 as to our introducing it at all in the approaching short session.

1. Edward Knox, Uncat. MSS Set 98/9. Three letters to H. Wrixon, Attorney-General of Victoria, 27 August 1887, 8 September 1887, and 15 September 1887; Samuel Winter Cooke to Knox, 24 October 1889, and rough draft of Knox's reply.

2. It has been impossible to enter into the reasons why Victoria managed to pass her Divorce Act more quickly than New South Wales.

I think it of great importance that we should pass the Bill, if possible, at once; in order that it may go to the Secretary of State at the same time as the Victorian Bill; which retains everyone of our grounds of divorce without alteration. Pray turn over these questions in your mind, and kindly give me your opinion. Parliament as you know meets on the 26th.

The result of this meeting was that Stephen initiated the Divorce Bill in the Legislative Council on 28 November, but it ran into trouble almost immediately. The Government wanted only a very short session to pass an Appropriation Act. By custom in the Council motions had precedence over orders for the day. Louis Heydon took advantage of this and moved six motions on 6 December, the day set down for the second reading of the Divorce Bill, and, worse, discussed them for six hours. This meant that the bill lost its place on the order paper. In the face of this determined obstruction which would certainly succeed in a short session, Stephen on 18 December moved, "That on Thursday, the 19th, instant, and on every succeeding Thursday during the session, the Divorce Amendment and Extension Bill shall have precedence on the paper over all other business." He appealed to the old principle that the Council had always yielded to the Lower House when it had passed a bill four or five times. He was supported by Manning, but the President said the motion could not be put in its present form. The next day Dangar moved to suspend the Standing Orders in the correct form. W.H.

1. Stephen to Dr. Creed, November 1889; Creed MSS A682 (Political). (M.L.) The letter had been dictated and copied which explains its lack of abbreviations.
2. N.S.W.P.P., 43, pp. 430-434, 18 December 1889.
THE HON. WILLIAM SHIELS,
THE NEW PREMIER OF VICTORIA.
Suttor strongly disapproved, so did Charles. Garran urged its acceptance as an expression of favour for the Divorce Bill; Heydon justified himself, and said Stephen had not even paid him the compliment of asking him to postpone his bill; Manning was embarrassed by Garran; Simpson, Jacob, Bowker, and Salomons were hostile, the last accusing Stephen of speaking from the heart not the head when he had made a moving appeal for the deserted wives and victims of brutes etc. At this point the Appropriation Bill appeared from the Lower House, Dangar withdrew his motion, and Parliament was prorogued. At a later date the Standing Orders had to be suspended in desperation to get the divorce bill through.

More important than the fourth abortive effort in two years to pass the New South Wales Bill, was the problem of how to ensure that the Victorian Divorce Bill received the Royal Assent. William Shiels, M.P., of Victoria, visited Sydney and revealed his campaign in a letter to Sir William Windeyer.

I have made up my mind to go to England in order to bring such representations to bear on the Colonial Office as may induce Lord Knutsford & his Colleagues to submit the Victorian Divorce Bill for the Royal Assent. This course has been for some time pressed upon me by prominent gentlemen in your Colony as well as here & in S.A. My main object in going recently to Sydney was to represent to Sir Alfred Stephen on behalf of the supporters of Divorce Reform the expediency of his going to England where his great prestige and position would have made success certain. Unfortunately his age made such a mission too hazardous and burdensome for him. I wrote to Sir Alfred yesterday intimating my resolve to undertake the duty, and I leave by the 'Carthage' on the 27th inst. ... With the knowledge & sanction of Mr. Gillies I have been in personal communication with the Premiers of N.S.W. & S.A. in order to secure the co-operation of the 3 colonies in urging the claims of our Bill upon the Imperial Cabinet. I am going properly accredited from here and from the replies
of Sir Henry Parkes & Dr. Cockburn the three colonies will make united representations to Lord Knutsford. You will be kind enough to regard this as strictly confidential. My purpose in writing to you is to ask if you can give me any letters of introduction to any public man in England who would be of help or influence in securing favourable consideration for the reserved Bill. I do not desire introductions for any social, private or pleasure purposes, but only for the one object I have in view in being in England. Lord Carrington has promised several & Sir Alfred Stephen has arranged to forward them to me. If you have any such knowledge of the Attorney or Solicitor General, Sir Henry James, Sir James Hannen, or any influential public men on good terms with the Cabinet, as would justify you in commending my cause & myself to his favour, I shall be under a great obligation by your so doing. ... Trusting you will not believe me a trespasser." 1

Sir Alfred twice wrote to Parkes soliciting from him an introduction to Sir Saul Samuel, the Agent General for New South Wales, for Mr. Shiels, and was successful in his application.2 Being an extremely persistent old man, he did not leave the matter there, but exerted all his influence. When Lord Carnarvon had called on Sir Alfred, during a visit to Sydney in 1888, the latter had taken the opportunity of presenting him with his photograph and some pamphlets.3 Now he wrote to Carnarvon asking him to assist Shiels in his mission.4 He is likely to have written to others also. In any event, this was only a preliminary skirmish before the main assault on the Colonial Office.

2. Stephen to Parkes: Parkes MSS, A 905, p. 448-9, 24 November; A 928, p. 110 (M.L.)
4. Carnarvon to Stephen: 18 February 1890, Stephen Uncat, MSS 211/3 (M.L.)
When the New South Wales Divorce Bill had been sent to London, Lord Carrington had shown no great interest in the matter, but during the succeeding years, Stephen had spared no effort to convince the Governor of the righteousness of his cause. In 1888 he twice recorded in his journal long conferences with Carrington on the Divorce Bill.¹ In September 1889 the Governor had been induced to send the current Divorce Bill, which had passed the Assembly, but not the Council, to the Colonial Office, and to ask for permission to assent to the Bill when passed. The Colonial Office was puzzled.² Now Lord Carrington wrote to Lord Knutsford earnestly hoping that he would see his way to advising the Queen to assent to the Victorian Bill, and asking him to grant Mr. Shiels a short interview. He also enclosed a printed letter from Stephen giving an outline of the vicissitudes the New South Wales Bill had undergone.³ In addition, he wrote privately to Knutsford, enclosing Stephen's letter to himself, which contained two cuttings from the Age and Argus depreciating a possible rejection of the bill.⁴ The letter concluded:

I am certain, supported as we in N.S.W, are on this great social question by not one other colony only, but I may say by all the Australian group, that a rejection of the Victorian Bill, — which will mean continuance of the rejection of every other having the same object, — would create a widely spread irritation, of which the final result will be fatal to continued loyalty and affection.⁵

¹ Stephen: Journal, MSS 777/2, pt.23, 20 March & 25 April 1888 (M.L)
² C.O., 201/610, pp. 222-3, 6 September 1889.
³ Ibid., pp. 313-317, 13 December 1889.
⁵ Ibid., p. 575, 13 December 1889.
In January 1890 Stephen was fulfilling the duties of Lieutenant-Governor and could not resist sending to the Colonial Office the two most recent bills introduced into the New South Wales Parliament, intending to show their similarity to the Victorian measure.¹

The Victorian Premier, D. Gillies, introduced Shiels to the Agent-General for Victoria, Sir Graham Berry, in a very strong letter.

I quite fail to see therefore any possible grounds on which the Veto could be exercised in this case. Its exercise must be a proceeding of great importance at any time. But I would point out not really so much in the interests of this Colony as in that of the general harmony of the great Empire that vetoing a measure without adequate reason might have a most injurious influence on the interests of the Imperial Government. There is no doubt that the result would be that this Colony and probably others: Colonies too, would pass the same Bill year after year until ultimately the Government of the day would be compelled to advise assent. With my desire to sustain the dignity of the Central Government of the Empire, I should greatly deplore the necessity of such pressure being brought to bear, and the loss of moral influence which the Imperial Government would suffer, if its consent were obtained under such circumstances. How infinitely preferable to do at once with a good grace what must inevitably be done later on. ... The Colonies as you know are most jealous of their powers of legislature being interfered with, and it may be difficult to foresee the result, should the idea get about that these powers are being unnecessarily restricted.²

The new Governor of Victoria, Lord Hopetown, wrote even more strongly in confidence to Lord Knutsford, suggesting that he show the letter to Lord Salisbury. He enclosed cuttings from all the Melbourne newspapers to illustrate the excitement over the Bill, and that feeling was running very strongly in favour of the measure.

1. CO., 201/611, pp. 10-14, 22 January 1890.
He commented on the different behaviour of the Presbyterians in New South Wales and Victoria.

Believe me I have no private feeling in this matter - no one takes a more serious view of the sacredness of marriage than I do, but I have no hesitation in saying that it would be a great misfortune if you felt yourself compelled to advise the Queen to withhold Her assent from this measure; it would create much irritation amongst the legal part of the population, it would give a great impetus to the small but noisy section who profess themselves opposed to the British connection. It would be said that the Royal Prerogative was being used in opposition to the clearly expressed wishes of the majority of the people. 1

Faced with the realisation at last that they were not merely dealing with the question of extended divorce laws, but with constitutional crisis, in which Victoria was backed not only by New South Wales, but also Queensland and South Australia, the Colonial Office dealt tersely with the telegrams of protest which arrived in London from the Bishop of Melbourne, the Moderator of the Presbyterian Church, the Wesleyan President, and the Dean of Melbourne. Even Lord Knutsford considered them incorrect in asserting that there had been no public expression in favour of the bill.2 The Bishop's earlier petition was dismissed briefly: "These are not grounds on which assent to the Bill could be refused."3

In London, Shiels had interviews with Mr. Fisher of the Colonial Office, Lord Carnarvon, Lord Knutsford himself, and Mr. Chamberlain, the only one to support the principle of the Bill. In

3. Ibid., 309/134, p. 526.
return Shiels kept the Press at bay. Reluctantly, the British Cabinet decided to advise the Queen to assent to the bill on political and constitutional grounds.

The triumph of the Victorian Bill was hailed in Sydney by the *Daily Telegraph*, which was jubilant.

We do not think it too much to say that the events of the last few months have virtually terminated the use and even the theoretic claim of the veto power, which as it has existed of late years has been little more than a cause of irritation to the colonies and a brand of their political dependence and subjection.

This first leader on the subject was followed by two more: on "Church and State", which heaped praise on the conservative Victorians for asserting their independence of Downing Street and quoted from Gillies and Chief Justice Higinbotham; and one on Self-Government.

The granting of the Royal Assent to the Victorian Divorce Bill did not pass without notice in London. One lady, who read that a question had been asked in the House of Commons whether it was true that the Queen had been advised to give her assent to the bill, wrote to the Archbishop of Canterbury on behalf of her Moral Reform Union, which had sent a Memorial to Lord Knutsford against giving sanction to the dangerous Divorce Bill. "I venture to ask you very

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1. William Shiels to Dr. Pearson, 18 February 1890. (State Library of Victoria)
2. *D.T.*, 3 March 1890, p. 4; 26 March 1890, p. 4; 18 April 1890, p. 4.
earnestly to support this Memorial, either by writing strongly to Lord Knutsford, or, if it were possible, by seeing him on this subject." But elderly ladies imploring the intervention of the Archbishop of Canterbury were not the only critics. The Spectator had two articles, and deplored the new surrender to Australia. They did not blame Lord Knutsford, who had questioned all the Agents-General and the principal colonists available. Instead they called for the abolition of the veto. The Australian Colonies had deliberately set aside the principles of Christianity. After this precedent, Britain would be quite unable to prevent them legalising polygamy or slavery, except by civil war. Miss Chapman writing in the Westminster Review deplored the "ever-increasing divorce mania", but had to confine her greatest cause of annoyance on the question, to a footnote.

The humiliating fact that we should have been compelled, under a practical threat of secession, to give the semblance of assent to the new Victorian Divorce Act, on the fallacious plea that the marriage law is a question of local concern, instead of being one of vital importance to the whole Empire - thus consenting to be saddled with the responsibility for grave social and political error, while retaining no authority at all - is nothing short of a scandal.

A few Englishmen spoke out in favour of the Colonies. The Earl of Derby published a letter in which he said that it would be most impolitic to refuse assent; Joseph Chamberlain expressed support

1. E. Blackwell to the Archbishop of Canterbury, 10 March 1890. Lambeth Palace Archives.
2. Spectator. 4 January 1890, pp. 7-8; 1 March 1890, pp. 295-6.
both for the principles embodied in the Bill, and sympathy from a constitutional point of view:¹ Lord Carnarvon was very doubtful about extending the grounds of divorce but thought that after such an expression of opinion, the bill ought not to be resisted.² A faint effort, but completely abortive, was made to introduce similar legislation in England, which did not get beyond the first reading. Jeanie Lockett wrote an article on Sir Alfred Stephen and Divorce in Australia, and urged the adoption of similar legislation in England.³

Victoria had triumphed, where New South Wales had pioneered. For the moment the shouting was over. All that had to be done was to pass Stephen's Divorce Bill, but that was to prove more difficult than anyone expected in March 1890.

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"For many years past I have never dared to rely on even a days continuance of my life; and I never expected to live beyond my eightieth year."

Sir Alfred Stephen - 1893.

It seemed in April 1890 that at last Sir Alfred Stephen would succeed in getting the Divorce Extension Bill through both Houses of Parliament, and when he did succeed, the Secretary of State must surely give the Bill to the Queen, in the light of the Royal assent being granted to the Victorian Bill. On numerous previous occasions it had passed both Houses, and its promoters were confident. These hopes were to prove illusory, and in 1890 the Divorce Bill was eventually once more halted by prorogation, after its progress had been interrupted by a completely outside event.

Stephen had not been idle in the months since the Bill had last been introduced. He wrote to his daughter Virginia in March, "I have just finished an article, written for publication in a Review, which - requiring as it did great care & accuracy - has cost me a world of trouble. Sho, it be published you will hear of it." This article was written in answer to Gladstone's in the North American Review, as he felt that the statesman had put all Christians who supported divorce extension on their trial for disobeying the Divine

Law. Stephen explained to the editor: "It cannot add to the value of my views that I am Gladstone's senior - (I am in fact in my 88th year - ) but it may be some apology for advancing them, that my professional and judicial experience has enabled me to see and feel the evils - and the cruelty - of the existing laws." He sent copies of the two letters to the Rev. Samuel Dike with whom he had been corresponding for some time. Mr. Wright's Report on Divorce for the United States Congress had reached Sir Alfred from two sources. He wrote to Parkes thanking him for it, but "more for the friendly interest which led you to send it. For comprehensiveness & minuteness of detail, embracing the laws of every State in Europe as well as America, - with statistics innumerable, - the work is a most wonderful compilation. It was sent me some weeks ago by Mr. Wright, at the request of the Rev. Mr. Dike, with whom I have been in correspondence.

1. Stephen to the Editor, North American Review, 27 March 1890; Stephen Uncat. MSS 211/2. (typed copy)
"It will be observed, that I confine myself to the one selected topic; that, which in Mr. Gladstone's paper put all the supporters of Divorce Extension, and even those who would restrict divorce to the cause of unfaithfulness only, on their trial. If, as maintained by that eminent person, divorce for any cause is forbidden by Christ, and especially in the case of divorced and divorcing women, there is no question left for Christians, as to either the wisdom or justice of any given divorce law. ... When therefore I read, in your influential and widely circulating journal, from the pen of our great Anglican Statesman, that - on the cited authority of Scripture - we Australian supporters of Divorce, - with those among you who for grave causes equally uphold it, - with the people of Scotland, of Germany, and many other European States, - are violators of Divine Law, which nevertheless we profess to follow, I felt called on to offer through the same medium my defence."

2. Ibid., 17 March 1890.

3. Stephen to Samuel Dike, April 1890; Stephen Uncat. MSS 211/2. (typed copy)
a long time on Divorce subjects — & I hope to make some use of it, on one point, in an article I am writing for the North American Review.¹ It was not published by the North American Review, but appeared more than a year later in a London journal.

The Sydney Morning Herald published a resume of Gladstone's article, and a sympathetic notice about Mr. Phelps, although the critic considered that total prohibition of remarriage would only serve to strengthen immorality, while wondering whether the enormous personal liberty that Americans enjoyed was the reason many of them, although far from being licentious, were so strongly in favour of divorce.²

On 30 April, Stephen introduced the Divorce Bill in the Legislative Council for the sixth time. It was remarkable that any one as old and fragile as Sir Alfred could continue the struggle. Now in his eighty-eighth year he made a last supreme effort, but it was to prove wearing and vexatious, requiring much patience. The minority opposed to the Bill were encouraged by the success of their delaying tactics over the last two years, when the Bill had four times been lost by prorogation, and they hoped to continue their success in the present session.

When Stephen moved the second reading on 8 May,³ he claimed that, after consultation with Mr. Shiels, they had tried to bring the

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3. N.S.W.P.D., 44, pp.215-244, 8 May 1890. (Second Reading)
Bill into line with the Victorian measure so far as possible. There were a few points of difference. Victoria had increased the time for desertion to five years, but they had kept the time at three years. The most important differences were that Victoria had refused to adopt Suttor's amendment, preventing a man or woman from benefiting from the measure if they knew at the time of the marriage that the respondent had already been divorced or was a drunkard. Nor would they accept the provision forbidding the respondent to remarry for two years, which tended towards concubinage, but which would put an end to collusion. Stephen raised few arguments to support the Bill.

Macintosh advised waiting for federation, Knox when moving to delay the reading for six months, quoted liberally from the articles by Gladstone and Phelps. Charles and Salomons had also opposed the bill before Louis Heydon rose to his feet and spoke for four hours.¹ It was a verbose speech, packed with quotations, and not infrequently irrelevant. His reference to the killing of infants in Sparta drew a reproof from the President. The members of the Council were appalled. They only sat on Wednesdays and Thursdays, and not until four in the afternoon. They had a good deal of business to get through, and liked to rise by nine o'clock. In consequence, it was the custom of the House to speak tersely and to the point. Manning even said that if Heydon would tell him when he intended to finish, he would go home to bed, returning in time to record his vote. The inevitable

¹ N.S.W.P.D., 44, pp. 221-244, 8 May 1890. (Heydon)
result was that the debate was adjourned.

When it was resumed on 14 May, W.H. Suttor, making his usual difficulties about his amendment, announced that a woman should be able to get a divorce for drunkenness alone. Garran defended the measure, and wasted no time in observing that Heydon had ignored the courtesies of the House. Manning, counselling that it would be wiser to wait for federation, thought it almost impossible to define what constituted a wife’s neglect of her domestic duties, while some remedy for simple cruelty should be included. When Faucett moved to adjourn the debate until the following day, Salomons tried to get it put off for a week. Stephen was furious as he thought the bill had been stonewalled quite enough. Faucett pointed out that he had never yet had an opportunity to speak on the Bill. Manning took the House to task: "I myself am an old man, and if I had charge of a bill, I should think it rather cruel if there were delays in the passage of the bill which were not necessary." After a good deal more wrangling the debate was adjourned until the next day, on a division.

An undated letter from Stephen, probably written that night, shows the strain he was under.

When I was obliged to decline yr friendly invitati^n for yesterday, because of my expected Parlmytry duties on that evening, and you then good-naturedly substituted to-day, I little thought it wo’d find me still in the same trouble—and moreover with impaired strength, the result of a fatiguing and vexatious debate of five hours. I dare not

1. N.S.W.P.D., 44, pp. 367-382, 14 May 1890. (Second Reading, cont.)
2. Ibid., p. 380. (Manning)
abandon the duty before me — and I could not discharge it after the excursion of the afternoon; however agreeable, I reluctantly ask you & Lady Parkes to forgive me. 1

Faucett got his chance to speak when the debate was resumed. 2

He was opposed to the Bill on strong religious grounds, and thought it a retrograde step to provide for the inherent wickedness of man. W.R. Campbell, provoked into defending the measure, was very severe on all the opponents of the bill. F.B. Suttor also spoke in favour of the measure for the first time. Parliament had to legislate for the people who had gone outside the Church, and for the community as a whole. Bowker managed to produce a new argument against the bill: now that payment of members had been brought in, it should wait until after a dissolution of Parliament and the people had been able to elect their own representatives. Stephen had meant to justify the measure at some length, but kindly refrained when reminded that the hour of refreshment had come. The second reading was then carried by 25 votes to 15.

Such a stormy debate on the second reading boded ill for the bill's progress through Committee. This stage was to go on for many days, descend to personal insult, and to cause the loss of many tempers. Heydon began it on 22 May, 3 with a long diatribe on the undesirability of retrospective legislation. Not content with that, he moved on the fruitful topic of the difficulty of defining domestic

2. N.S.W.P.D., 44, pp. 437-443, 15 May 1890, (Second Reading, cont.)
3. Ibid., pp. 630-652, 22 May 1890, (Committee)
duties. Manning, disgusted, threatened to withdraw his opposition if this time wasting continued. Salomons, supporting Heydon, after Barton, on one of his rare appearances in the House, had called for order, made a savage attack on Stephen, the gist of which was that a Chief Justice had no right to change his mind. Simpson eventually put an end to the wrangling when he said he did not see why people already married should not benefit from the legislation, and the amendment was defeated on division. F.B. Suttor introduced an amendment to increase the period of domicile from two years to three. Simpson soon called for adjournment, which was opposed by Barton. The opponents of the measure walked out before Heydon had finished explaining he had maimed his speech by curtailing it on the advice of the Attorney-General. The bill was counted out.

Stephen's first attempt to get it restored to the paper on 28 May was prevented by Heydon objecting and giving notice of five important motions. This was too much for Sir Alfred, who was unwell the next day. However Lackey succeeded in getting the Bill restored to the order paper. Dangar wanted to suspend the Standing Orders which caused an acrimonious debate.¹ He finally withdrew the motion after being convinced by F.B. Suttor that it was unnecessary, because the new Standing Orders gave precedence to general business over motions on alternate private days. Everyone tried to justify himself for walking out, and denied opposing the Bill in an improper or unparliamentary manner. Salomons claimed that unlike many members, he

¹ N.S.W.P.D., 44, pp. 820-830, 29 May 1890. (Suspension of Standing Orders)
had done a full day's work. He also held that the Herald had not
given an accurate account of what had taken place.

Mr. Heydon's activities in the Council were severely criti-
cised by the Sydney Morning Herald, which had two direct, and two in-
direct leaders and sub-leaders on the Divorce Bill in May.\(^1\) The edi-
tor thought that attempts to talk out a bill were of doubtful value
in the Assembly and out of place in the Council. Despite Heydon's
forlorn hopes, they were optimistic about the outcome, praising the
persistence of Sir Alfred Stephen and Mr. David Buchanan. The count
out was considered an old trick and an unfair one.

The Divorce Extension Bill experienced last night
another of those vicissitudes that seem destined to
beset its somewhat chequered career. ... Having taken
every fair means to state their views, and even somewhat
strained them so far as talking against time may be so
described, the opponents of the bill resorted last night
to decidedly unfair tactics to defeat it. They waited
their opportunity to withdraw from the Chamber while the
House was counted out for want of a quorum. \(^2\)

The Daily Telegraph was also very critical of the time wasting
tactics which "are utterly illegitimate and unconstitutional when
they are used, as they have been in this case, to make the will of
the minority prevail, at least for a time over that of the majority". \(^3\)

Although the Committee stage took three more nights to com-

\(^1\) S.M.H., 1890, 14 May, p. 6; 16 May, p. 4; 19 May, p. 6.
\(^2\) Ibid., 23 May 1890, p. 4.
\(^3\) D.T., 31 May 1890, p. 4.
plete, it did not again take five hours to cover five lines.¹ Various amendments concerning time were made. F.B. Suttor asserted that the supporters of the bill were afraid to say anything lest they should provoke a volume of talk. Things moved more quickly on 19 June:² clause one was disposed of; clause three, preventing a dissolution of the marriage if the petitioner knew at the time of the marriage that the respondent had been divorced, or was a drunkard, and forbidding the respondent to remarry for two years, was struck out. Heydon was permitted to strike out the words in the preamble claiming that the bill was "in the interests of morality and for the relief of unoffending persons".³ When the Bill had been reported with amendments and the report adopted Stephen left the Chamber, leaving Garran to move that the third reading be delayed for a week, thus provoking a fresh storm. It transpired that Stephen had made a compact with Heydon. Dangar was furious; Manning and Burdett Smith defended Stephen, arguing that such an arrangement saved valuable time; Cox, F.B. Suttor and Davies protested loudly against compacts and caucus meetings to carry out business. Garran explained that not only had Heydon promised to stop obstructing the Bill in committee, but also that he would not speak for more than twenty minutes on the third reading. He managed to delay the third reading so the compact was honoured.⁴

¹ N.S.W.P.D., 45, pp. 1064-1084, 5 June 1890; pp. 1289-1312, 12 June 1890. (Committee)
² Ibid., pp. 1469-1476, 19 June 1890.
³ Ibid., p. 1475.
⁴ Ibid., pp. 1476-1481, 19 June 1890. (Delaying the Third Reading)
By the time the third reading came on, Lord Carrington had gone on a visit to New Zealand, and Sir Alfred had taken up his duties as Lieutenant-Governor. He entrusted his precious bill to Andrew Garran, who was eventually to get it through.\(^1\) Garran conveyed Stephens cordial thanks to those members who had assisted him. "He knows well that they did so at considerable personal inconvenience, and he also desires me to thank hon. members cordially for their patience and perseverance and for attending day after day, and night after night, to sustain him in passing this measure."\(^2\) The debate was then adjourned by pre-arrangement with the Attorney-General.

The Bill was opposed by Macintosh, Knox, who was very upset that remarriage was allowed and that the limiting Clause 3 had been struck out, Heydon, Manning, R.D.H. White, Charles, Pigott, W.H., Suttor, and Bowker. Only Dangar spoke in its favour.\(^3\) Heydon was resolved to vote against the measure because he thought that by passing it, the Colony would "commit an act of national apostasy and repudiate its character as a Christian land".\(^4\) He then threw the cat among the pigeons.

And I think that the message conveyed to the House from Government House last night, thanking those faithful members who had, as the hon. and learned member Sir Alfred Stephen, said, 'sustained him' in passing the bill, was in very bad taste; and I did think of taking a point of order as to

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1. N.S.W.P.D., 45, pp. 1736-1738, 2 July 1890. (Third Reading)
2. Ibid., p. 1736. (Garran)
3. Ibid., 1779-1804, 3 July 1890. (Third Reading)
4. Ibid., p. 1793. (Heydon)
whether a member of the House could carry on business here while exercising the functions of Governor: but as I had made a bargain, I did not wish to appear to break out in any fresh place to-night, and I abandoned the idea: still I do not think it is becoming of the Acting Governor to send messages to Parliament, thanking members for their kindness in supporting a measure of his. At all events, the hon. and learned member - if he is at this moment an hon. and learned member, of which I am not sure - may congratulate himself that, at the close of his career, by an extraordinary expenditure of energy and by personal solicitation of individual members, he has succeeded in carrying a measure to destroy the old English purity and sanctity of our homes, to rob the country of its Christianity, and to degrade us in respect of one of the most vitally important and most sacred of all questions to the level of a community of heathens. There may be a majority in favour of the bill, but their victory will be one for which they should mourn. 1

The majority was about to pass the bill "at the request of the hon. and learned member Sir Alfred Stephen". 2 Heydon would probably have got away with these remarks under the cover of parliamentary privilege if he had left the matter there.

Manning was the only other speaker to say anything of interest, raising a point that was perhaps obvious, but had not previously been mentioned. He thought it very undesirable to make a broad division between those who adhered to the Churches and those who did not. Despite the assertions made by Heydon the bill was carried by 26 votes to 21, the largest number of members yet to vote on it. Louis Heydon was now the most vocal member who opposed the Divorce Bill in the Upper House, but the opposition was still being organised by Edward Knox, who acted as an unofficial whip. He received letters from

1. N.S.W.P.D., 45, p. 1794. (3 July 1890. (Heydon)
2. Ibid., p. 1795. (Heydon)
George Thornton and George Campbell apologising for being too unwell to get to the Council to record their votes against the bill.¹

The following Wednesday (9 July) two protests were tabled in the House against the Divorce Bill. The first was unexceptionable, drawn up by Knox,² who included all the usual grounds of complaint.

1. George Thornton to Edward Knox, 3 July 1890; George Campbell to Edward Knox, 27 June 1890; Knox Uncat. MSS.98/9 .. (M.L.)

2. S.M.H., 11 July 1890, p. 3.
Because the proposed extension of the conditions of divorce is at variance with the law of the Christian Church, and would introduce dangerous facilities for the disruption of the marriage tie, impair the sense of the sacredness of marriage, and inflict serious injury upon the domestic and social welfare of the community. 2. Because the alteration in the law of divorce sought to be effected by this bill would be at variance with the law of England, and upon a matter most deeply affecting the morality of the people and the happiness of families, is opposed to the sentiments and feelings of nearly all the religious denominations.

3. Because, by permitting the immediate remarriage of one 'who, during three years and upwards, has been a habitual drunkard, and either habitually left his wife without the means of support or habitually been guilty of cruelty to her', or of one 'who has been imprisoned for a period of three years under a commuted sentence for a capital crime, or who, being a husband, has, within five years, undergone frequent convictions for crime, and left his wife habitually without the means of support; or of one, 'who has been convicted of having attempted to murder the petitioner' (for divorce), 'or having assaulted him or her with intent to inflict grievous bodily harm, or has repeatedly assaulted and cruelly beaten the petitioner,' and who has, on either of these grounds, been divorced - the opportunity would be given to those who have been guilty of the greatest cruelty and sin to repeat their offences on fresh victims of their licentiousness and brutality. And because such re-marriages, coupled with the licence to obtain fresh divorce, would have the effect of encouraging and multiplying divorces, and tend to the moral and social degradation of the community. 4. Because uniformity in essentials, on so vital a subject as that of divorce from the bond of marriage, is of the deepest importance, not only on social but on national grounds; and because a large majority of the people of this colony, sincerely attached to the mother country and to her institutions, is opposed to so grave and undesirable a departure from the marriage law of England.

Louis Heydon tabled his own protest, which was to arouse a storm both in Parliament and in the Press. He asserted that the measure had not been carried on its merits, but by the influence of the member who introduced it; and, that the measure would not have been carried but for the extreme "enthusiasm and devotion to the measure shown by the member who introduced it, and his warm personal canvass and persevering solicitations of honorable members, coupled with his great influence and high position as Lieutenant-Governor of the colony." It was a matter of special protest that while actually

1. N.S.W.P.D., 46, pp. 1988-9, 10 July 1890. (Protest read by Garran.)

"1. Because the passage of such a law, in violation and contempt of the plain commands of Our Saviour Jesus Christ written in the Gospels, is an act of national apostasy and a formal repudiation of the character and obligations of a Christian people. 2. Because in passing this bill this House outrages the wishes and beliefs of a large majority of the people of this colony, who are notoriously opposed to this bill; the Church of England, the Roman Catholic Church, the Wesleyan Church, the Presbyterian Church, and the other principal sections of the people having formally declared themselves in strong hostility to it, and only a very insignificant minority in the community expressing themselves in its favour. 3. Because the great majority of the people of this colony, in particular that conservative and loyal portion of our population whose attachment to the mother country and her institutions is sincere and to be relied upon, have no desire to have forced upon them so grave and objectionable a departure from the marriage laws of England, and they feel that the adoption of such a law is incompatible with the relations of the colony with the mother country, and would seriously weaken the bond which at present unites them. 4. Because this measure has not been carried in this House by reason of its merits, and because it commended itself to a judgment of a majority of honorable members, but by the influence of the member introducing it. The
discharging the duties of Governor, the author of the bill sent down a message from Government House thanking his supporters. Heydon had only been in the Council for a little over a year, besides being, in his early forties, considerably younger than most of the other members of the House. He had already had a good deal of criticism from the Press for not conforming to the customs of the Upper House and for attempting to use there, methods which were acceptable in the Assembly. The opponents of divorce extension had frequently asserted that the bill would never have received the support it had but for the prestige and influence of Stephen. Now the old men were irritated by having to sit up late, by what they considered a lack of courtesy towards their most venerable member, and by Heydon's impetuosity.

1. (cont.) small majority of 26 to 21, by which the third reading of the bill was carried, would, certainly, in my opinion, have been reversed, and the bill have been rejected by a much larger majority against it but for the extreme enthusiasm and devotion to the measure shown by the member who introduced it, and his warm personal canvass, and persevering solicitations of his members, coupled with his great influence and high position as Lieutenant-Governor of the colony. It is specially a matter for protest that, while actually discharging the duties of Governor, in the absence of Lord Carrington, the author of the bill sent down, by the member in charge of the bill, a message from Government House, the night before the final division on the bill, to his supporters in the House, to thank them, as he said, for having sustained him in his efforts to pass the bill."
The following day Heydon's protest was debated - as a question of privilege. Stephen was cheered when he rose to speak; he said that in a conference before he took up his duties as Lieutenant-Governor, it had been decided that Garran would take charge of the bill, and that it would be desirable to thank the members who had attended night after night to support the measure, not himself. No message had been sent, nor did he intend to defend his conduct against the serious imputations that had been alleged. Garran repeated what Stephen had said, read the protest, and moved that it be expunged from the records of the House. To make matters worse, Heydon was not present in the Chamber, giving Faucett an excuse to

1. Stephen, Uncat. MSS 211/3. Stephen, for all his urbanity was extremely displeased by the protest, and his papers contain a typewritten page, headed "Mr. L.F. Heydon's Protest", and dated 12 July 1890, "FIRST; slander of the House, by asserting that the measure was not carried on the merits, and in accordance with the judgment of the majority, but by the influence of an individual. SECONDLY; slander of that individual, a member of the House, by the false assertion that, while discharging the duties of Governor, he sent down from Government House a Message of Thanks to Members, for their support. THE FACTS. FIRST; The measure was fully discussed, in the House and by the Press, for years preceding its adoption; although in the late and present Sessions met mainly by efforts to delay its progress, and wear out the patience and physical power of its supporters. SECONDLY; In point of fact no Message whatever was sent by the member alluded to while in office, from Government House or elsewhere. When the Third Reading was moved, the Lieutenant-Governor had practically ceased to be a Member of the House; but, when asked Dr. Garran to convey the expression of his thanks, for support previously afforded, he was simply a member; and the expression, therefore, was obviously legitimate and single-minded. Whether, under such circumstances, Mr. Heydon stands morally justified or excused, for deliberately conveying to the public an impression, Sir Alfred Stephen had availed himself of his temporary position to influence votes, may safely left to the judgment of honorable and fairly judging men, here and elsewhere."
try to adjourn the debate. Some members considered that their
honour had been impugned by the allegation that they had not voted
for the bill on its merits. The motion for adjournment was lost on
division, and the protest was expunged from the records of the House,
many opponents of the measure going against Heydon.¹

The *Herald* considered that the "Legislative Council was
called upon yesterday to assert its dignity and defend its honour".
The charges laid against Stephen were grave, and the members voting for
the measure were "virtually charged with voting contrary to their
opinions and their consciences and in violation of their oaths".
Had the House taken no action it would have collaborated in a gross
abuse of privilege.² Louis Heydon had an acrimonious argument in the
columns of the *Herald* with A.H. Jacob over the latter's assertion
that Heydon was aware that his protest would be discussed in the
House, and that he had acted "in a cowardly manner" by absenting him-
self. Heydon maintained that his absence had been quite natural.³
On July 16 he moved for an adjournment instead of making a personal
explanation. Even if Stephen had claimed that he sent his thanks to
members for their support of the measure, and not for their support
for himself, he still had thanked them. Obviously Stephen felt him-
sel to be under a deep obligation.⁴ The *Herald* did not think that
Heydon's explanation was in any way satisfactory.⁵

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¹ *N.S.W.P.P.,* 46, 1985-2005, 10 July 1890.
² *S.H.H.,* 11 July 1890, p. 4.
³ *S.M.H.,* 12 July 1890, p. 7. (Heydon); 15 July 1890, p. 7. (Jacob);
  16 July 1890, p. 5. (Heydon)
⁴ *N.S.W.P.P.,* 46, 2083-2086, 16 July 1890.
⁵ *S.M.H.,* 17 July 1890, p. 4.
During these months of struggle in the Legislative Council, public interest reached a height not equalled since the discussions in 1886-7. The Church of England made its last determined stand against the Bill, although Bishop Barry had left the Colony for ever in 1889. He was praised by the Herald for his liberality and tolerance.\(^1\) On the whole the paper considered that his episcopacy had been a success. There was a long interval between his departure and the arrival of the Rev. Dr. Samaurez Smith in September 1890. The controversy started after the Victorian Divorce Bill had received the Royal Assent. The Bishop of Melbourne issued a decree:

> When in accordance with the Act, a decree has been pronounced dissolving a marriage on the ground of 'desertion, cruelty, drunkenness, or conviction for crime', if either party thus divorced seeks to marry again you will decline to officiate at such marriage or to allow your church to be used for its celebration; and where such a marriage has already been contracted you will, however reluctantly, regard the parties thereto as 'coupled together otherwise than God's word allow,' and therefore not joined together by God. 2

These instructions to the Anglican clergy were strongly criticised by the Argus,\(^3\) but their importance lies in the hopes of many Anglican clergymen in New South Wales that they would be ratified by the General Synod when it met later in the year.

The Rev. Dr. Zachary Barry had been extremely outspoken against the views of his own Church since the introduction of the Bill for the first time. He violently attacked the Bishop of Melbourne:

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1. S.M.H., 8 May 1889, p. 6.
2. Stephen Press Cuttings, p. 82.
3. Argus, 19 April 1890, Ibid., p. 82.
I perceive that the Anglican Bishop of Melbourne has fulminated all kinds of pains and penalties against such persons as avail themselves of the relief mercifully offered by the Divorce Extension Act, and especially commands all clergymen to refuse to officiate at their re-marriage, and to treat them when married as living in adultery. 1

He maintained that as clergymen obtained their power to marry from the State, they were responsible to the State for its use. Two days later, he claimed perfect liberty for Anglican clergymen to marry divorced persons, and if the law of God was to be brought into the discussions, "I say that it would be those who God has utterly put asunder, let no man forcibly keep together". 2 The Bishop of Bathurst defended Bishop Goe.

His clergy although they receive from the State the licence to marry, yet in order to be eligible for this, must first have been ordained by a Bishop, and also must obtain from the Bishop of Melbourne a licence to officiate in his diocese. These clergy have all taken the vow of canonical obedience to him. 3

Barry replied in the columns of the Herald, which was publishing all the discussion, that any "attempt to interfere in civil affairs will only make a prelate ridiculous". 4

Canon Selwyn now hastened to the defence of the Church. The controversy that followed was vehement and not particularly edifying. Garran attacked a letter by "Catholicus" for his misuse of words in general, and in particular, for saying that it was dangerous to "distort" the law of God. Even Moses had adapted the law, while the Mor-

1. S.M.H., 15 May 1890, p.7. (Z. Barry)
2. Ibid., 17 May 1890, p.7. (Z. Barry)
3. Ibid., Stephen Press Cuttings, p. 84.
4. Ibid., 22 May 1890, p.8. (Z. Barry)
mons justified polygamy by too literal interpretation of the Old Testament. Selwyn maintained that adultery was sin whatever Garran or anyone else said, and the Divorce Extension Bill "ought to be called the Divorce and Adultery Bill." Stephen inevitably entered the fray with a long article answering the "Ecclesiastical Objections". He denied that all divorce was against the law of God, a view that was so energetically supported by Mr. Gladstone. He mentioned St. Matthew's exception, porneia, claiming that there was no basis to the assertion that the Church of England had never accepted divorce. The Lambeth Conference had, at least inferentially, recognised divorce for adultery. Canon Selwyn claimed that he was totally unable to understand Stephen's meaning, which was rash as it made it quite certain that Stephen would reply. Selwyn was also shocked by the very idea that an adulteress should be permitted to marry her paramour. Stephen did indeed reply, and agreed that Selwyn had misunderstood his argument.

The stated facts were that the Anglican clergy generally, even when divorce for adultery alone was in question, opposed themselves to the general feeling of the community, and to the law of the land; and that now, in denouncing the projected extension of that law, the clergy are in opposition not only to the public feeling, but to the opinions and decisions of their own bishops and divines in the Reformation age, and to the legislation of nearly all Europe.

He considered that the whole controversy rested on the interpretation of the Greek word porneia.

1. S.M.H., 24 May, p. 7; ("Catholicus"); 29 May, p. 8; (Garran)
2. Ibid., 10 June, p. 6. (Selwyn)
3. Ibid., p. 6. (Stephen)
4. Ibid., 14 June, p. 5. (Selwyn)
5. Ibid., 21 June, p. 7. (Stephen)
To mention *porneia* was inviting argument. Zachary Barry was arguing that the word meant "unchastity" before marriage, and that *moicheia* was always used to indicate adultery after marriage; hence to be consistent the Church of England ought not to tolerate divorce for adultery.\(^1\) The traditionists were themselves perverting Scripture by arguing from the perversion. Selwyn, already infuriated by Garran's speeches in the Council, admitted that *porneia* did mean pre-nuptial unchastity, but neither Stephen or Garran would answer his question: "Did Moses say, 'Thou shalt not commit adultery', and did our Lord say, 'Whosoever marrieth her (or him) that is put away committeth adultery'?\(^2\) Neither was prepared to say openly "We throw over Moses, and we throw over Christ".\(^3\) Barry contended that: "Our present law of limited divorce is simply unjust and cruel, therefore it ought to be extended. So long as it involves injustice it is un-Christian and un-Christianlike."\(^4\) Selwyn made two more attacks on the supporters of divorce extension on 3 and 4 July, when he asserted that "it was not possible for a man to be "at one and the same time a faithful servant of Christ and a supporter of an Adultery Extension Bill".\(^5\) It was by these means that Sodom and Gomorrah disappeared. This was too much for the Herald, which devoted a main leader to castigating the Canon, who they claimed suffered from disturbed vision, narrow mindedness, and grave discourtesy to

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1. *S.M.H.*, 2 June 1890, p. 9; 30 June 1890, p. 6. (Z. Barry)
2. Ibid., 28 June 1890, p. 5. (Selwyn)
3. Ibid., 30 June 1890, p. 6. (Z. Barry)
4. Ibid., 3 July 1890, p. 4; 4 July 1890, p. 6. (Selwyn)
his opponents. In a final letter he repeated all his former assertions more wildly than before, and plagiarised the Attorney-General, who had argued that since there were over one hundred and forty new causes of divorce, there were that number of offences liable to a penalty of seven years imprisonment. This resulted in another caustic editorial from the Herald.

Canon Selwyn's address to the Newcastle Synod, as its president, aroused the displeasure not only of the Herald, but also one of the paper's correspondents. The Canon felt that much of the danger to society, arose from the bill being "undertaken in the sacred name of pity for the oppressed". He objected most to the deliberate adultery, which followed from the legalising of re-marriage. He described the supporters of divorce extension as infidels, who had "on their side all wicked and merely worldly men. The devil and his servants never make any mistake as to what they go in for; ..." This provoked the most serious attack yet from the Herald, which interpreted it as condemning the public press as high priests of infidelity, because they were in touch with the world. The editorial went on to accuse the Church of imposing a "tyranny of opinion". Besides which not all humanity had been blighted by original sin. "The preachers of sects who spend their time in wailing jeremiads are publishing, not the world's degeneracy, but their own ineptitude."

1. S.M.H., 4 July 1890, p. 4.
2. Ibid., 10 July 1890, p. 7. (Selwyn)
3. Ibid., 10 July 1890, p. 4.
4. Ibid., 23 July 1890, p. 5.
5. Ibid., 26 July 1890, p. 8.
"A Divorce Extension Christian" took umbrage at being classed in the same category as the Devil.¹

This was almost the end of serious and vocal opposition from the Church of England. The General Synod which met in Sydney was more tolerant than had been expected, resolving only not to permit clergymen to marry divorced persons. Archdeacon Hales of Launceston admitted that if he were a member of parliament he would have voted for the divorce law. "He could not say that the marriage of a divorced person should be blessed by God, but at the same time he would be sorry to say the contrary because he believed that God was more merciful than men."² The Banner, and Anglo-Catholic Review, a new paper, reported that the Primate had trouble keeping order during the discussions on divorce, and that a large number of lay representatives voted against the resolution.³

Soon after his arrival, the new Bishop of Sydney petitioned against the Bill, on the advice of the Standing Committee of Synod. He insisted on prefacing the petition with an expression of sympathy: "Whilst he sympathises sincerely with any who may have to suffer hardship on account of the desertion, drunkenness, criminality, and violence mentioned in the Bill as causes for extending the law of divorce, he considered that the legislation proposed contravenes the

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¹ S.M.H., 25 July 1890, p. 6. ("A Divorce Extension Christian")
² Ibid., 26 September 1890, p. 7.
³ Banner & Anglo-Catholic Review: 1 September 1890; (no pagination)
teaching of our Lord Jesus Christ. ... The petition then followed the same words as previous ones. There were also petitions against the Bill from the Clergy and lay representatives of the Synods of the Diocese of Sydney, (180 signatures), the Diocese of Newcastle (84), the Diocese of Bathurst (67), Diocese of Goulburn (48), the Diocese of the Riverina (22), and from 196 Ministers of the various Christian Churches of New South Wales. Edgar F. Tye and A. McLaren presented a petition in favour of the Bill on behalf of the Australasian Secular Association, similar to their previous one. Samaurez Smith, however, did not enter into any controversy over the Divorce Bill in the press, or even address the Synod on that subject until 1896 when he proved to be a moderating influence.

The Wesleyan Methodists renewed their opposition to the Divorce Bill in 1890. At the Wesleyan Conference in February, the Rev. Mr. Mack was unsuccessful in carrying a resolution protesting against the renewed efforts to pass the bill, but this was reversed at the General Conference in May, which passed the motion:

That this Conference views with profound regret the recent alterations made in the law of divorce in the colony of Victoria. It stands by the plain teaching of the Lord Jesus, and regards as of perpetual obligation the limitation of divorce to the one cause, namely, that of adultery. This Conference, therefore, urges the members and adherents of our Church to resist all such Parliamentary attempts to weaken the divine obligations of the marriage tie, and, where such attempts may for a time have succeeded, to seek in every

2. Ibid., pp. 753-759.
legitimate way to obtain the repeal of such mischievous legislation.

TheWeekly Advocatehad only one leader on the subject of divorce in 1890, in which it deplored the apathy with which the new divorce legislative proposals were regarded by all the Churches, except the Church of England.

There is perhaps no subject which is being more widely discussed in England and in the United States of America than this. Writers of almost every type are urging their particular opinions, and it is instructive to mark the relation which is invariably apparent between the views expressed on the marriage institution and the attitude which writers take in regard to the Christian religion. In fact it is difficult to escape the conviction that the remarkable views held by some men in regard to marriage, and still worse by some women, is really a revolt against the Christian religion itself. ... Such views, of course, can only be regarded as a sequel to the moral decadence which is all too palpable in the writings of those who advocate the substitution of what they call free love and terminable contracts for the indissoluble bond of holy matrimony.

The Advocate, which admitted the sincerity of the promoters of the measure, feared that they could not have looked at the results of such legislation in America, quoted from Mr. Phelps's article in Forum, and called for a stand by all Christians.

The Editor of the Herald received and published more letters on the divorce question in 1890 than in any year since 1886. Forty-six letters appeared in all, twenty-five supporting the bill, and twenty-one against, including those of Canon Selwyn and Zachary Barry.

2. Ibid., 28 June 1890, p. 120.
They began in mid May, and continued till the end of July. William F. Tucker, Canon of the Diocese of North Queensland, wrote on the fruitful subject of porneia. A Greek scholar himself, he questioned Stephen's authority for his interpretation. ¹ H.S. Millard and "Christianus" both considered that porneia meant unchastity. ² Almost all the letters repeated the old arguments and raised the old issues. Fitzjohn Hall wrote two letters on the divorce of Napoleon and Josephine. He also made a personal attack on Canon Selwyn. The clergy should direct their attention to bringing back erring sheep, "and how that is to be accomplished by never saying another word to them is a mystery which Mr. Selwyn alone can explain." ³ L. Fane De Salis may not have been well enough to record his vote in the Legislative Council, but he managed to write a long letter. Apart from his religious objections to the measure, he disliked the power of divorcing being handed over to "insatiable lawyerdom - a profession which needs as much reform now as did religion four centuries ago". He worked it out from Knox's statistics that over the next 18 years there would be 31,800 divorces, if they continued to increase at the same rate, which would mean £15,900,000 in law costs. Furthermore, he made the startling suggestion that where the population was dense (as in Sydney) marriage should be forbidden except in the clear case of fitness. He went on to say that "forcing a Catholic into divorce

1. S.M.H., 23 June 1890, p. 3. (Tucker)
2. Ibid., 2 July 1890, p. 4. (H.S. Millard and "Christianus")
3. Ibid., 2 June 1890, p. 9; 5 June, p. 7; 8 July, p. 8. (Fitz-John Hall)
is equally tyrannical with confining a Jew prisoner solely to pork. Remember the old story of the greased cartridges in India.1 Edward Skinner again wrote a lucid letter commending the measure in the interests of "justice and mercy".2 "Fiat Justitia Ruat Coelum" pleaded the agnostic point of view.3 J.C. Hoge thought the supporters of the Bill should add "an Act to make Christianity comfortable".4 The most interesting letter came from "Umpire". He sent a quotation which is written in large letters on the principal gate of Agra in Hindostan.

In the first year of the reign of Julef two thousand couples were divorced by the magistrate of this city by mutual consent. The Emperor, learning this fact, was so indignant that he abolished the law of divorce. During the following year, the number of marriages in Agra was less than usual by three thousand. Three hundred women were burnt for having poisoned their husbands; sixty-five men were burnt for having killed their wives; and three million rupees' worth of furniture was broken to pieces in private dwellings. The law of divorce was then re-established — and nearly time.

The correspondence in the columns of the Herald was rarely illuminating, for although clergymen frequently wrote letters against the bill, those whom the bill was intended to relieve seldom did so.

At the end of 1890 one sufferer did.

The principle objection to the Divorce Amendment Act seems to be that the public do not cry out for it. And why? Because the chief sufferers are of necessity silent sufferers; dumb because of their sex, which precludes them

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1. S.M.H., 2 June 1890, p. 9. (L. Fane De Salis)
2. Ibid., 3 June 1890, p. 8. (Skinner)
3. Ibid., 3 July 1890, p. 4. ("Fiat Justitia Ruat Coelum")
4. Ibid., 25 June 1890, p. 3. (J.C. Hoge)
5. Ibid., 24 May 1890, p. 5. ("Umpire")
from making their woes heard in public. From time immemorial women have depended on the chivalry and championshhip of the stronger sex to obtain them such privileges as they have gained. And now, in this vital question, we must wait, voicelessly, patiently, anxiously, till our Champion's efforts are successful or otherwise. 1

An impetus was given to the discussion of the whole question of marriage and divorce by the first Australian performance of The Doll's House by Henrik Ibsen. The Telegraph and the Bulletin made much of the play's "unconventional" ending, when after the sudden removal of the causes of dissension, Nora, believing physical union without spiritual union to be immoral, deserted her husband and children. The Telegraph considered that the marriage question was being regarded more realistically every day.

This is the standpoint from which popular writers like George Eliot and Mona Caird have recently educated the British public to contemplate the conjugal relation, and each successive change in our marriage laws seems to indicate a further recognition of the influence which this sort of literature exercises upon the thought of the times. The work of the great Scandinavian philosopher Ibsen is one of the most remarkable contributions to the literature of this school that has ever been offered and its presentation to an Australian public at a time when the marriage question is again made the subject of heated public discussion between the people and the Churches naturally excites interest. 2

All critics were agreed that modern audiences who came to the theatre to be amused, and not to think, would fail to understand the depth of the philosophical drama, or be shocked by Nora's seemingly immoral behaviour. 3 The Bulletin had articles on whether Nora's conduct

1. S.M.H., 10 December 1890, p. 8. ("En Avant Australie")
was reprehensible or not, for three weeks. The paper published an interesting letter from Fred. J. Broomfield who argued that it was not the purpose of the theatre to amuse.

Everywhere among the most civilised communities is evidenced a vague unrest at the position held by women in the marriage relationship. Everywhere legislatures have brought under consideration the necessity of extending the limitations of the divorce laws, and during the past year or so Europe has been stirred to its social depths by the performance of Henrik Ibsen's *A Doll's House*, and more recently by the publication of Tolstoi's *Kreutzer Sonata* and the alleged awful drama by the same author, *La Puissance de Ténèbres*, produced simultaneously at Paris and St. Petersburg. All these works deal with the marriage problem as it is presented in modern highly-civilised and conventional society. ... Ibsen, on the contrary, cynic, enthusiast, and reformer as he is, sees ahead to a possible perfectability attainable only by the wholesale demolition of conventions, the elevation of labour, and the freedom, mental and moral, of women.

In the light of the discussion that went on in Sydney during the winter of 1890, providing a background for the battle in the Legislative Council, it is perhaps surprising that the Divorce Extension Bill was not passed that year. It had its first reading in the Assembly on 3 July. Before the second reading took place, chance in the form of the great maritime strike, intervened. In August the strike, which brought out marine-officers, seamen, waterside workers, miners, transport workers, and shearers for periods of two weeks to two months, began. It was not only momentous in extent but raised fundamental social issues. Although the strikes were decisively defeated, they occupied the full attention of the Government and the Legislative Assembly. Even Stephen was more interested in proposing

himself as a strike mediator.\(^1\) By October lack of funds, the em-
ployment of non-union labour, the increase of the police force from
559 men to 3,952 to control picketing, and the army being sent to
the coalfields, slowly brought a return to order.\(^2\)

A further problem presented itself. At the end of October
Joseph Palmer Abbott became Speaker, and some one had to be found
to take charge of the Bill. Stephen implored Parkes to take charge
of the bill himself:

Whether in your capacity as Prime Minister, or as a
Member of Parliament simply, or as a friend — in each and
all of these — you are now addressed by me; and I earnestly
ask that you will undertake the conduct of the long-pending
Divorce Bill — so that it may at last in this session become
law. I am no longer young; and could not expect con-
tinuance of strength, to conduct the great measure elsewhere,
But is there not the constitutional principle of self govern-
ment yet to be vindicated? — Or have we forgotten that Bill
of 1887 was passed here and rejected? 3

Parkes declined. Eventually Abbott entrusted the Bill to Mr. Frank
Smith,\(^4\) who appeared to lack the position of Abbott and the persis-
tence of Neild. Despite another request to Parkes, which contained
a faint threat, the bill was not brought forward until 5 December.

An earnest appeal. — If it be not imposing additional
work, — unfairly asked of you, — I entreat your aid, all-
powerful if given, in the getting a hearing for the Divorce

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1. S.M.H., 15 October 1890, p. 7.
2. Robin Gollan: Radical and Working Class Politics, Melbourne
3. Stephen to Parkes, 31 October 1890; P.C., A904, p. 338 (M.L.)
4. Stephen to Creed, 15 March 1891; Creed MSS, (Correspondence) A680.
   Stephen had evidently not met Smith in December. "And I want to
get you & Dr. Garran some day to lunch with me — meeting Mr.
Smith M.P. on the Divorce Bill. — Abbott entrusted it to him —
but as yet I have not personally his acquaintance."
Bill. - passed by yr House six times - by our's five times - & by Victoria in support of this Colony, almost word for word. - I know what yr views are. If not favourable, I sho. not intrude mine. But Lord Carrington is going. - Ought the "Assent" to be left to his Successor, or to me? -1

Stephen, rationaliser that he was, was quite capable of deciding that as the Victorian Bill had received the "Assent", he was entitled to give it to the New South Wales Act, as no new principle was involved.

When the Divorce Bill was finally brought forward to its second reading on 5 December, it was an unruly debate, punctuated by frequent interjections. 2 Parkes, unwilling to take charge of the Bill himself, nevertheless made a warm speech in its defence, and stressed the constitutional principle at stake.

In the present case, it is really incumbent upon us, every man amongst us, whether Protestant or Roman Catholic, whether in favour of the law of divorce or not - it is incumbent upon us, in the present state of circumstances, to send this bill to Westminster, as a protest against the interference with our rights under the constitution by a mere secretary of state. 3

Copeland accused the Premier of blowing hot and cold over Imperialism, and if he wanted to "cut the painter" and "paddle our own canoe", 4 then he should say so. O'Sullivan was in full flight. The Bill was also opposed by Gould, Molesworth, Seaver and J.H. Young, who made serious imputations against Stephen. It was strange that after all the hard cases he had experienced on the Bench, he did not take up divorce extension until after he had opposed Buchanan's Bill. "It is

1. Stephen to Parkes; (undated) c. 1890; P.C.A 928, p. 116. (M.L.)
2. N.S.W.P.D., 50, pp. 6017–6052, 5 December 1890. (Second Reading)
3. Ibid., p. 6025. (Parkes)
4. Ibid., p. 6031. (Copeland)
quite likely that he has been approached, or that still harder
cases have come to his knowledge. Or perhaps someone in whom he
took a particular interest was concerned in a case which was thus
brought home to him with greater effect."¹ The Bill was supported by
Dibbs and Cullen, reluctantly by Levien and Wardell, who seemed to
have been convinced by the arguments put forward by the supporters,
and erratically by Haynes, who pressed for adjournment, then railed
against the law which made children born out of wedlock illegitimates.
The opponents of the bill for once wanted the debate to go to a divi-
sion. Parliament was now meeting five nights a week, and the debate
was taking place on a Friday night, when all the country members
went home. However, when it came to a division on the question of
adjournment, there was no quorum. There was no chance of restoring
the bill to the order paper as Parliament was to be prorogued on
20 December, and it would have been talked out.

In a sense, despite the loss of the Bill in 1890, the
struggle with public opinion had been won. Even the Church of Eng-
land, apparently thinking the proposed legislation was inevitable,
offered no further opposition, and there was no more controversy in
the correspondence columns of the Herald, except between Dangar,
O'Sullivan and Stephen. Outside events were once more to play their
part in forcing Parliament to deal with the question in a serious
manner. The Assembly was severely criticised by the Herald for the

¹. *N.S.W.P.D.*, 50, p. 6045. (J.H. Young)
unfair opposition the Bill had met with in all its vicissitudes.

The fact is in part to be explained by saying that it is a private measure. Members frequently profess a high sense of the value of the days reserved for private business, and object to any encroachment upon them; but in practice there is as little economy of time on private days as on Government days. Probably there is less. Perhaps if this bill had been a Government measure it would have fared somewhat better. But experience shows that it would be hazardous to make too sure of that. This bill, however, could not have been introduced as a Government measure, because there is too marked a difference of opinion in the Ministry upon it, and the subject is eminently one to be dealt with on its merits, and not on party lines.

The divorce question in 1891 was to take on a different shape. Although the press was to campaign for divorce extension, it was made clear by the attitude taken to the Parnell divorce scandal that it did not look kindly on the fact. The New South Wales papers were as censorious as the English, which were having one of their attacks of "nonconformist conscience". It was not only that Parnell had been found guilty in a court of law of a "grave charge of immorality", but that the leadership of a nation was at stake. Those in the struggle for power ignored the fact that his liaison with Mrs. O'Shea was well known long before it was dragged through the mire of the Divorce Court. O'Shea's scandalous treatment of his wife was

1. S.M.H., 10 December 1890, p. 6.
2. Charles Stewart Parnell, leader of the Irish Nationalist Party in the House of Commons, was cited as co-respondent by O'Shea, who had neglected his wife for ten years at least. Gladstone could not accept it, although he must have known about the liaison, which was common knowledge.
3. S.M.H., 4 November 1890, p. 4; 20 November, p. 4; Sydney Mail, 29 November, p. 1194.
5. S.M.H., 4 November, p. 4.
completely ignored. Two New South Wales politicians who were in divorce scandals at about the same time fared no better. Alexander Hutchison, prominent in the temperance movement, committed bigamy, and long after he had returned to his first wife, the second petitioned for a divorce, which was unnecessary as the marriage was void. He was called on by his electorate of Canterbury, at a public meeting, to resign, which he refused to do, but did not offer himself for re-election.\(^1\) Myles McRae's divorce suit went on for months attended by the maximum publicity, and was seen as another example of the degeneracy of parliament. His wife sued for divorce on the ground of adultery, after he had not only seduced a girl of 17, but done so "within the chaste precincts of Parliament House".\(^2\) After his wife got her divorce, the girl sued McRae for breach of promise. He did stand for re-election for Morpeth in 1891, but lost.\(^3\) Another item of interest to the scandal mongers was that Charles Bannerman, the well known cricketer, appeared on remand on a charge of wife desertion.\(^4\)

A Victorian, John Lothian Robson, published a novel, "Till Death us Sever; or "What God has Joined together let not man put asunder!," which was reviewed in the *Sydney Quarterly Magazine* in December, 1890. The reviewer considered that the author brought out the contrast between Christian profession and Christian practice when

4. Ibid.: 21 May, 1890, p. 4.
the hero, Lorraine, forced his wife to live with him. But Mr. Robson in pointing his moral that the world was harder to a female sinner than to a male one, had a different effect on the reviewer to what he intended "Mr. Robson has written a strong argument in favour of divorce."

Robson would certainly have been displeased for in 1892 he criticised Mrs. Craik, authoress of John Halifax, Gentleman, for her advocacy of a wife having the right to leave her husband in cases of "confirmed drunkenness, evil courses of any kind, ingrained lack of principle, and violent temper which is akin to madness, and equally dangerous." Robson thought the only solution lay in the Mosaic Law with the death penalty for adultery, which was treason against society.

During the first half of 1891 parliamentary conditions were unfavourable for introducing the Divorce Bill. Stephen, with great reluctance, resigned from the Legislative Council in February of that year. He told Parkes that it was with "regret" that he could not accept his offer of a seat in the Council. "On many grounds, my age and health being the chief, I feel the decision to be necessary. The last session was a very trying one to me: and my medical advisors think that I ought not to incur the risk of a second." For the

2. Ibid.; March 1892, pp. 69-75; p. 70; John Lothian Robson, "The Constancy of Woman".
3. Stephen to Parkes, 4 February 1891; P.C. A918, p. 239.
He wrote again to Parkes on 9 February: "You may well be assured that if I could with safety have remained at my post I should gladly have continued there. But I could not have sat in any assembly without endeavouring to do my duty there - and I feel that its performance would have been too much for me." A928, p. 84.
first time since 1886 no divorce bill was introduced at the beginning of the session in March. Other issues seemed more important; The Herald had called Parkes weary in 1889. Politics were confused for much of 1891, and Parkes was an old man losing his grip.

Although there was no divorce bill before Parliament, the Sydney Morning Herald waged an editorial campaign for its reintroduction. The first opportunity came with the Jackson case in England. Despite a court order for the restitution of conjugal rights, Emily Jackson refused to return to her husband, who had deserted her two days after her wedding, and took out a writ of habeas corpus, after Jackson with two friends had "seized on her coming out of Church, forced her into a carriage, drove her to his house, and retained her there".1 The Lord Chancellor, Lord Esher, and Lord Justice Fry sitting on the Court of Appeal had unanimously set her at liberty. The Herald thought this provided a new argument in favour of divorce extension.

In June the paper commented on the success of the Victorian Divorce Act. Even if the new increased figures represented the normal number of divorces (rather than working off the backlog,) it would only confirm that there was a public need for relief.

Our Victorian friends reaped the benefits of our repeated efforts in this direction, and have anticipated us in the enjoyment of this humane form of legislation; and there are, no doubt, quite as many in New South Wales who are painfully

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1. S.M.H., 4 May 1891, p. 4.
and patiently awaiting the time when the exigencies of party politics may allow the opportunity for another, and it may be hoped successful, effort to place an amended Marriage Act on the Statute book."

At long last the article written by Stephen in answer to Gladstone was published, not in the North American Review, but in the London Contemporary Review. "The Law of Divorce", which was republished as a pamphlet in New South Wales, was the most widely circulating and also the most scholarly of Stephen's articles on divorce. He began by taking issue with Gladstone over the latter's contention that in Mark and Luke divorce a vinculo was meant, while in Matthew and St. Paul their exceptions only referred to judicial separation; "the conclusion is irresistible, Mr. Gladstone being the interpreter, that judicial separation equally with divorce proper is forbidden by our Saviour". Nevertheless Stephen was more concerned with Gladstone's assertions that remarriage "was forbidden by the text of Holy Scripture", while the Latin and Anglican Churches "from time immemorial have never allowed re-marriage". The latter could not be proved by a casual dismissal of the Reformatio Legum Ecclesiasticarum, and the Divines of the Reformation.

1. S.M.H., 26 June 1891, p. 4.
2. Sir Alfred Stephen: "The Law of Divorce, a Reply to Mr. Gladstone."
   pp. 1-13; p. 6; p. 7; p. 8.
3. Ibid., p. 6.
4. Ibid., p. 7.
5. Ibid., p. 7.
Stephen, of course, pointed out that the true meaning of 
porneia had not been settled by the learned. He maintained that
St. Matthew's Gospel had originally been written in Hebrew, but the
entire text had been lost. The Authorised Version translated
porneia as adultery, the Douay version, by fornication; and the Jews
had been able to put away their wives for "some unclean thing".
Stephen thought it might be translated as "unfaithfulness", and un-
faithfulness need not be of merely one kind, of the body; persistent
drunkenness, brutality or desertion were equally unfaithful to the
marital tie. When Christ repeated His words on divorce to the Dis-
ciples, He added, "All men cannot receive this saying, save they
to whom it is given;" and "he that is able to receive it let him
receive it", which Stephen pointed out was hardly "the language of
prohibition, either absolute or qualified, intended as a law for
all nations, for all time".  

He protested above all against the dogma forbidding re-
marrriage to a divorced woman, which arose from a false separation
in a sentence in Matthew 5. It was base to suggest that a woman,
cruelly wronged, was only tempted to remarriage by passion. Stephen
concluded the article by praising the work of Dr. Dike and the Di-

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1. Sir Alfred Stephen: "The Law of Divorce, a Reply to Mr. Glad-
stone."; Contemporary Review.
   Republished as a pamphlet, Sydney p.8.
2. Ibid., p. 9.
The number of divorces is appalling; but they are largely the result of a wandering, mixed, and unsettled population, and they are spread over twenty years, and comprise (it must be born in mind) a population of nearly sixty-six millions of people. The Marriage and Divorce Laws of the United States, we may be well assured, will be thoroughly reformed; but not in the direction of indissolubility, or of sexual unfaithfulness alone. 1

Stephen was very pleased about the publication of his article and wrote to Parkes: "My article on (virtually) the Church of England dogmas on the subject of Divorce is in the Contemporary for June; and I hope you will feel able to congratulate me on having floored the greatest Statesman of the age! - ! - - 2 Both the Daily Telegraph and the Sydney Morning Herald had main leaders on Stephen's article and the divorce question. The Telegraph thought that Gladstone's dismissal of the Reformatio Legum was unworthy of him, but was more interested in modern morality.

To say that a union entered into mistakenly should be held sacred after it has become repellent and injurious to both parties would be understandable enough if we knew that such a course was enjoined by a revelation of Divine law. But no such claim could be put forward as ordinary reasoning with any hope of acceptance. True morality permits the dissolution of immoral marriages. 3

The Herald's main leader was long, and even more flattering to Stephen. He had rendered a valuable service to the cause with his article, which the editor held, displayed "singularly close and consecutive reasoning" that warranted freedom of opinion in interpreting the disputed Biblical texts.

2. Stephen to Parkes; 10 July 1891; P.C., A 928, p. 69.
Sir Alfred's contribution to the *Contemporary* is a masterly rebuttal of the arguments for restriction of divorce, which are founded on disputed interpretations of the sacred text. ... But neither religion nor morality, neither individual or social interests, can be benefited by such an unnatural union; and it is characteristic of the liberal and humane spirit of the colonies that, against this remnant of canonical dogmatism the spirit of colonial life is now everywhere in revolt.

Stephen was much pleased by these comments, and wrote to Parkes:

"I am gratified by the two articles—Telegraph and Herald—again commending the Divorce Extension Bill to public attention. I trust in God that, with your support, it may at last become law—and before I die."\(^2\)

Early in August a mild sensation was caused when Judge McFarland in the Quarter Sessions sentenced Clara Sabina Eden, on trial for bigamy, to imprisonment in the court until its rising. The Judge had been shocked by the first husband's treatment of his wife.

...under ordinary circumstances bigamy was a very great offence, but he held that the duty of a Judge was to have regard to the actual circumstances of the immediate case, and allow consequences to provide for themselves. The facts of the case were that a worthless vagabond married a young girl, and, so far from providing for her support and comfort by his exertions, by his idleness and worthlessness he allowed the furniture of the house in which they lived to be sold over her head. By the same worthless behaviour and cowardly disgraceful idleness he had failed to provide the necessary food for the poor woman, and had in fact left her to starve. Under these circumstances she met a respectable young man, who made her his wife, and who had deposed that during the period of their living together her conduct had been most excellent. ... The poor woman seemed to have been oppressed with mental suffering, and at last made a confession to Rawn, and he, like a good

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and true man, parted from her in kindness and pity. Be the consequences what they might he would discharge his duty let others think of it as they might, and that was to sentence the prisoner to imprisonment in the court till the rising of the Court.

The judgement was greeted with applause.¹

The political situation in 1891 was confused. The Parkes Government was defeated in May; Dibbs, once more heading a minority government went to the country. The result of the June elections completely failed to clarify the situation because of the success of the infant Labour party which had thirty-five members when Parliament opened on 15 July. By the end of the month this number was reduced to twenty-seven. Parkes shakily clung to office without a clear majority until October, when Dibbs took over, supported by Labour, which had changed sides. The Labour members however were divided over the free trade or protectionist issue. In December the party split: ten "Democratic" labour members breaking solidarity to keep the protectionist government in office.² This uncertainty on the political see-saw was the main reason for the delays suffered by the divorce bill. One enormous advantage had resulted from the election of 1891, which was the re-election of John Cash Neild for Paddington.

Neild quickly resumed his charge of the divorce bill, but was unable to introduce it until 12 August.

¹ S.M.H., 6 August 1891, p. 7.
At the beginning of 1890 the North American Review had sent its questions to prominent women for comment. Mary A Livermore and Amelia E. Barr were in favour of absolute divorce for grave causes, while Rose Terry Cooke, Elizabeth Stuart Phelps and the novelist, Margaret Lee were opposed to remarriage, after separation.¹

This discussion among American women on divorce and remarriage may seem far removed from New South Wales. The Sydney Morning Herald supplies one answer.

The Divorce Laws of the United States are usually a chosen field for reference in any controversy regarding the propriety of facilitating the severance of the marriage-tie. In such capacity they commonly become a lesson of instruction or a horrid example, according to the pre-conceived opinions of the disputants, and in truth they are not without their practical use for either purpose. ²

Its American correspondent commented that the federal report on statistics proved that the removal of one ground of divorce, did not diminish the total number, but led to a corresponding increase in the divorces on other grounds.

This subject, as we have said, is about once more to engage the attention of our Legislature, and it is not inopportune that an illustration like this has come to hand to show that the extension of the facilities of divorce does not necessarily create a demand for divorce, but may be merely a relief from a state of things that is productive of great individual suffering and a menace to the general welfare. ³

In a dispute in the columns of the Herald, both Stephen and

3. Ibid..
O'Sullivan revealed that they were both well aware of the discussion of divorce in the pages of the *North American Review*. The passage of arms began when Dangar wrote to the *Telegraph* commending Judge MacFarland for his clemency in the bigamy case, and inquired if that unhappy young woman was one of whom O'Sullivan claimed to speak for, and then added deliberate provocation: "Is it possible that any Christian man or woman in New South Wales can be so priest-ridden or blinded by religious prejudice as to shut the doors of the Divorce Court against such a case as that."\(^1\) O'Sullivan immediately replied by instancing the petitions from women and Protestant clergymen. He then quoted farcical grounds of divorce in America, taken from Carroll D. Wright's report. "The ablest men and women of the Anglo-Celtic race are now denouncing loose and licentious laws of divorce." Inevitably he quoted Gladstone's dictum that re-marriage destroyed the family "root and branch", and referred directly to the discussion in the *North American Review*.\(^2\)

Stephen had followed the dispute closely, and decided that it was time he intervened in defence of American morals.

As to America, I am in a position to deny that there is any such movement as Mr. O'Sullivan suggests. The reaction

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1. *D.T.*, 7 August 1891; Stephen Cuttings, *p.j.* (Dangar,H.)
   1. Plaintiff states that she is subject to headache, and cannot stand the smell of tobacco.
   2. Defendant cut my bangle off by force. 3. My husband would never cut his toenails, and I was scratched every night. ... 1. Plaintiff's wife said, 'you are no man at all.' ... 3. The wife pulled the plaintiff out of bed by the whiskers,
has been exclusively against its loose extremes found in some of the laws in that great continent and occasionally in their worse than loose administration.

He quoted at length from *American Commonwealth* by Mr. Bryce, M.P., for Aberdeen and Regius Professor of Civil Law at Oxford. He recommended that O'Sullivan should study the records of the courts and police.

every year increases the number of victims to marital abandonment and cruelty, for whom the law at present affords virtually no relief. Last year there were no less than 100 Protection Orders to wives granted by the Supreme and District Courts alone. In previous years the number was slightly in excess; and by-and-by the accumulation—for which your opposition alone is responsible—will be charged on the Divorce Court as a crime.

O'Sullivan replied the next day. He repeated that he had strong social reasons for opposing any extension of the law as well as religious ones. He then cited more frivolous grounds of divorce in America.

The divorce laws of the United States have simply degenerated into a burlesque, and are now the objects of ridicule and scorn of the civilised world,... Sir Alfred does not propose to legislate for 'mental anguish', but when he has passed away some more radical reformer may make such an effort.

The 328,711 divorced wives would not have remarried and in all probability have drifted into prostitution. He then quoted from three American ladies, Margaret Lee, Amelia E. Barr, and Rose Terry Cooke. If there was no movement against divorce, why did the Ameri-

1. S.M.H., 13 August 1891, p. 7.
2. Ibid., (Stephen)
3. Ibid., 14 August 1891, p. 8.
can Congress call for a report, why was the Divorce Reform Association so active in New England, why did Mr. Phelps speak out, and why all the controversy in the North American Review?

Before Stephen could answer this O'Sullivan had another
letter in the Telegraph criticising their leader attacking him for posing as the champion of the women of New South Wales. The Daily Telegraph took strong exception to O'Sullivan appropriating to himself the role of championing the rights of women, and was extremely doubtful if the women of New South Wales would thank him. It was also an insult to their conjugal virtue. The editor pointed out that under the new Victorian Act wives as petitioners have outnumbered husbands. The Telegraph then referred to a case in England to emphasise the need for extending the grounds of divorce. A lady had petitioned for the annulment of her marriage on the ground that she had been terrorised into it by the threat of suicide. Finding she was not as rich as he had thought, her husband deserted her. The Court dismissed the appeal, though it would have granted it, had he pointed the pistol at her head instead of his own.

Stephen could not let O'Sullivan's reply go unanswered. He quoted from the Imperial and Asiatic Review on the lack of protection afforded to women under English law, and the cruelty of their divorce laws. English wives who had been deserted could not sue under the law for wrongs however great. The wife had at least some protection in the colony. Stephen soon published these letters as a pamphlet

1. D.T., 17 August 1891, p. 3.
2. S.M.H., 18 August 1891, p. 6.
called "Wives and their Friends," and sent several copies to Dr. Dike.¹

The Telegraph was still in the fray, and published another editorial in which Thomas Walker was dubbed a "Lesser Quixote" for springing to the defence of deserted wives. The editor thought his suggestion that prisoners doing time for failing to provide maintenance for their wives, should be employed at union rates while in prison, and the money given to their wives, was ridiculous and well on the road to State socialism.² During all this discussion in August 1891 there were but two letters to the editor of the Herald on the subject.³

The second reading of the Divorce Amending and Extension Bill came up on 8 September.⁴ Neil's only new point was that the 1887 Divorce Bill was now of historical interest being the last bill which failed to get the royal assent. O'Sullivan reiterated all the old arguments used against divorce against a background of repeated interjections from J.D. Fitzgerald. He maintained that the persistent opposition to the bill had been justified by the modifications made in it. Cotton was "unable to understand the opposition to the bill from a democratic standpoint, from a moral standpoint or from a

¹ Dike wrote to Stephen in June 1892 to send him a paper, and, belatedly, to acknowledge the receipt of Wives and Their Friends. He promised to put some of his copies in the Boston State Library. The Rev. Br. Samuel Dike to Stephen, 24 June 1892, Stephen, Uncat. MSS 211/3... (M.L.)
² D.T. 19 August 1891, p. 4.
³ "Spes", in favour extension, 22 August 1891, p. 13; "Omega", in favour, 27 August 1891, p. 3.
⁴ N.S.W.P.D., 53, pp. 1511-1531, 8 September 1891. (Second Reading)
Christian standpoint. Cotton was the only man to say explicitly that he was an advocate of female suffrage, although other members urged that the passing of the bill should be delayed until it had been granted. The measure on this occasion was opposed by Molesworth and Gormley, and supported by Torpy and Cullen, who accused O'Sullivan of making exactly the same speech as he had previously delivered to the House. At this stage E.B.L. Dickens moved for adjournment, which was carried on division by 30 votes to 18. The Sydney Morning Herald was furious. Even allowing for accidents which had dogged the bill, "it was obvious that the chief cause of failure is to be found in the tactics of the minority opposing the bill." It was disgraceful that the debate, which was a dull repetition of stale arguments, should be adjourned without a division.

There is a point beyond which the continuance of discussion is subversive to the very objects for which the Legislature was created, and that point is reached when talking is prolonged, not with the view of influencing a vote, but with that of preventing the taking of a vote, and with the knowledge that if a decision can be avoided to-day the to-morrow for coming to a decision may never arrive.

The political situation was now such that there was little chance of resuming the debate for some time to come. The Parkes Government fell in October leaving Bibbs uncertain of his majority, which depended on the Labor vote. Meanwhile the shocking case of Freeman v. Freeman enabled several people to keep the public aware

1. N.S.W.P.D., 53, p. 1523, 8 September 1891. (Cotton)
2. S.M.H., 10 September 1891, p. 6.
3. Ibid.
of the need for reform. Freeman had twice pushed his pregnant wife down a thirty-five foot deep well, fractured her cheekbone with a whip, and locked her in a damp cellar in winter with her three children, one an infant in arms which had nearly died of cold. Mr. Justice Windeyer once more used his judgment as a means to attack the law as it stood. The case

was a shocking example of the inhumanity with which a woman might be treated. Yet the law in its present state allowed no remedy unless she could prove adultery also. The petitioner had been subjected to brutal violence; she was absolutely starved until she became so weak that she could not move. Throughout it all she had behaved towards her husband in the most angelic manner. If some of those who were opposed to the reform of the divorce laws would only attend in that court and hear some of the cases, they might perhaps think they had sufficient grounds for changing their opinions.

Windeyer found the adultery proved.

The Herald did not miss the opportunity of writing another leader pressing for reform. Had the unfortunate woman not been able to produce the proof of adultery

... can anyone honestly say that either religion or reason would justify the continuance of a bond that made it compulsory on her to live with such a man, to love, honour, and obey him? ... And could anything be more calculated to alienate men's hearts from religion than for men to invoke its solemn sanctions for riveting the chains of such tyranny, and tell a poor tortured victim that Christianity forbids her to have any deliverance but through the portals of the grave.

Violence, especially when it ended in murder, was always

sensationally reported in the press, and there was rarely a day in

1. S.M.H., 18 November 1891, p. 5.
2. Ibid., 19 November 1891, p. 4.
the Quarter Sessions or Police Courts when some man was not charged with assaulting his wife. There were nearly as many cases of bigamy, which usually arose from unhappy marriages and desertion. In spite of the protection afforded by the Deserted Wives and Children Act and the Married Women’s Property Act, the problem of deserted wives was causing grave concern to all those interested in social welfare. Under the Deserted Wives and Children Act a man who deserted his wife and children for thirty days and left them without the means of support could be prosecuted, affording the wives some protection in theory. In practice deserting husbands were difficult to trace, for there was no machinery to deal with them if they absconded interstate, or overseas. Granting that the husband could be traced and charged, there was no guarantee that he could or would pay maintenance. If he was impoverished or bankrupt the Court could sentence him to three years imprisonment, but if this was done the unfortunate wife was almost worse off than before, because she still would not get any maintenance, and worse, she was not only deserted but the wife of a gaol-bird, without the right of divorce. Consequently many wives were reluctant to prosecute their husbands. A brief sub-leader in the Sydney Mail in 1890 expressed surprise and approbation when a man was sentenced to four months imprisonment with hard labour for wife desertion at the Wagga Assizes. Convictions for this offence had not been frequent, which was not explained by the rarity of the offence.1

1. Sydney Mail, 12 April 1890, p. 800.
The reports of the Benevolent Asylum show clearly that the problem was increasing. Edward Maxted, Manager of the Asylum, presented a special report to the directors of the Benevolent Society in 1886.

The number of deserted families who have received relief amounts to 55 women with 171 children. It is to be regretted that where action has been taken in the issuing of warrants against the deserters, the results have not been satisfactory in the matter of bringing to justice men who, in the majority of instances have been addicted to habits of intemperance and have left their families under conditions of extreme destitution and distress. The society has also under relief, 18 women with 51 children – cases in which the male heads of the families are undergoing various terms of imprisonment, and where the Society has found it absolutely necessary to extend a helping hand. The sudden removal of these men to prison has in many instances left the homes in a deplorably destitute state.

The position was much the same in 1890, although Edward Maxted had begun to give details of distressing cases: one particularly brutal case concerned a young woman with two children whose husband

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1. The Benevolent Society was one of Sydney's oldest charitable institutions. At this time its President was Dr. Renwick, who was also Chairman of the State Children's Relief Board. Although he rarely spoke in Parliament on the divorce issue, Renwick was a consistent and extremely able assistant to Stephen behind the scenes. Examples of the assistance provided by the Benevolent Asylum were set out in a pamphlet published by the Society in 1888. It was increasingly finding it necessary to provide outdoor relief, in the form of grants of provisions and an allowance ranging from 1s. to 5s. a week, which helped widows or deserted wives to keep their family in its own home, and not destroy the natural ties which would be the case if she put her children on the State. E.g. One widow with 4 children made 12s., a week by making 18 pairs of trousers; from the Asylum, she received 5s., 6 loaves of bread, 6 lbs. meat, 1/2 lb. tea, and 1 lb. sugar. D.T., 17 March 1888, p. 9. See also B. Dickey's Ph.D. Thesis, in preparation (A.N.U.) for development of Social welfare in N.S.W. "Charity in N.S.W., 1850-1914".

absconded while she was in hospital, having sold most of the furni-
ture. The same sorry story continued about the difficulties of se-
curing maintenance for these miserable women.

In connection with these cases of desertion, it may be
mentioned that the Inspector-General of Police was re-
cently furnished with particulars of all cases of desertion
on the books, and a special effort was made by the Police
Department to capture the deserters, with but little
success however.

The position was to deteriorate.

Neill tried to resume the debate on the second reading in
December, but was foiled. The Dibbs Government was in a state of
crisis, which was not resolved until the end of the month, when ten
"Democrat" Labour members left the party to support the Dibbs Govern-
ment. All through January everyone expected Parliament to be pro-
rogued within the week. Before the debate was resumed on 8 February,
Jane McCrow was murdered by her intemperate husband at Black Friars. 2
As usual more people spoke against the bill than supported it. 3
Slattery began the attack, and was followed by Garrard, Copeland, A.
Hutchinson (Glen Innes), who thought it would be far easier to
abolish public houses, in which case the men would not go home in a
drunken condition to their wives and beat them, Young, who threaten-
ed obstruction in Committee, Dowel, who said that the bill would
check the disposition to have children - a new argument, and Rose.

1. S.M.H., 15 October 1890, p. 9.
2. Ibid., 16 March 1892, p. 4. (Inquest)
3. N.S.W.P.D., 56, pp. 4924-4939, 8 February 1892. (Second Reading)
The measure was supported by Tonkin, who claimed that Jane McCrow would probably not have been murdered had the bill been law, Alfred Allen, and G.D. Clarke. Neild replied with commendable brevity, but did nothing to ease the acrimonious atmosphere when he asserted that although the bill did not concern Roman Catholics, "it is a remarkable fact that the members of that church have been the greatest, and the most consistent and most persistent opponents of the bill". The bill was carried by 36 votes to 20, which was the largest vote yet, nearly half the House recording its opinion, which was considerable for a Private Member's Bill.

With enormous difficulty the bill was forced through the Committee stage in the face of factious opposition, the same night. The atmosphere was charged. O'Sullivan believed that there had been an understanding not to proceed with the bill that night, otherwise the debate would have lasted longer. Paddy Crick, taking umbrage, announced virtuously that long ago he had promised to help keep a quorum, even if the bill was at the bottom of the paper. Barton was present and proved a tower of strength. Ninian Melville, who had once been bitterly opposed to the bill, resisted all efforts to move him out of the chair, and was resolute in curbing obstruction. O'Sullivan was difficult and his amendment to increase the period of domicile from three years to five was only defeated on division.

1. N.S.W.P.D., 56, p. 4938, 8 February 1892. (Neild)
2. Ibid., pp. 4939-4972. (Committee)
Sharp wanted to omit the words forbidding persons to resort to the Colony for the purpose of getting a divorce, as they were conducive to perjury. Although it was considered a frivolous amendment, it too went to a division. Molesworth wanted to omit the words praying for the marriage to be dissolved, (leaving only judicial separation). Neild was furious: "I am not in the habit of inviting the House to indulge in a harlequinade." Molesworth explained that he was only trying to remove the sting from the bill. This amendment opened up the opportunity to discuss the principle of the bill. Crick was surprised at the child-like opposition, Slattery was prolific, Neild requested supporters of the bill not to encourage the opposition to waste time by making speeches themselves. The Chairman threatened to use the new standing orders and request members to curtail their speeches. Abbott made some severe remarks about obstructive tactics, and two hours later the amendment was negatived on division by 31 votes to 16.

Further amendments were moved, but were defeated on division. Then Willis made a spirited effort to move the Chairman out of the chair; the Chairman refused to accept the motion, and threatened to remove Willis if he kept on interrupting. Proposed amendments and divisions went on, although the opposition was now reduced to seven, until the difficult clause concerning habitual drunkenness was reached. Copeland, Secretary for Lands, claimed it was impossible to define,

1. *N.S.W.P.D.*, 56, p. 4943, 8 February 1892. (Neild)
and baited Melville in the Chair on how much grog would make a man drunk. Barton said it was unseemly for a Minister to argue with the Chair: he was not going to waste time by defining drunkenness. The debate had been going on for five and a half hours by this time. Willis then joined in the discussion. By this time Dibbs was displeased and offered to define an habitual drunkard if Willis would sit down and not say another word. Dibbs then said that a drunkard was a man who got drunk once a week, and an habitual drunkard was a man who was drunk every day. Willis accepted his chief's definition, but he was not going to be lectured by "the Attorney-General or any other brainless Minister". At one-thirty, Willis decided that he wanted his bed, and was certain that there would be a fight in the near future, when the gentleman now sitting with the Premier would be on the opposition benches and trying to slit his throat. (Whose throat remained obscure.) O'Sullivan denied that the opposition was in a comatose condition and proposed to increase the time of imprisonment from three years to five years, which was negatived on division.

After eight divisions and six and a half hours after the bill had entered the Committee stage, the Divorce Extension Bill was reported, without amendments. The report adopted on division by 26 votes to 6. It had been a marathon effort. The third reading was carried the next day, without a debate by 36 votes to 18. O'Sullivan

1. N.S.W.P.D., 56, p. 4970, 8 February 1892.
made a final protest, although he would not oppose the bill any farther, as it was obviously the will of the majority that it should become law. But it would undoubtedly be repealed in five or six years.  

The Herald praised J.P. Abbott's caustic remarks about obstructive tactics.

However respectable may be the motives upon which these opponents act, it is unquestionable that they are inspired by disloyalty to the central principle of representative government: that the majority when clearly ascertained, and above all when it is a permanent majority found existing in one Parliament after another, must rule, and that the minority must bow to the decision.

The Divorce Amendment and Extension Bill was read for the first time in the Legislative Council on 16 February. Andrew Garran, who had so eloquently defended the measure on previous occasions, moved the second reading on 25 February. He paid tribute to the author of the bill.

I am acting practically on behalf of an old member of this House, who was its first President, and for a long time a distinguished ornament of the House, and who is really the author of the bill; but who, by reason of his age and infirmities, is no longer able to be present with us to prosecute this object in person.

Garran's only new arguments were the successful working of the Victorian Divorce Act, and the Jackson case in England, which had decided that a man could not compel his wife to remain in his house.

1. N.S.W.P.D., 56, pp. 5189-5190, 15 February 1892. (Third Reading)
2. S.M.H., 9 February 1892, p. 4.
3. N.S.W.P.D., 57, pp. 5677-5703, 25 February 1892. (Second Reading)
4. Ibid., p. 5677. (Garran)
The law recognised that a wife was not a slave. Garran called for a division, but Heydon rose to his feet, and was permitted to speak. After this courtesy the House was not amused when he launched into a long and tedious speech. Daniel O'Connor, now in the Council, kept calling for the House to be counted. He and Heydon had a duet to the effect that had the bill been originated by an ordinary man, it would never have got a majority. After nearly five hours Burdett Smith accused Heydon of grossly abusing the courtesy extended to him, and that he had been guilty of tedious repetition. The division was then taken, and the second reading was carried by 16 votes to 12.

The Bill was considered in Committee on 3 March, but first Daniel O'Connor moved the adjournment of the House because of the mean action in cutting short the second reading. Heydon again resorted to obstructive tactics moving almost all the amendments. Supported by D. O'Connor, Faucett and Simpson, he tried to limit the bill to persons not previously divorced. His three amendments were all negated on division, but their discussion lasted till twenty past eleven, which was late for the Council to sit, in any case, so on Macintosh's motion the committee was adjourned after a division. Garran successfully moved that the Divorce Bill would have precedence. It was resumed on 8 March. Heydon moved yet another amendment to debar people who had been married for ten years, or had three or more

1. N.S.W.P.D., 57, pp. 6096-6113, 3 March 1892. (Committee)
2. Ibid., 57, pp. 6091-6096, 3 March 1892. (Adjournment)
3. Ibid., pp. 6113-4. (Precedence)
4. Ibid., pp. 6135-6143, 8 March 1892. (Committee)
children from getting a divorce. The Council had had enough of Heydon by this time, and announced that it was prepared to alter its standing orders to give the Chairman of Committees power to halt a member's speech, as the Assembly had been forced to do. Although Heydon considered it "strange that the House should be so enamoured of this bill, that after only a night and a half of debate, it should be willing to part with its own liberties", he promised that rather than curtail these liberties, he would not stonewall or obstruct the bill any more, although he made some bitter animadversions against the press for its comments about the wickedness of stonewalling. He moved one further amendment that "no officiating minister shall be compelled to solemnise a marriage", if either party had had a previous marriage dissolved, and to be liable to no penalty for so refusing. It was negatived on division, but it was important that it was so defeated. In 1937 A.P. Herbert was forced to accept a similar amendment in his English Divorce Bill, which enabled the Bishops to exert sufficient power over their clergy, to prevent even the remarriage of the innocent party in a church, which had been especially provided for under the 1857 Matrimonial Causes Act. For the first time the Legislative Council reported the Divorce Bill without amendments, after a division. A.J. Riley found it necessary to defend his support of Heydon in Committee in a letter to the Herald.

1. N.S.W.P.D., 57, p. 6135, 8 March 1892, (Heydon)
2. Ibid., p. 6141. (Heydon)
4. S.M.H., 5 March 1892, p. 10.
At this opportune moment Edward Maxted delivered a special report to the Benevolent Society about the plight of deserted wives and children. He thought it necessary to bring to the consideration of the board "certain matters bearing upon the ill-treatment and desertion of wives, as I find that this popular vice has become of such magnitude as to warrant special prominence and consideration with a view to inducing legislation for the relief of the unfortunate victims". The cases which had come to the Asylum for relief had familiarised Maxted "with the drunkenness and cruelty of these men before the desertion of their helpless children, and I would therefore venture to suggest that the penalty for the crime is not sufficiently powerful to act as a deterrent". During the previous year, despite the reluctance of wives to prosecute, 130 persons had been imprisoned for desertion, and the men came from all walks of life. Maxted then produced figures from the Police Department and the records of the Benevolent Society for 1891.

Deserted wives and children assisted by the Benevolent Society during 1891, 623; deserted wives and children assisted by the Charity Organisation in 1891, 500; children at present under State control and deserted by their fathers, 486; summonses and warrants issued from the Central, Water, Redfern and Newtown police courts during 1891 against men who had failed to maintain their families, 625; men incarcerated in gaols of the colony for wife desertion and disobeying maintenance orders for maintenance, etc., in 1891, 130.

But these figures only gave a limited indication of the evil because of the reluctance of wives to prosecute. Maxted called for a realisation from the public of the extent of the hardship and suffering of
a "large number of women under the yoke of infelicitous marriages". ¹

The Sydney Morning Herald had a main leader on Maxted's report.

The situation described by the manager of the Benevolent Asylum may well be considered in connection with the Divorce Extension Bill, which now seems likely to pass into law. That measure has been described as a measure of relief. The facts before us show how urgent is the need. It may well be supposed that many of the victims of cruelty and desertion would be restrained by their experience of life from marrying again if they were once set free. But for all that it would be a simple act of humanity to set them free. ²

In the face of this evidence, there was little difficulty in carrying the third reading of the Divorce Extension and Amendment Bill on 15 March.³ Daniel O'Conner spoke at length against it, and it was also opposed by A.J. Riley and Dr. Bowker, more briefly. Edward Knox made no effort to delay the reading, and it was carried by 18 votes to 7. The Governor of New South Wales, Lord Jersey, cabled the Colonial Office asking permission to assent to the Bill which was refused. But the Royal assent could no longer be withheld.⁴ There was some delay owing to an informality, but it was finally received on 13 August 1892, proclaimed by the Queen in Council.

The long fight for a humane divorce law had come to a triumphant conclusion, and congratulations poured down on the man who had been most responsible for its ultimate success. Neild and

1. S.M.H., 9 March 1892, p. 11.
2. Ibid., 10 March 1892, p. 6.
3. N.S.W.P.D., 57, pp. 6441-6460, 15 March 1892. (Third Reading)
other Members of Parliament wanted to give a banquet for Sir Alfred Stephen, but he declined the honour.

I am grateful to them, and to many others, for the unflinching support given through long years to the great social measure at last accomplished. I desire no other congratulation for myself; and your kindly feeling might be misconstrued into the desire, on your part or on mine, to commemorate a personal triumph.

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SIR ALFRED STEPHEN.
"As you know, I have for years conceded to the State the right to grant divorce for several reasons, and I believe it is often expedient for it to do so. This whole matter of legislation has been made difficult by the continual attempt of the Church to dictate to the State its policy in a matter where the opinions of the Church should be respected yet not copied into Civil Law."

The Reverend Samuel Dike, 1892.

The literature of the eighteen-eighties reflects the interest shown in questions of marriage and divorce. George Meredith, Thomas Hardy, Leo Tolstoy and Henrik Ibsen were only a few of those who were writing about the problems of marriage and the rights of women, at a time of changing social values and conditions. Life in New South Wales was sordid, ugly and, often, violent. The weak were exploited by husbands, fathers, manufacturers, mine managers, or perhaps by anyone with power over another. Living and working conditions were hardly regulated, for only very slowly did the State realise that it not only had the right to interfere, but that it was its duty to do so. It was, however, a decade of confidence and optimism, with a faith in progress stemming from the Colony's development and economic prosperity. Wrongs could be righted if only people were energetic enough. Men turned to the United States of America for an example of what the Australian Colonies might become, for in many ways their experience was similar, as well as being varied enough to provide illumination on any question.

Before the emergence of the Labor Party in 1891, social

amelioration had, on the whole been left to a few charitable and far sighted men. The passing of the Divorce Extension Act was a triumph for a small group of educated reformers. In this case it was largely the work of lawyers and some doctors, who knew from first hand experience the plight of deserted wives, or the hopelessness of women whose husbands failed to provide the means of support, or worse wasted it, because of drunkenness, imprisonment or crime. The measure was conceived in the interests of social utilitarianism and humane idealism, to benefit oppressed women, especially from the working classes, who were thought to have the greatest need of the protection afforded by the bill. Despite the active support given to the bill by the public press, it seems that the Divorce Bill was ahead of its time. The various assertions made by its promoters to the contrary, provide no concrete evidence to suggest that the divorce question ever roused much public interest, except among a small educated minority. There were few petitions in its favour, and letters to the editor of the Sydney Morning Herald on the subject indicated little other than the fluctuating public interest.

The Divorce Extension Bill was first introduced into the Legislative Council in 1886 by Sir Alfred Stephen, at the age of eighty-four. He gave it his devoted attention for the next six years, piloting it through the Council, defending it in the columns of the Herald, and writing nine pamphlets. He revealed himself not only as a very humane and compassionate man, but also as an astute parliamentarian and tactician. The other supporters of the measure relied
heavily on his work. Dr. Creed and Dr. Remwick attended meetings, provided advice, but rarely spoke for the bill in Parliament. This was necessary in order to give its opponents as little opportunity as possible to call for an adjournment of the debate, or to employ other delaying tactics. Andrew Garran, who was ultimately to steer the bill to success, gave a little more active support. Stephen maintained his gracious and persistent concern with the bill until it at last became law. It was frequently asserted that the measure would have never received the support it won, but for the prestige and influence of its promoter.

It is a question not easily answered whether the bill could have been carried by any other man. Only two years before Stephen first carried the bill in the Upper House, a far less radical divorce bill, extending the grounds only to cover desertion, was decisively defeated on its second reading by 20 votes to 6 in the Assembly. Stephen, who had been Chief Justice of New South Wales for nearly thirty years and was a venerable member of the Council, in addition to being Lieutenant-Governor, occupied a unique position of prestige in Sydney. When he spoke, after all his years of experience, his opinion was respected. Over the years he had made many influential friends, not only in New South Wales, but in the other Australian Colonies and overseas. He corresponded with his distinguished relations in England, the English Judge in Divorce, Sir James Hannen, the Chief Justices of the other Colonies, an ex-member of the Imperial Cabinet, Lord Carnarvon, the Reverend Samuel Dike, who was the leading figure
of the North American Divorce Reform Association, ex-Governors, and doubtless many other eminent people. A letter written by Stephen to Creed, while staying with Chief Justice Way in Adelaide illustrates the manner in which he kept in touch with opinion.

I sent my son Septimus a letter (wh: I had express permission to show my friends) from the mover of the Div: Extn Bill in Melbrne showg the prospects of the measure there. I have an equally favourable prognosis as to the Bill here. I believe all the Govrs, - & I know that all the Chf. Justices, - are in favour of the measure.

In addition to his influential friends in the legal profession Stephen had built up a warm personal friendship with Sir Henry Parkes, who was Premier for most of the time that the Divorce Bill was before Parliament. The Divorce Bill was not introduced without great deliberation and consultation. Probably, eventually the bill would have been carried in the Legislative Assembly by the persistence of John Cash Neild, with Parkes and J.P. Abbott behind him. Nevertheless the Bill's majorities were so small in the non-elective Upper House, that O'Sullivan and Heydon were probably correct in ascribing its acceptance there to Stephen's influence. Garran could complete the work, but was unlikely to have been able to secure the initial support to have carried it in the early stages. However much of the success of the bill depended on the exertions of Stephen, it was a remarkable achievement for a fragile old man.

It was suggested by the Herald in 1890 that the Divorce Bill

1. Stephen to Creed, undated, /1887/ Creed MSS A682 (Political) .. (M.L.)
2. SMH, 10 December 1890, p. 6.
might have fared better in Parliament had it not been a Private Member's Bill. Possibly in that case obstructive and delaying tactics would not have succeeded in delaying the measure for five years, but the whole question of divorce was far too dangerous for any government to tackle, even if the Cabinets were not divided over the issue, as they, in fact, were, because of the religious principle involved. For either Parkes or Dibbs to have undertaken the bill would have involved the splitting of their parties. This did not prevent Stephen from urging Parkes to take charge of the bill at various times. Both the Protectionist and Free Trade Parties were divided over the issue: 52 Free Traders voted for the Bill, and 22 against; the Protectionists divided 38 for and 29 against. Only the infant Labor Party had a convincing majority in favour of the measure; 18 out of 24 of their members who voted on the bill were in favour of it.\(^1\) The Divorce Extension Bill was one that could only be carried on its merits in an age when party discipline did not extend beyond money bills and votes of no confidence, if always that far.

In the last resort, no matter what arguments they used, most men took their decision on the divorce question according to their religious beliefs. The various Christian Churches found some measure of unity in opposing the Divorce Extension Bill, which had no more bitter opponent that the Church of England. The Roman

\(^1\) See Appendix III.
Catholic Church was less concerned, for it both denied the right of Parliament to legislate on marriage and its dissolution, and forbade its members to benefit from any divorce law, on pain of excommunication. The Protestant Churches were more divided than the Catholic Churches over the intention of Christ's words, but were at one with them in predicting the danger to the marriage tie of extending the grounds of divorce, and the general evils that would befall society. Preoccupied with the fragility and sinfulness of mankind, they saw only the prospect of a further decline in moral standards from the secularisation of society. The Church of England, confused in its thinking on divorce, admitted the right of the State to grant divorce for adultery, but refused to admit other grounds not specifically revealed in the New Testament. Any further loosening of bonds was felt likely to contribute to the deplorable growing impatience with restraint, and the weakening of family authority. Its opposition to the Divorce Extension Bill was bitter and sustained.

Bishop Barry, and the other Anglican leaders, both clerical and lay, had no choice. Divorce for any cause, save adultery, was contrary to Christ's teaching. Nevertheless their opposition laid them open to serious charges: of ignorance concerning the working of the marriage laws, of failing to give practical assistance and comfort to those who needed them most, of being an incubus on all progress. The Argus in 1887 considered that

It is the duty of the Church to apply its moral teaching to this highly organised, highly sensitive society. If it cannot do so, if it can offer no word on the most
important social problems of the day, if it can show no sympathy with the spirit of the age, then it must be content to lose touch with the people, and to become little more than an antiquarian movement.

Bishop Barry's painful duty of fighting the Divorce Extension Bill was made more difficult by the support given to the measure by prominent members of the Church of England, who reserved the right of interpreting the Bible for themselves, and who did not think that under changed circumstances the State was forbidden by Christ to legislate according to necessity. Others agreed with the opinion of Sir Anthony Musgrave, the Governor of Queensland.

If divorce is permitted for any cause, or under any circumstances whatever, the relief ought to be extended to the cases for which you desire to provide, and it is barbarous cruelty not to do so. I have little sympathy with any doctrine that makes the religion of our blessed and gentle Lord responsible for barbarous cruelty.

Yet O'Sullivan and Knox would have considered that their direst forebodings had been more than fulfilled by the experience of the twentieth century. Once the grounds of divorce were extended beyond adultery, it became inevitable that other grounds would be added. Stephen, as well as the opponents of the bill, would be horrified by the provision in the Matrimonial Causes Act of 1959 permitting divorce after five years separation, a clause which allows those guilty of a matrimonial offence to put away the innocent, and which overrides any religious scruples.

2. Sir Anthony Musgrave to Stephen, 26 May 1888, Stephen, Uncat. MSS 211/22(M.L.)
3. Matrimonial Causes Act 1959, 28(m).
Manning, when he counselled waiting for Federation so that there could be a uniform marriage and divorce law within the Australian Commonwealth, showed great foresight. The fact that most colonies had passed differing divorce legislation by 1900, and that divorce remained such a controversial issue, meant that no serious attempt was made to introduce uniform legislation on divorce until Sir Garfield Barwick, when Attorney-General, carried the Matrimonial Causes Act in 1959.

In what other terms would Mr. Seaver and Canon Selwyn describe the marriages of so many notable figures from stage and screen, and indeed of ducal and other well known families, but legalised adultery, or, perhaps, successive polygamy? The opponents of the Divorce Extension Bill would have considered that they had been justified by time. Nevertheless, the supporters of the bill, and the stern critics of the Churches were right in their predictions that the Churches would lose touch with the people if they did not adapt with changing social conditions.

The question of divorce extension in New South Wales between 1886 and 1892 became more important than the mere desirability of increasing the grounds of divorce or not. It raised the whole question of the relation between Church and State and of the secularisation of society, largely because of the strong efforts made by the Church of England, ably backed by the other Churches, to prevent the bill becoming law. A Parliament which openly avowed no religious dogmas could hardly allow itself to be dictated to by the Churches on a
question of important social legislation.

Strong pressure was put on the Colonial Office in London by the protagonists of both sides over the Royal assent. When the assent was withheld in 1887 the question took on constitutional importance. Too many divorce bills had already failed to get the Royal assent, and now other Australian Colonies had introduced similar legislation, which would be jeopardised. To Parkes and Melville the issue of divorce became less important than the right of the Imperial Government to use the veto, the continued existence of which they held to be an infringement of the independence of a responsible government. It was for this reason that a united effort was made by all the Colonies to win the Royal assent for the Victorian Divorce Bill in 1890.

The question remains whether the new Divorce Extension Act did actually help those it was intended to relieve, or whether working class wives were too poor to take advantage of it, although provision was made to sue in pauperis. The immediate result was a large increase in the number of divorces granted, which rose from 66 in 1891 to 102 in 1892 and 305 in 1893.¹ It would seem that costs were fairly high: in 1890 Aubisson was ordered by the Court to pay £50 towards his wife’s costs, and Tomson £30.² In 1886 a man called Miller committed suicide because his wife was about to bring a divorce

¹. N.S.W. Statistical Register, 1893, p. 603.
². S. M.H., 14 May 1890, p. 4.
suit and he feared that he would not be able to pay the costs.\(^1\)

On the other hand, no one seemed to hesitate in bringing a divorce suit because of the expense involved. George Thompson, a fireman on the railway in receipt of 9/- a day, McGarry, a journeyman blacksmith earning £2 a week, Griffiths, a teamster, Cole, a paddock keeper, Lee, a labourer on the railway, and Cox, a coach builder,\(^3\) all petitioned for a divorce against their wives. In 1889 Alexander Hutchison contended in Court that the £300 allowance paid to him as a member of Parliament was not a salary but expenses, and therefore was protected against his creditors, so it could not be used to pay alimony and costs in his wife's divorce suit. Judge Windeyer decreed otherwise, and ordered him to pay £2 a week alimony and £30 costs. He was to find the money or face the consequences.\(^4\) Judge Windeyer never hesitated to order the husband to pay the costs when the wife was the petitioner. The average weekly wage for a working man ranged from £2 to £3, but it seems that the new act did have the desired effect of giving maltreated wives the means of release.

The most serious unanswered questions are why, after the New South Wales Divorce Extension Bill was passed comparatively easily in 1887, did it take nearly five years to be passed a second time, and why did Victoria manage to pass her Bill after only three years?

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The answer to the first question probably lies in the strong and persistent opposition to the measure offered by the Church of England, and in a combination of bad luck and a strongly organised minority in both Houses of the Legislature, which exploited delaying and obstructive tactics to the utmost. The answer to the second question is more difficult. It was introduced by a future Premier, the Upper House was elected, albeit on a restricted franchise, possibly the Victorian Parliament was better disciplined, and Victoria had a reputation for being more radical than New South Wales.

The final success of the New South Wales Bill was contributed to by many men - by the persistent work of Neild in the Assembly, by the support of Parkes and Dibbs, by Garran’s oratory in the Legislative Council, by Remwick and Creed behind the scenes, by the editorials of the *Sydney Morning Herald* and the *Daily Telegraph*, which never wavered in support of the measure, by the pioneering work of David Buchanan, by the strongly expressed opinions of Mr. Justice Windeyer, but in the last analysis, it might well have failed but for the prestige and tireless efforts of Sir Alfred Stephen. Sir William Windeyer had no doubts on the question.

I congratulate you with all my heart on the passing of the great Measure which will ever be identified with your name & to which you have given so much of your life’s labours. Thousands of women in time to come will bless your memory for the means of escape which you have given them from a life of misery & all thinking men will recognise the new Divorce Law as the crowning service which you have rendered to the Colony which you have served so nobly throughout your honoured life.

With all loving regards.

1. Windeyer to Stephen, 16 March 1892, Stephen, Uncat. MSS 211/2 (M.L.)
In its time Sir Alfred Stephen's Divorce Extension Act was regarded as an extremely radical measure. In England deserted wives had to wait until 1937 for similar relief when A.P. Herbert passed his Matrimonial Causes Act, despite the recommendations of the Royal Commission on Divorce in 1912. Herbert's Act extended the grounds of divorce to include most of those which Stephen had introduced, but excluded habitual drunkenness. It included incurable insanity, which New South Wales long had to do without, largely because Stephen considered that it was an act of God, and not a matrimonial offence.

The first principle on which the law of divorce rested was that one partner had to commit a matrimonial offence. At first the only offence that was recognised was adultery, but gradually others were admitted. If the Court suspected collusion, connivance or condonation it was powerless to grant a decree dissolving the marriage. The second principle, which was admitted by some States of America and a few Protestant countries in Europe, was mutual consent. After a long interval Australia is once more pioneering divorce legislation by omitting both the necessity of a matrimonial offence or mutual consent. Sir Garfield Barwick's Act of 1959 introduces a new principle by permitting an absolute divorce after five years separation, even if the partner is unwilling and unoffending.¹ Further

¹. Matrimonial Causes Act 1959, 28,(m).
"that the parties to the marriage have separated and thereafter lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed."
modifications have been made in 1965 allowing a trial period of reconciliation, which need not extend the length of time for a divorce on this ground.
APPENDIX I

Family Tree of Sir Alfred Stephen.
APPENDIX II

Three despatches from the Secretary of State of the Colonies disallowing
New South Wales Divorce Bills.
Sir Michael Hicks-Beach to Sir Hercules Robinson,
(N.S.W., 40.)
Downing-street, 15 July, 1878.

Sir,

I have not failed to give my best consideration to the important questions involved in the Bill passed by the Legislative Council and Legislative Assembly of New South Wales, and reserved by you for the signification of Her Majesty's pleasure, entitled, "An Act to amend the Law relating to Divorce and Matrimonial Causes," a transcript of which, accompanied by a protest signed by eight Members of the Legislative Council, was transmitted in your Despatch, No.57, of the 30th of April, 1877.

2. I regret the delay which has occurred in replying to your Despatch, but the questions raised by this measure appeared to my predecessor, as well as to myself, to be of such grave importance as to demand the most careful deliberation; and I have felt it my duty to seek for advice from the highest legal sources before communicating to you the view taken by Her Majesty's Government.

3. In the first place, I have to point out that this Bill, if passed into law, would conflict with the law of divorce in England. It would no doubt place the law of New South Wales upon the same footing in respect of the grounds for dissolving marriage as the law of Scotland. But it would only partially assimilate the marriage laws of the Colony and Scotland; seeing that they would still differ in respect of the conditions which are required for contracting a legal union, so that the Colony under your Government would acquire a system of marriage law peculiar to itself, and differing from that prevailing in any part of the United Kingdom, or in any other portion of Her Majesty's dominions.

4. If the effect of such legislation could be confined to New South Wales this difference would be a matter of Colonial concern, and I should not feel it necessary to dwell upon the social results which might follow from the proposed change, or the facilities for collusion which it might give. But as questions of marriage and divorce affect persons domiciled in various parts of the Empire, it appears to Her Majesty's Government highly impolitic, unless for the strongest reasons, to add to the discrepancy already unfortunately existing between the laws in force in different parts of Her
Majesty's Dominions.

5. I am advised that under this Bill, except in cases where the parties to the petition clearly had their domicile in New South Wales, very delicate and difficult questions might follow upon a decree of dissolution of marriage, and the future status of an innocent wife might be very grievously compromised beyond the Colony were she to follow up a successful suit by the solemnization of a second marriage during the life of the divorced husband. If the first marriage were an English one, and the parties had not changed their domicile, the decree of dissolution would be simply inoperative in England for any purpose, and the same inconvenience might possibly follow if the marriage had been contracted elsewhere out of the Colony, and the parties had not acquired a domicile in New South Wales.

6. The very serious consequences that may result from changes of this nature in the marriage law are illustrated so forcibly in the reasons given by the House of Lords in 1860, for disagreeing to certain amendments made by the House of Commons in "The Conjugal Rights Bill," introduced by Lord Campbell into the House of Lords, that I will quote them for your information.

Their Lordships stated that they disagreed to the amendments, among other reasons, "because the most grievous inconvenience arises from the existing state of the law of England and Scotland on this subject, as declared by judicial decisions in both countries, for according to this when parties have been married in England a sentence of divorce pronounced in Scotland is valid in Scotland and a nullity in England, so that the divorced women still remains the wife of the husband in England, but the husband and wife are free to contract another valid marriage in Scotland, and the children of such second marriage are legitimate in Scotland, but bastards in England; and the husband or wife marrying in England after the divorce in Scotland is liable to be indicted for bigamy and punished by penal servitude."

7. I have now explained to you the reasons for which I have found myself compelled to refrain from submitting this Bill for Her Majesty's assent.

I request you to communicate this Despatch to both Houses of the Legislature, and I trust that they will appreciate the considerations by which I have been actuated in arriving at this decision.

I have, &c.,
M.E. HICKS-BEACH.
My Lord, Downing-street, 22 June, 1880.

The question of the advice to be tendered to Her Majesty, with respect to the Bill passed by the Legislative Council and Legislative Assembly of New South Wales and reserved by you for the signification of Her Majesty's pleasure, entitled, an Act to amend the Law relating to Divorce and Matrimonial Causes, a transcript of which accompanied your despatch, No. 62 of the 4th of December last, has been under consideration of Her Majesty's Government; and after careful examination of the very grave issues raised by this measure, they have arrived at the decision which I have now the honor to convey to your Lordship.

2. Her Majesty's Government are fully sensible of the force of the reasons which induced their predecessors to advise Her Majesty to withhold her assent from two Bills previously passed by the Colonial Legislature, identical with the Bill now in question, viz. (1), the inexpediency of introducing conflict and divergence on a most important subject affecting family and social relations between the law of New South Wales and that of England, and every other part (except Scotland) of the British Empire (including the other Australian Colonies) between which and New South Wales there is a constant interchange of population; and (2) the confusion and uncertainty as to the validity of subsequent marriages, the status of children, and rights of succession to property which would ensue if sentences of dissolution of marriage were pronounced by the Courts of New South Wales, the validity of which was not recognized in other countries. But whilst on the general ground that it is much to be lamented that a different marriage law should prevail in different parts of the Empire, Her Majesty's Government very greatly regret that the New South Wales Legislature has determined to persevere in this measure, they have come to the conclusion that it is not their duty any longer to resist the principle of a Bill which has now been passed for the third time, and with full knowledge of the objections to which I have referred, provided certain modifications are introduced into it, which I will now proceed to explain.

3. Her Majesty's Government understand the object of those who introduced and supported the Bill in the Council and Assembly to be, that a sentence for dissolution of marriage, on the ground of the husband's
adultery, may be pronounced by the Matrimonial Courts of the Colony when, and only when, the parties are domiciled in New South Wales. In order effectually to secure this object, they are of opinion that it should be made a condition by express words in the Act, that any judge pronouncing such a sentence should first be satisfied, by sufficient evidence in the suit, that the married parties were so domiciled. Of all questions of fact which may require incidental determination for the purpose of ascertaining rights of status, succession, or inheritance, it would be impossible to suggest one more frequently involving difficult and complicated inquiries and voluminous evidence than that of domicil; and it is most important that it should be clearly laid down by law as the duty of a tribunal, on which it is proposed to confer a new matrimonial jurisdiction, dependent for its effect on domicil, to require proof for that domicil as the foundation of its jurisdiction, and to afford easy means of obviating, by the judgment and evidence on record, the questions which might otherwise be liable to arise in neighbouring colonies or in Great Britain or elsewhere at a distance of time, and after the remarriage or death of either of the parties. The proof of domicil, when both parties are living, will generally be much more easy and simple than after their deaths, and (in the absence of collusion) even an admission of the fact of domicil by a husband defendant upon the record, so made as to satisfy the Judge, might often be held conclusive if an attempt were afterwards made to raise the same question.

4. Her Majesty's Government are confident that the Colonial Legislature will not object to such an amendment of the Bill as may secure that the fact of domicil should in all cases be substantiated, as a necessary condition of the exercise of the jurisdiction, and, if this should be done, they will be prepared to advise Her Majesty to give her assent to a Bill passed in that form.

5. But in the absence of such an express condition, they think that there would be a very serious risk of suits being instituted and sentences of dissolution of marriage pronounced under the proposed law in cases in which there was no real colonial domicil, and of the consequent confusion and uncertainty above adverted to, I am therefore unable to submit the Bill in its present shape for Her Majesty's assent.

I have, &c.,

KIMBERLEY.
The Secretary of State for the Colonies to The Right Honorable Lord Carrington, G.C.M.G.
(N.S.W., 12.)

Downing-street, 27 January, 1888.

My Lord,

Her Majesty's Government have given very careful consideration to your Despatch, No. 147, of the 29th July, 1887, transmitting the Bill to amend and extend the law of divorce, which you had reserved for the signification of Her Majesty's pleasure.

After full deliberation they have come to the conclusion that they ought not to advise Her Majesty to assent to the Bill, and I request you to invite the attention of your Ministers to the reasons for that conclusion as stated in this Despatch, which should be communicated to both Houses of the Legislature.

2. Her Majesty's Government have no desire to interfere with legislation which is within the competence of the Parliament of New South Wales, and laws operative within the Colony on the subject of matrimony and divorce fall, as a general rule, within that class of legislation. But it is impossible for Her Majesty's Government to ignore the exceptional importance of the proposed alteration of the existing law. It will introduce a divergence between the law of this country and the law of New South Wales upon a matter most deeply affecting the morality of the people and the happiness of families. It will make those who are wives or legitimate children in one country unmarried mothers and illegitimate children in the other; and it will make the same action innocent in one country and, possibly (as constituting bigamy, if followed by remarriage), criminal in the other.

3. Her Majesty's Government do not feel that these consequences, grave as they undoubtedly are, render it incumbent upon them to advise the Queen to exercise her power of controlling the privilege of legislating for their own requirements, which has been conceded in full measure to the Australian Colonies. But they are of opinion that, in order to reduce to the lowest possible point the inconveniences which this change in the law would cause, three precautionary conditions should be satisfied before it is adopted.

4. In the first place, so far as possible, it should be ascertained that the change is the deliberate resolve of the people of New South
Wales, and is not likely in the future to be modified by any accidental alteration in the balance of political parties; and it would therefore be, in the opinion of Her Majesty's Government, more expedient that the Queen's assent to such a measure should be deferred until it has been again passed by another Parliament after the occurrence of a General Election.

5. Secondly, it appears to Her Majesty's Government to be exceedingly inconvenient that a different law on this subject should prevail among the different Colonies of Australia. The many evils which would result from the existence of a conflict of law upon this subject between more distant parts of the same Empire will be intensified in the case of communities so closely connected as the Australian Colonies, if they should not be prepared to adopt similar legislation on this subject.

6. And thirdly, Her Majesty's Government are of opinion that the operation of the change should be confined to those who are really inhabitants of the Colony in which the new law is made, and should not be extended to persons whose residence for any reason is transitory. They are of opinion, therefore, that, in place of a two years' residence, a legal domicil should be required, as the condition of a capacity to obtain a divorce under this measure.

7. If the Bill had been made to apply only to persons possessing a domicil in New South Wales, a decree of dissolution pronounced by the Supreme Court would doubtless be recognized elsewhere; but the Bill substitutes for domicil a residence of two years and it is far from certain that the Courts of this country, or of other colonies, or of foreign countries, would in such circumstances recognize a decree of the Court of New South Wales, which may alter the status of their citizens. Your advisers are probably familiar with the case of Niboyet v. Niboyet, L.R. 4, P.D. 1, in which the Court of Appeal held, by a majority of two to one, that the Court had power to decree a dissolution of the marriage of a French subject who was resident in England, but who still retained his French domicil; but I would observe that, even in that case, both the Judges who formed the majority admitted that it did not follow that the decree would be recognized in other countries; and that it might be that
the parties, although in England no longer husband and wife, might in
other countries be still so regarded.

8. It should further be borne in mind that cases might occur in
which the husband had never lost his domicil in another country, and his
residence in New South Wales, though extending over two years, had only
been temporary, and with the intention of leaving the Colony after obtain­
ing the decree; in which case the probability would be much increased of
other countries declining to recognize the validity of such decree. I may
also observe that, as I am advised, an English Court would refuse to recog­
nize the validity of a divorce between two English residents in New South
Wales effected upon the grounds provided by the Bill.

9. I request you to invite your Ministers, in connection with this
Despatch, again to give their careful consideration to the Despatches No.40,
of Sir Michael Hicks-Beach, dated the 15th July, 1878, and No.18, of the
Earl of Kimberley, dated the 22nd June, 1880, on the Bills then proposed to
amend the law relating to divorce and matrimonial causes. The reasoning of
those Despatches (of which copies are enclosed for convenience of reference)
appears to be equally applicable in the present case; and I need only add,
in the words used by Lord Kimberley, that Her Majesty's Government are con­
fident that the Legislature of the Colony will not object to such an
amendment of the Bill as may secure that the fact of domicil should in all
cases be substantiated as a necessary condition of the exercise of the
jurisdiction.

10. In conclusion, then, I have only to repeat that Her Majesty's
Government would strongly urge upon your Advisers the inexpediency of en­
larging the grounds upon which a divorce can be obtained, until it has been
fully established that the general feeling of the Colony is decidedly in
favour of the change, and until after communication with the other Aus­
tralian Colonies it is made clear that they are prepared to adopt a similar
alteration in their laws. Her Majesty's Government, however, attach still
greater importance to the necessity of securing that legal domicil, and
not a transitory residence, such as that of two years, laid down in the Bill,
should be a condition of the exercise of the jurisdiction of the Court in
decreeing a divorce. They earnestly trust that these views will, upon
further consideration, commend themselves to your Ministers.

I have, &c.,

H.T. HOLLAND.
Table of major divisions on the Divorce Bills 1886 - 1892
of all members of the Legislative Assembly and Legislative Council who
voted on the Bills, with some details concerning religion and occupation.
The table was compiled from the Parliamentary Debates, A.W. Martin and
P. Wardle Members of the Legislative Assembly of New South Wales 1856 - 1901,
and Newspapers.

Abbreviations

L.A. - Legislative Assembly
L.C. - Legislative Council
1R - First Reading
2R - Second Reading
3R - Third Reading

C.of E. - Church of England
R.C. - Roman Catholic
Meth. - Methodist
Presb. - Presbyterian
Congreg. - Congregationalist
Prot. - Protestant

pr. - Protectionist
F.T. - Free Trader
L - Labour
I - Independent
X - voted against the Bill
✓ - voted for the Bill
o - spoke on the measure
- - not in the Legislative Assembly
S. - Speaker
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**Religion:** Meth. = Methodist, C.of E. = Church of England, R.C. = Roman Catholic, Prot. = Protestant

**Party:** pr. = private means

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**Notes:**
- X indicates a member.
- L.A. indicates an attendee at the Synod.
- Axe indicates a resolution passed.
- The table includes the year and status of various individuals and their occupations.
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F.T. = Free Trade
pr. = Protectionist
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APPENDIX IV

Table of Divorce Bills introduced in the New South Wales Parliament between 1886 and 1892.

Legislative Council:

First Reading: 10 February 1886.

Second Reading: 24 March, adj., 31 March; division 13 – 10.

Committee: 8 April, counted out; 5 May restored to order paper;
resumed 6 May, adj., 12 May.

Third Reading: 19 May; division 19 – 16.

Legislative Assembly:

First Reading: 20 May.

Second Reading: 13 August, adj., 24 September; division 25 – 14.

Committee: 8 October, lapsed – no quorum.

2. Session 8 March – 13 July 1887.

Legislative Assembly:

First Reading: 16 March 1887.


Committee: 25 March.

Third Reading: 29 March, division 31 – 10.

Legislative Council:

First Reading: 30 March.

Second Reading: 6 April, adj., 28 April; division 16 – 10.

Committee: 28 April, adj., 4 May, adj., 5 May.

Third Reading: 19 May, delaying move carried, 15 – 13, but no quorum
2 minutes later; restored to order paper 9 June;
16 June; division 19 – 18.

Returned to Assembly with Amendments, 16 June; adopted after
5 divisions, 12 July. Reserved for Royal Assent, 13 July, 1887.

   Legislative Assembly:
   First Reading: 21 March 1888.
   Second Reading: 15 May; Division 32 - 15.
   Committee: 15 May, adj., 12 June.
   Third Reading: 13 June; no division.
   Legislative Council:
   First Reading: 13 June 1888.
   Second Reading: 20 June; division 19 - 9.
   Committee: 20 June, (pro forma), 17 July, adj., 19 July.
   Third Reading: 23 July, division 19 - 9.
   Returned to Assembly with Amendments, not considered forthwith,
   Parliament prorogued 24 July 1888.

   Legislative Assembly:
   First Reading: 24 October 1888.
   Second Reading: 25 October; division 36 - 20.
   Committee: 25 October, adj.

5. Session: 27 February 1889 - 10 October 1889.
   Legislative Assembly:
   First Reading: 10 April 1889.
   Second Reading: 28 May; division 25 - 13.
   Committee: 28 May, (no amendments).
   Third Reading: 27 August; division 43 - 24.
   Legislative Council:
   First Reading: 27 August 1889.
   Second Reading: 5 September, adj., 27 September; division 15 - 12.
   Parliament prorogued 10 October.

   Legislative Council:
   First Reading: 28 November 1889.
Debate on suspension of standing orders to give the Divorce Bill precedence, 18 December; Parliament prorogued 20 December 1889.

7. **Session:** 29 April 1890 - 20 December 1890.

**Legislative Council:**

- **First Reading:** 30 April 1890.
- **Second Reading:** 8 May, adj., 14 May, adj., 15 May; division 24 - 15.
- **Committee:** 15 May, adj., 22 May, counted out; restored to order paper; 29 May; 4 June, move for precedence; 5 June, adj., 12 June, adj., 18 June.
- **Third Reading:** 2 July, adj., 3 July; division 26 - 21.

**Legislative Assembly:**

- **First Reading:** 3 July 1890.
- **Second Reading:** 5 December, counted out.

8. **Session:** 14 July 1891 - 1 April 1892.

**Legislative Assembly:**

- **First Reading:** 12 August 1891.
- **Second Reading:** 8 September 1891, adj., 8 February 1892; division 36 - 20.
- **Committee:** 8 February, (no amendments).
- **Third Reading:** 15 February; division 38 - 18.

**Legislative Council:**

- **First Reading:** 16 February 1892.
- **Second Reading:** 25 February; division 16 - 12.
- **Committee:** 3 March, adj., 8 March. (no amendments)
- **Third Reading:** 15 March; division 18 - 7.

Reserved for the Royal Assent, 24 March 1892. Assented to by proclamation, 6 August 1892.

adj. - adjourned. During the Committee stage "adj." has been used to denote "progress reported".
APPENDIX V

Various Divorce Bills and Acts 1881 - 1892

There is no complete collection of divorce bills or acts, and these have been assembled from various sources. I am particularly indebted to Mr. Jecklyn, Clerk of the New South Wales Legislative Council for his assistance.
An Act to amend the Law relating to Divorce and Matrimonial Causes.

(Reserved, 25th March, 1881.)

Whereas it is expedient to amend the Law relating to Divorce and Matrimonial Causes and to confer the same rights and privileges in the matter of Divorce on women as are now held and enjoyed by men Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows :-

1. On and after the passing of this Act it shall be lawful for any wife whose husband shall at the time of the institution of the suit be domiciled in New South Wales to present a petition to the Court praying that her marriage may be dissolved on the ground that since the celebration thereof her husband has been guilty of adultery And every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded.

2. (Proof of domicile to be given &c.)

3. (Court may pronounce decree on proof of adultery.)

4. (Principal Act to apply to proceedings under this.)

5. (Short Title.)
A BILL

To amend the Matrimonial Causes Act.
(Mr. Dalley; - 27 February, 1884.)

Clause 12, in a long bill on Divorce Court Procedure extended the grounds for divorce.

12. After the passing of this Act it shall be lawful for any husband or wife to present a petition to the Court praying that his or her marriage may be dissolved on the ground that since the celebration thereof

(I.) The petitioner's husband or if the husband is the petitioner his wife has without reasonable grounds deserted the petitioner for a period of five years or upwards from the date of filing the petition or that

(II.) The petitioner's husband or if the husband is the petitioner his wife has (a) attempted to murder the petitioner or (b) has wounded with intent to murder the petitioner or (c) has wounded with intent to inflict grievous bodily harm on the petitioner or (d) has inflicted grievous bodily harm on the petitioner or (e) has administered or attempted to administer poison or other destructive thing to the petitioner or has caused poison or other destructive thing to be administered to the petitioner with intent in any such case to murder the petitioner and whether bodily injury be effected or not on the petitioner (in all such cases in which bodily injury is not necessarily implied)
A BILL

Further to amend the Law relating to Divorce.

(Sir Alfred Stephen:– 10th February, 1886)

Whereas it is desirable in the interests of morality and for the relief of unoffending married persons to extend the provisions of the Law of Divorce to certain cases of desertion drunkenness and conviction for crime in which the objects of marriage are by the conduct of the offending party equally defeated as in the case of adultery or cruelty. Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:–

1. Any married person who at the time of the institution of his or her suit is domiciled in this Colony and has been so domiciled for two years and upwards and whose marriage with the Respondent was celebrated therein may present a petition to the Supreme Court in the form prescribed by the "Matrimonial Causes Act" (thirty-sixth Victoria number nine) or by the Rules made under the same praying on one of the grounds in this section mentioned that such marriage may be dissolved (I) on the ground that since such celebration the Respondent has without just cause or excuse deserted the Petitioner and remained continuously absent from the Colony or in places therein unknown to the Petitioner for three years and upwards or (II) on the ground that since such celebration the Respondent by long continued habits of drunkenness during three years and upwards has become insane or has by such habits wasted the means of support of the Petitioner or their family or left the Petitioner for twelve months and upwards without such means or (III) on the ground that at the time of the presentation of the petition the Respondent is under sentence for a capital crime or to penal servitude for seven years or upwards or that within two years previously he has been twice convicted whether before a Court or summarily of an aggravated assault upon the Petitioner accompanied or followed by threats from the Respondent of further violence.
2. In any such case of assault the Court may pronounce either a sentence of judicial separation or a decree for dissolution of the marriage. Provided that if in the opinion of the Court the Petitioner's own habits or conduct induced or contributed to the wrong complained of the petition may be dismissed. But in all other cases under this Act if the Court is satisfied that the case of the Petitioner is established the Court shall pronounce a decree dissolving the marriage but subject to the provisions of the "Matrimonial Causes Act" respecting unreasonable delay or misconduct on the part of the Petitioner and the temporary suspension of such decree and the allowing of an Appeal therefrom so far as such provisions are applicable. (And provided also that where the ground of dissolution is the desertion and continuous absence of the Respondent the Decree shall not take effect so as to enable him or her to marry again until after the expiration of two years from the date thereof. —) [Stephen's annotation]

3. So far as they severally are applicable all the other provisions of the "Matrimonial Causes Act" and the Acts amending the same shall apply to petitions and suits under this Act and to the parties and all proceedings therein and to all persons whatsoever affected thereby.

4. The word "Court" in this Act shall ordinarily be taken to mean the Judge exercising jurisdiction in matrimonial causes but for the purposes of an Appeal after its institution shall mean the Supreme Court sitting as in banco. And this Act may be cited as the "Divorce Extension Act of 1886".

(New South Wales Legislative Council)
An Act to amend and extend the Law of Divorce.
(Reserved, 13th July, 1887.)

Whereas it is desirable in the interests of morality and for the relief of unoffending married persons to extend the provisions of the Law of Divorce to certain cases of desertion cruelty drunkenness and conviction for crime in which the objects of marriage are by the conduct of the offending party equally defeated as in the case of adultery and it is desirable also in certain other particulars to amend the existing law. Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:

1. Any married person who at the time of the institution of the suit shall have resided in this Colony for two years and upwards may present a petition to the Supreme Court in the form prescribed by the "Matrimonial Causes Act" (thirty-sixth Victoria number nine) or by the Rules made under the same praying on one or more of the grounds in this section mentioned that his or her marriage with the respondent may be dissolved-

   (I) On the ground that the respondent has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left him or her continuously so deserted during three years and upwards.

   (II) On the ground that the respondent has by continued habits of drunkenness during two years and upwards habitually left his wife without the means of support or being the petitioner's wife has by such habits for a like period habitually neglected her domestic duties or rendered herself unfit to discharge them.

   (III) On the ground that at the time of the presentation of the petition the respondent has been imprisoned for a period of not less than twelve months and is still imprisoned under a commuted sentence for a capital crime or under a sentence for seven years or upwards for some other crime or being a husband has by reason of frequent convictions for crime left his
wife habitually during two years and upwards without the means of support.

(IV) On the ground that within six months previously the respondent has been convicted of having attempted to murder the petitioner or on the ground that the respondent has repeatedly during that period assaulted and cruelly beaten the petitioner or otherwise during a period of two years been repeatedly guilty of cruelty towards her.

2. If in the opinion of the Court the Petitioner's own habits or conduct induced or contributed to the wrong complained of the petition may be dismissed. But in all other cases under this Act if the Court is satisfied that the case of the Petitioner is established it shall be lawful for the Court to pronounce a decree dissolving the marriage. Provided always that in any suit under the provisions of this Act in which the Court shall have pronounced a decree dissolving the marriage it shall not be lawful for the respondent therein to contract another marriage before the expiration of two years from the time when such decree shall have been made absolute and if any respondent in such suit shall contract another marriage within the said time such respondent shall be guilty of bigamy and the said last-mentioned marriage shall be void.

3. (Previous Acts made applicable)
4. (Pauper suits or Defences and forbidding publication of evidence)
5. (The term Court and title)

In the name and on the behalf of Her Majesty I reserve this Bill for the signification thereon of Her Majesty's pleasure.

CARRINGTON.
A BILL

To amend and extend the Law of Divorce.

(Mr. Neild; 24th October, 1888)

Whereas it is desirable, in the interests of morality, and for the relief of unoffending married persons, to extend the provisions of the Law of Divorce to certain cases of desertion, cruelty, drunkenness, and conviction for crime, in which the objects of marriage are by the conduct of the offending party equally defeated as in the case of adultery, and it is desirable also in certain other particulars to amend the existing law. Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

1. Any married person, who, at the time of the institution of the suit, shall have been domiciled in this Colony for two years and upwards, may present a petition to the Supreme Court in the form prescribed by the "Matrimonial Causes Act" (thirty-sixth Victoria number nine), or by the Rules made under the same, praying on one or more of the grounds in this section mentioned that his or her marriage with the respondent may be dissolved, that is to say:

(a) On the ground that the respondent has, without just cause or excuse, wilfully deserted the petitioner, and, without any such cause or excuse, left him or her continuously so deserted during three years and upwards.

(b) On the ground that the respondent has, during two years and upwards, been an habitual drunkard, and habitually left his wife without the means of support, or habitually been guilty of cruelty towards her, or, being the petitioner's wife, has, for a like period, by continued habits of drunkenness, habitually neglected her domestic duties or rendered herself unfit to discharge them.

(c) On the ground that, at the time of the presentation of the
petition, the respondent has been imprisoned for a period of not less than twelve months, and is still in prison, under a commuted sentence for a capital crime, or under sentence to penal servitude for seven years or upwards, or, being a husband, has within three years undergone frequent convictions for crime, and left his wife habitually without the means of support.

(d) On the ground that, within six months previously, the respondent has been convicted of having attempted to murder the petitioner, or of having assaulted him or her with intent to inflict grievous bodily harm, or on the ground that the respondent has repeatedly during that period assaulted and cruelly beaten the petitioner.

2. If in the opinion of the Court the petitioner's own habits or conduct induced or contributed to the wrong complained of, the petition may be dismissed. But in all other cases under this Act, if the Court is satisfied that the case of the petitioner is established, the Court shall pronounce a decree dissolving the marriage.

3. Provided always that no dissolution shall be decreed, if it be proved that at the time of the marriage the petitioner knew that the respondent was a person of habitually drunken habits, or was a person against whom a decree of divorce had been granted for any cause whatever - but in such cases the Court may grant a judicial separation. Provided also that it shall not be lawful for the respondent, in any case, to contract another marriage before the expiration of two years from the time when the decree was made absolute; and if he or she shall contract another marriage within that period, such respondent shall be guilty of a misdemeanor, and the marriage shall be void.

4. (Previous Acts made applicable.)

(Appeal and Trial by Jury.)

5. A domiciled person shall, for the purposes of this Act, be taken to be one who for the period specified has resided in this Colony as his or her actual home - although such person's domicil of origin or other legal domicil may be elsewhere. Provided that no person shall be entitled to petition under this Act who shall have
resorted to the Colony for that purpose only.

6. (Pauper suits or defences, and forbidding publication of evidence.)

7. (The term Court and short title.)

Note: This Bill was drawn up in response to Sir Henry Holland's (Lord Knutsford's) Despatch - See Appendix II. (Knox Uncat. MSS 98/9)(M.L.)
A Bill
To amend and extend the Law of Divorce
(Sir Alfred Stephen; - 30 April, 1890)

Whereas it is desirable, in the interests of morality, and for the relief of unoffending married persons, to extend the provisions of the Law of Divorce to certain cases of desertion, cruelty, drunkenness, and conviction for crime, in which the objects of marriage are by the conduct of the offending party equally defeated as in the case of adultery, and it is desirable also in certain other particulars to amend the existing law. Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

1. Any married person, who, at the time of the institution of the suit, shall have been domiciled in this Colony for two years and upwards (provided that he or she shall not have resorted to the Colony for the purpose only of such institution) may present a petition to the Supreme Court in the form prescribed by the "Matrimonial Causes Act" (thirty-sixth Victoria number nine), or by the Rules made under the same, praying on one or more of the grounds in this section mentioned that his or her marriage with the respondent may be dissolved, that is to say -

(a) On the ground that the respondent has, without just cause or excuse, wilfully deserted the petitioner, and, without any such cause or excuse, left him or her continuously so deserted during three years and upwards. And no wife who was domiciled in New South Wales when the desertion commenced shall be deemed to have lost her domicile by reason only of her husband having thereafter acquired a foreign domicile.

(b) On the ground that the respondent has, during two years and upwards, been an habitual drunkard, and either habitually left his wife without the means of support, or habitually been guilty of cruelty towards her, or, being the petition-
er's wife, has, for a like period, been an habitual drunkard, and habitually neglected her domestic duties or rendered herself unfit to discharge them.

(c) On the ground that, at the time of the presentation of the petition, the respondent has been imprisoned for a period of not less than twelve months, and is still in prison, under a commuted sentence for a capital crime, or under sentence to penal servitude for seven years or upwards, or, being a husband, has within three years undergone frequent convictions for crime, and left his wife habitually without the means of support.

(d) On the ground that, within one year previously, the respondent has been convicted of having attempted to murder the petitioner, or of having assaulted him or her with intent to inflict grievous bodily harm, or on the ground that the respondent has repeatedly during that period assaulted and cruelly beaten the petitioner.

2. (Divorce when pronounced, &c.)

3. Provided always that no dissolution shall be decreed, if it be proved that at the time of the marriage the petitioner knew that the respondent was a person of habitually drunken habits, or was a person against whom a decree of divorce had been granted for any cause whatever - but in such cases the Court may grant a judicial separation. Provided also that it shall not be lawful for the respondent, in any case, to contract another marriage before the expiration of two years from the time when the decree was made absolute; and if he or she shall contract another marriage within that period, such respondent shall be guilty of a misdemeanour, and the marriage shall be void.

4. (Previous Acts made applicable.)

(Appeal and Trial by Jury.)

5. (Pauper suits or defences, and forbidding publication of evidence.)

6. (Trying issues on Circuit.)
7. (Wife's property and alimony.)
8. (The term "Court" and short title.)

Note: This Bill was more or less brought into line with the Victorian Act - See pp. liv - lvi.

(Knox Uncat. Mss 98/9) (M.L.)
An Act to amend and extend the Law of Divorce.
(Reserved, 24th March, 1892.)

Whereas it is desirable to extend the provisions of the Law of Divorce, and also in certain particulars to amend the existing law:
Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :-

1. Any married person, who, at the time of the institution of the suit, shall have been domiciled in this Colony for three years and upwards (provided that he or she shall not have resorted to the Colony for the purpose of such institution) may present a petition to the Supreme Court in the form prescribed by the "Matrimonial Causes Act" (thirty-sixth Victoria number nine), or by the Rules made under the same, praying that his or her marriage with the respondent may be dissolved, or praying that a judicial separation may be granted in either case on one or more of the grounds in this section mentioned, that is to say -

(a) On the ground that the respondent has, without just cause or excuse, wilfully deserted the petitioner, and, without any such cause or excuse, left him or her continuously so deserted during three years and upwards. And no wife who was domiciled in New South Wales when the desertion commenced shall be deemed to have lost her domicile by reason only of her husband having thereafter acquired a foreign domicile.

(b) On the ground that the respondent has, during three years and upwards, been an habitual drunkard, and either habitually left his wife without the means of support or habitually been guilty of cruelty towards her, or, being the petitioner's wife, has, for a like period, been an habitual drunkard, and habitually neglected her domestic duties or rendered herself unfit to discharge them.
(c) On the ground that, at the time of the presentation of the petition, the respondent has been imprisoned for a period of not less than three years, and is still in prison, under a commuted sentence for a capital crime, or under sentence to penal servitude or imprisonment for seven years or upwards, or, being a husband, has within five years undergone frequent convictions for crime, and been sentenced in the aggregate to imprisonment for three years or upwards, and left his wife habitually without the means of support.

(d) On the ground that, within one year previously, the respondent has been convicted of having attempted to murder the petitioner, or of having assaulted him or her with intent to inflict grievous bodily harm, or on the ground that the respondent has repeatedly during that period assaulted and cruelly beaten the petitioner.

2. If in the opinion of the Court the petitioner's own habits or conduct induced or contributed to the wrong complained of, the petition may be dismissed. But in all other cases, under this Act, if the Court is satisfied that the case of the petitioner is established, the Court shall pronounce the decree prayed for: Provided that where the Petitioner's case if for dissolution of the marriage has failed, or the petition been dismissed, but a case for judicial separation has been established, the Court may pronounce a decree for such separation.

3. So far as they severally are applicable, all the provisions of the "Matrimonial Causes Act" and the Acts amending the same shall apply to petitions and suits under this Act, and to the parties and all proceedings therein, and to all persons affected thereby. And in every such suit the parties shall have the same right of Appeal, against any Decree or Order, as they would be entitled to in respect of a Decree or Order pronounced or made under the first-mentioned Act, and shall have the same right of trial of contested matters of fact by a jury. And every Decree or Order may, on Appeal, be reversed or
varied as the Court shall think proper.

4. The Court shall have the same power of granting Orders to sue or defend in _forma pauperis_, in any suit under this or the recited Act or Acts, as in cases at law or in equity - and may in any suit, at any stage thereof, and from time to time, make an Order forbidding the publication of the evidence therein, or any report or account of such evidence, either as to the whole or portions thereof. And the breach of any such Order may be dealt with as for Contempt of Court.

5. The Court may in any case direct any issue of fact in a matrimonial or divorce suit to be tried on Circuit, and for that purpose may make all necessary orders for the setting down of the case and the return of the finding or findings therein, and respecting the costs of such trial; and the Circuit Court Judge shall have the same power of forbidding the publication of evidence as is by the preceding section conferred on the Judge exercising matrimonial jurisdiction.

6. The Court shall have power in suits under this Act, as well as under the Matrimonial Causes Acts of 1873 and 1884, whether the suit be for divorce or for judicial separation only, to make all such orders in respect of the wife's property, and of alimony to her, when the decree made is for judicial separation, as the Court could make under the said Acts or one of them if the decree made was for divorce.

7. The word "Court" in this Act shall ordinarily be taken to mean the Judge exercising jurisdiction in matrimonial causes, but for the purpose of an Appeal shall, after its institution, mean the Supreme Court consisting of three Judges sitting as in banco. And this Act may be cited as the "Divorce Amendment and Extension Act of 1892."
The Victorian Act to amend the Law of Divorce.
(Reserved 25th November, 1889. Royal Assent proclaimed 13th May, 1890)

Whereas it is desirable in the interests of justice to lessen the excessive costs and simplify the procedure of divorce and in the interests of morality and for the relief of unoffending married persons to extend the provisions of the Law of Divorce to certain cases of desertion cruelty drunkenness and conviction for crime in which the objects of marriage are by the conduct of the offending party equally defeated as in the case of adultery: And whereas it is also desirable in certain other particulars to amend the existing law in regard to marriage and matrimonial causes: Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows:-

1. (Short title.)
2. (Suits may be tried at Assize Courts.)
3. (Mode of commencing proceedings.)
   (Schedule.)
4. (Making decree absolute.)
5. (Power to order monthly or weekly payments to wife from husband on dissolution of marriage.)
6. (Power to grant relief to respondent.)
7. (Power to order husband to pay money to wife to have her case investigated.)
   (Costs of wife to be in discretion of the court even when she is unsuccessful.)
8. (Trial in chambers.)
   (Forbidding publication of evidence.)
9. (Exercise of powers under No. 787.)
10. (Petition for restitution abolished.)
11. Any married person who at the time of the institution of the suit or other proceeding shall have been domiciled in the colony of
Victoria for two years and upwards may present a petition to the
Supreme Court praying on one or more of the grounds in this section
mentioned that his or her marriage with the respondent may be dis-
solved -

(a) On the ground that the respondent has without just cause
or excuse wilfully deserted the petitioner and without any
such cause or excuse left him or her continuously so deser-
ted during three years and upwards:

(b) On the ground that the respondent has during three years and
upwards been an habitual drunkard and either habitually left
his wife without the means of support, or habitually been
guilty of cruelty towards her, or being the petitioner's
wife has for a like period been an habitual drunkard and
habitually neglected her domestic duties or rendered her-
self unfit to discharge them:

(c) On the ground that at the time of the presentation of the
petition the respondent has been imprisoned for a period of
not less than three years and is still in prison under com-
mited sentence for a capital crime or under sentence to pe-
nal servitude for seven years or upwards, or being a husband
has within five years undergone frequent convictions for crime
and been sentenced in the aggregate to imprisonment for three
years or upwards and left his wife habitually without the
means of support:

(d) On the ground that within one year previously the respondent
has been convicted of having attempted to murder the petition-
er or of having assaulted him or her with intent to inflict
grievous bodily harm or on the ground that the respondent has
repeatedly during that period assaulted and cruelly beaten
the petitioner:

(e) On the ground that the respondent being a husband has since
the celebration of his marriage and date of this Act been
guilty of adultery in the conjugal residence or coupled with
circumstances or conduct of aggravation or of a repeated act of adultery.

12. (When divorce may be pronounced,)

14. (Previous Acts made applicable,)

15. A domiciled person shall for the purposes of this Act include a deserted wife who was domiciled in Victoria at the time of desertion, and such wife shall be deemed to have retained her Victorian domicile notwithstanding that her husband may have since the desertion acquired any foreign domicile. No person shall be entitled to petition under this Act who shall have resorted to the colony for that purpose only.

16. The court shall have the same power of granting orders to sue or defend in forma pauperis in any suit under this or the recited Act or Acts as in cases of law or in equity.
Matrimonial Causes Act, 1937.

The grounds of divorce introduced by A.P. Herbert in England.

2. 'A petition for divorce may be presented to the High Court (in this part of this Act referred to as "the court") either by the husband or the wife on the ground that the respondent -
   
   (a) has since the celebration of the marriage committed adultery; or
   
   (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or
   
   (c) has since the celebration of the marriage treated the petitioner with cruelty; or
   
   (d) is incurably of unsound mind and has been continuously under the care and treatment for a period of at least five years immediately preceding the presentation of the petition;

   and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.'

12. 'No clergyman of the Church of England or of the Church of Wales shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on any ground and whose former husband or wife is still living or to permit the marriage of any such person to be solemnized in the Church or Chapel of which he is the minister.'

APPENDIX VI

List of Letters to the Editor of the *Sydney Morning Herald* on the divorce question, with some to the Editor of the *Daily Telegraph* on the divorce issue in 1886, and on the *Doll's House* in 1890.
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The O'Sullivan, Stephen controversy of August 1891 has been omitted because of its political character.
Letters and petitions to the Editor of the Daily Telegraph on the divorce question in 1886, and Ibsen's *Doll's House* in July 1890.

### 1886

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<td></td>
<td>&quot;A Deserted Wife&quot;</td>
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### Church Petitions

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<td>&quot;Culex&quot;</td>
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For

18 July
Dr. Stockman
"Hard Hitter"
A. Newman
"Likewise a Churchman"
"W.E.B."

Against

It is interesting that after featuring the question "Is Marriage a Failure?" in 1888, the paper only published one letter on the subject from Samuel Hutchin (12 Oct.)
APPENDIX VII

The Resolutions against the withholding of the Royal assent from the Divorce Extension Bill, 1887, passed by the Legislative Council, 13 June 1888, and introduced into the Legislative Assembly 19 June 1888.
The Resolutions

(1) That, in the opinion of this House, the recent despatch from her Majesty's Secretary of State for the Colonies to his Excellency the Governor, on the subject of the Divorce Extension Bill, demands the gravest consideration of Parliament and of the country.

(2) That, in the session of 1886, a bill, substantially the same as that to which her Majesty's Government declines to advise assent, was passed by this House and (as to its second reading) by the Legislative Assembly of this colony, supported by petitions (among others, from 4,800 citizens of Sydney and its suburbs), and, it is believed, with the approval of a large majority of their fellow-colonists.

(3) That, in the session of 1887, the previous measure having lapsed by prorogation of the Parliament, and a general election having in the interval taken place, the bill was submitted to the newly-elected Assembly, by which it was passed by large majorities, and finally it passed the Legislative Council, notwithstanding strenuous efforts in each House to defeat it.

(4) That, from the time of its first introduction to Parliament, the measure received from the public press throughout the colony ample and reiterated discussion; so that not Parliament alone, but the community at large, had full information as to its character, with time and opportunity for its consideration.

(5) This House protests, therefore, against any assumption or suggestion, by whomsoever made, that the bill was not the result of deliberate resolve by the community which Parliament represented; and protests against the decision, founded apparently on that
assumption, not to advise her Majesty's assent to any like measure, unless passed by a future Parliament. In the opinion of this House, nothing justified such an assumption, if entertained; and, if not entertained or not warranted by the facts, no government had a right to require, as a condition of approval, the subjecting of this measure to a third ordeal.

(6) This House protests equally against the doctrine implied, if not expressed, in the despatch — that a great measure of this character may, constitutionally, and without doing violence to the independent action of each Australian colony, be suspended or defeated in its action, because of its being at the time unsupported by some other or others of the group. Such a doctrine, if acted on with respect to the existing divorce acts passed in Australia, would have defeated or indefinitely postponed them, even when in unison with the English statute. Each of these, although alike in general resemblance, originated necessarily in some one colony. Those which followed, more or less differing in detail, were passed at various intervals. Concerted action was impracticable.

(7) That this House, recognising the principle referred to in the despatch respecting legislative jurisdiction in divorce cases, is of the opinion that it was not violated by the bill; and that the substitution of domicile for actual residence, sought to be imposed as the condition of assent to the measure, would, in many cases (by reason of the technicality of the term, and of its application), operate simply as a delusion and a snare. By law, the wife's domicile is that of her husband; and, although the latter may have occupied their matrimonial home in the colony for several years previous to desertion, his legal domicile may always have been elsewhere. The difficulties which would then arise are not inappropriateply illustrated by the case cited in the despatch.

(8) That the foregoing resolutions be presented by Mr. Speaker to his Excellency the Governor, with the request that he will be good enough to forward them to the Right Honorable the Secretary of State.
APPENDIX VIII

Statistics on Divorce.
### DIVORCE.

#### Decrees nisi.

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<th>Year</th>
<th>(1) Granted</th>
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<th>(3) Not made absolute up to Aug. 1894</th>
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**Total transactions to 1893.**

903 692 211 160 38 1101 45 2 37 84

No. 52. - SUPREME COURT - DIVORCE and MATRIMONIAL CAUSES, 1873 - 93.
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No. 24. - MARRIAGES. - DIVORCED PERSONS RE-MARRIED during each year, 1884-93.
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   Votes and Proceedings of the Legislative Assembly of New South Wales, together with Parliamentary Papers, 1886-1892.

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   New South Wales Statistical Register, 1886-1893.

2. Manuscript Sources.

   a) Official.

   Colonial Office Records, New South Wales, 201/606-611, 613.
   Victoria, 309/134-135.


   Lord Belmore: Letters from his Ministers, 1868-1872, vol.II.
   (Mitchell Library, Sydney)

   b) Unofficial.

   The Stephen Papers held by the Mitchell Library are mostly to be found in two main catalogue divisions, but there are others in addition. For a man who spent sixty-five years in public office, they are disappointingly meagre.

   Stephen Papers, Set 777. (are still being catalogued, so item numbers may prove to be temporary.)

   (They include Stephen's Journals, Eleanor Stephen's Journals, and letters from other members of Sir Alfred Stephen's family.)

   Sir Alfred Stephen, Uncatalogued Manuscript, Set 211, 3 Boxes.

   Sir Alfred Stephen to his nephew, Frank, 23 May - 2 April, 1886, AS13.

   Letters from Sir Alfred Stephen held in the Dixson Library, Sydney.
A large number of the surviving letters from Stephen are to be found in the :-

Parkes Correspondence.
The letters to and from Sir Henry Parkes in the numerous bound volumes are individually catalogued, and are held by the Mitchell Library, Sydney.
Vol.28,A898; vol.34, A904; vol.35, A905; vol.46, A916; vol.48, A918; vol.5, A928.

Macarthur Papers.
Bound volumes of catalogued letters to and from the Macarthur family, held by the Mitchell Library. Although six volumes contain letters from Stephen, only those in vol. 28 were found to be of any use.

Creed Papers.
The papers of Dr. John Mildred Creed are in bound volumes divided into subjects, but with no pagination. There are a number of letters from Stephen on divorce and other topics in the volumes labelled "Correspondence", (A680) and "Political", (A682). They are held by the Mitchell Library.

The Mitchell Library has, uncatalogued, a large number of papers belonging to Sir Edward Knox. These are sorted into bundles according to topic and labelled in his own handwriting. Box 9 contains a large and important bundle on divorce.

There is a large, uncatalogued collection of Windeyer papers in the Mitchell Library. The ones relating to Sir William Windeyer were disappointing, but Boxes 2 and 4 yielded several important letters.

Other collections held by the Mitchell Library were consulted, but yielded very little on Stephen, and nothing on divorce. Among them were

Photostat Papers, 1873-1893.
Darley, Sir Frederick, 2 Boxes Uncat, MSS.
Lang, John Dunmore, Papers, vol. II.
Thompson, Edward Deas, Papers, vols. II and III.
Attorney-General's Department, Papers, 3 vols.

Sir Alfred Stephen to Sir Archibald Michie, 10 August 1887,
William Shiels, M.P., to Dr. Pearson, 18 February 1890.
Both these letters are in the possession of the State Library of Victoria.
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Lambeth Palace Archives.

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First Session, 1886.
Second Session, 1887.
Third Session, 1888.
Historical Records of Australia, First Series, vol. XXIV.
Benson, Arthur Christopher and Viscount Esher: The Letters of Queen Victoria, A Selection of Her Majesty's Correspondence between the years 1837 and 1861. John Murray, London 1908.
4. Pamphlets and miscellaneous works by Sir Alfred Stephen.

Stephen, Sir Alfred, Thoughts on the Constitution of a Second Legislative Chamber for New South Wales, Sydney 1853.
Address on Intemperance and the Licensing System, Sydney 1870.
The Divorce Extension Bill, A Reply to Certain Ecclesiastical Objectors, (Reprint of a letter to the Sydney Morning Herald), Sydney 1886.
Divorce Extension Defended, Sydney 1887.
The New South Wales Divorce Extension Bill, with a Reply to Protest Against the Measure, (Miseris Succere), written in reply to the Minority Protest in the Legislative Council, Sydney 1887.
Australian Divorce Extension Bills, a Reply to Synod, Sydney 1888.
Australian Divorce Bills, The Objections raised to them, religious and social considered, with Appendix, and dedicated to Sir James Fitzjames Stephen, Sydney 1888.
Australian Divorce Bills, Their History and Present Position, Sydney 1890.
Wives and Their Friends, (Reprint from the S.M.H, August 1891), Sydney 1891.
The Law of Divorce, A Reply to Mr. Gladstone, Sydney 1891. (Reprint from an article in The Contemporary Review, vol.LIX, June 1891.

Jottings from Memory, printed privately, and republished by Ruth Bedford: Think of Stephen.

All these pamphlets are to be found in the Mitchell Library, Sydney, and/or the Australian National Library.

5. Contemporary Works.

a) Books.


b) A Select List of Articles and Pamphlets.

Australia.

Cowper, William: Two Sermons upon Marriage and Divorce preached in St. Andrew's Cathedral, June 1888, Sydney 1888. (Pamphlet in the possession of His Honour Sir Victor Windeyer, and inscribed "The Honourable Sir Alfred Stephen with the Dean's Compliments.")

Dundas, C.H.: Marriage and Divorce, Two sermons preached in St. David's Cathedral, June 1890, Hobart 1890.


Anon. : Review, Till Death Us Sever, (J. Lothian Robson), Sydney Quarterly Magazine, December 1890.

Britain.


America.
Dike, the Rev. Dr. Samuel : "Statistics of Marriage and Divorce", Political Science Quarterly, vol. 4, December 1889.

The North American Review took a great interest in the question of divorce throughout the eighteen-eighties, until at the end of the decade it conducted an inquiry into opinion on divorce. The following articles (in order of appearance) were all published in the North American Review.
Woolsey, Dr. Theodore : "Marriage and Divorce"
Jameson, Judge : April 1883.
Davis, Judge Noah : "Marriage and Divorce", March 1884.
Stanton, Elizabeth Cady : "The Need for Liberal Divorce Laws" September 1884.

Dike, the Rev. Dr. Samuel :
Gibbons, James (Cardinal) : "Is Divorce Wrong?"
Potter, Henry C. (Bishop) : November 1889.
Ingersoll, Robert G. :
Gladstone, The Right Hon. W.E. :
Bradley, The Hon. Joseph P. 
(Judge of the U.S. Supreme Court):
Dolph, Senator Joseph N. :

Livermore, Mary A. :
Barr, Amelia E. :
Cooke, Rose Terry :
Phelps, Elizabeth Stuart :
June, Jennie :

Lee, Margaret :
Moxam, The Rev. Dr. Philip S. :

"The Question of Divorce".
December 1889.

"Women's Views of Divorce",
January 1890.

"Final Words on Divorce",
February 1890.

The following novels and plays have been referred to in the text. Books only referred to in Reviews have been excluded as they have been mentioned elsewhere in the Bibliography. Most of the works have run to many different editions, so only the original date of publication has been given.

Hardy, Thomas : Far From the Madding Crowd, London 1874.
Ibsen, Henrik : Nora, or a Doll's House, Copenhagen 1880. 1st English Translation, T. Weber 1880.
Meredith, George : Diana of the Crossways, London 1885; published as serial by the Fortnightly Review, 1884.
Tolstoy, Leo : Anna Karenina, Moscow 1878, first English trans. N.H. Dole 1886.

7. Newspapers.

Sydney Morning Herald.
Daily Telegraph.
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Banner and Anglo-Catholic Review.
Freeman's Journal.
Protestant Standard.
The Weekly Advocate.
The Freethinker.

The Bulletin.
The Sydney Mail.

The Nation. ("A Weekly Journal Devoted to Politics, Literature Science and art." New York)

Spectator. ("A Weekly Review of Politics, Literature, Theology and Art." London.)

Stephen, Sir Alfred, Newspaper Cuttings and Extracts, 1886-1892, vol.12, (M,L.) Devoted entirely to divorce.

8. Secondary Sources and References.

a) Books.


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Martin, A.W. and Wardle, P. : *Members of the Legislative Assembly of New South Wales, 1856-1901*, Australian National University, Canberra, 195.


Penguin Dictionary of Quotations.


b) Articles


Dickey, Brian : Some Aspects of Charity and Social Welfare in New South Wales, 1850-1914. To be submitted for Ph.D., A.N.U.