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# ARTIFICIAL INSEMINATION

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"O what a tangled web we weave
When first we practise to deceive!"
Scott—*Marmion*

So-called progress in science, whatever progress may be, is not always an unmixed blessing. It often creates serious social problems and demands a re-examination of the bases of many of our beliefs, laws and conventions. The practical application of the long-known fact that both water and oil expand when heated revolutionized transportation and industry. It created new social conditions and legal problems unknown in the days when man's work was done by hand and he travelled only on his feet, his ass or his ox, his camel or his horse. Novelty of use, while it may lessen man's labour, may increase his worries. It is not always, or necessarily, a virtue. One potential use of atomic energy threatens the very existence of man, if not indeed the existence of all life on the earth.

The biologist, as well as the physicist, may stir us out of our complacency. It has long been known that children result from the introduction of male seed into the sexual organs of a woman, where, if the time is opportune, it may fertilize an ovum newly detached from the ovary. As this process is associated with the

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gratification of a complex of several powerful and associated instincts, it is frequently initiated by sophisticated persons without either hope or expectation that it will run its full course. We might find a purpose for this instinctive behaviour in the perpetuation of the race, but the act is not always purposive, in that sense at any rate. Nevertheless, it is only in comparatively recent years that the possibility has been realized of severing the emotional from the purposive aspects of the procreative function. First men and women learned that by the use of contraceptives they could gratify their sexual instincts with little risk of producing children. Then, that by artificial insemination children might be produced without the mutual gratification of these instincts. With the first practice we are not here concerned. No serious legal problems are involved. But the second may require a reassessment of many social values and profound changes in several fields of law.

It is tempting to discuss the social aspects. If the practice became widespread, it might well destroy family life as the basis of human society. The future course of its development might lead to conditions at least as strange as those described in Huxley's *Brave New World*, where babies are sown and grow in a laboratory, and sexual intercourse, divorced entirely from any procreative purpose, and indulged in solely to gratify desire, has a significance analogous to that of drinking wine or eating candy. Brave and new indeed, but he who would advocate it is not necessarily wise. Would the scientist treat his fellow-man as the stock-breeder does his domestic animals the last stage of whose abject subjugation to man has been reached in the growing practice of artificial insemination? One bull, a veterinarian and a quick-freeze unit now suffices to inseminate all the cows in a thousand square miles for perhaps scores of years.[1] Flushed with this triumph of economy do scientists now wish to extend their so-called success to mankind?

Of course, the purpose at the moment is not economic, or eugenic or the advancement of science, but allegedly to relieve the supposed frustration of a comparatively few married, childless women. It is asserted, and no doubt with truth, that women are endowed with a strong desire to procreate, nourish and rear children. But there may be less justification for the further statement that if the desire is not satisfied her life becomes intolerable.

[1] Semen has already been kept frozen for over two years and is found to be still potent. Perhaps a donor may soon be able to bequeath his semen to impotent and frustrated women of a century hence, so long of course as he does not infringe the rules against perpetuities.

Whether justifiable or not, it is made the basis for the argument that artificial insemination should be resorted to in the cases of married women who have failed to become pregnant as the result of normal sexual intercourse with their husbands, or who, either by reason of some physical or psychological condition of themselves or their husbands (temperamental abnormalities), cannot have with their husbands such sexual intercourse as will result in their becoming pregnant. This solicitude has so far been restricted to married women. The equally deplorable plight of the unmarried woman or man, or of the married man denied the joys of parenthood by the incapacity of his wife, has not as yet stirred the sympathies of the advocates of this practice.

The sole basis and justification then, if any justification there can be, for the practice of artificial insemination of women, is the proposition that a woman is entitled to have satisfied a desire to bear a child of her own blood. This postulated desire is something apart from sexual desire, for sexual desire is not gratified by artificial insemination. It is also something apart from the desire to care for, protect and rear a child, for this desire could be gratified, without resort to artificial insemination, by the adoption of a child who has no mother, or a mother in whom the postulated desire is less imperative than other desires.[2] It must therefore be a desire by a woman, who by hypothesis has never known the sensations experienced by a pregnant woman between the conception and birth of her child, to experience such sensations. It may perhaps be doubted whether any such desire exists, isolated from the sexual act and from the instinct to protect and care for a living child. Yet by hypothesis she must have this desire without any previous experience of it, because if she had already had a child in the natural way, presumably she could do so again, and there would be no necessity for artificial practices.

So far as the writer is aware, no responsible persons have advocated that the practice be extended to other than married women, who either by reason of their own physical or temperamental condition, or that of their husbands, have not been able to conceive in the natural manner. But if, as those who advocate or condone

[2] There is force in the argument that, if a woman's desire to care for and protect a child is entitled to be gratified, then from her viewpoint it would also be desirable that it be of her own blood. So far, however, from making for harmony in the relationship between herself and her husband, the contrary might prove to be true. Every defect in character and conduct might well be attributed by the husband to inheritance from the wife. In the case of an adopted child, such defects could not be the occasion for any blame of either spouse, so far at any rate as heredity is concerned.

the practice profess to believe, it does not constitute adultery in the case of a married woman, then there is no logical reason why it should not be extended to unmarried women desiring to become mothers, to married women who have already borne defective children, or indeed to enable any man, married or unmarried, to have a child of his own blood through some woman artificially inseminated with his seed; and if it does constitute adultery in the case of a married woman, and is condoned in her case, there is no reason why it should not also be condoned in the case of an unmarried woman or a man. Carried to these lengths, and there would seem to be no reason for special consideration being shown to one group in preference to any other, family life as we have known it in the past would be fundamentally changed.

The secrecy concerning the identity of the donor of the semen, which most advocates of the practice deem essential, would destroy any certainty about blood relationships. No husband could be certain that the children he is required to support are those of *his* own blood. And it cannot consistently be argued, as one writer seems to do,[3] that blood relationships have no significance, except in relation to outworn feudal customs, since the very reason advanced for the practice is that a woman desires and is entitled to have a child of *her* own blood.

If the practice should become common, married women who desire to do so may avail themselves of another method of deceiving their husbands. A childless wife, after obtaining her husband's consent to resort to artificial insemination, would be able to carry on with impunity sexual intercourse with a lover, secure in the knowledge that she could attribute any pregnancy which might result to artificial insemination.

The operation of the rules affecting inheritance of property, and the rules relating to incest and divorce, will be affected, as will those imposing liability on public authorities to care for and maintain neglected children.

Even if the practice should not extend to the lengths suggested, it has already been followed in a sufficient number of cases to indicate that sooner or later the courts will have to deal with legal problems arising from it. Many of these problems will be entirely novel, as neither courts, except in a very few cases, nor legislatures have previously considered the possibility that children would be produced except as a result of natural sexual intercourse. In the

[3] Artificial Insemination: A Parvenu Intrudes on Ancient Law (1948-1949), 58 Yale L.J. 456 (a comment, name of author not given).

United States of America alone it was estimated by Seymour and Koerner that by 1941 9,580 women had been impregnated by artificial means.[4] A further indication of the practical significance of this problem is the fact that the Archbishop of Canterbury in December 1945 appointed a commission "to consider the practice of human artificial insemination with special reference to its theological, moral, social, psychological, and legal implications". The commission made its report in February 1948.[5]

There are three types of artificial insemination. *First*, insemination with semen other than that of the woman's husband. This is known as artificial insemination donor (A.I.D.) or artificial insemination heterologous. It is the only possible method when the husband has been found incapable of producing fertile spermatozoa. Hereinafter it will be referred to by the abbreviation A.I.D. *Second*, insemination with semen of the woman's husband, known as artificial insemination husband or artificial insemination homologous, hereinafter referred to by the abbreviation A.I.H. *Third*, insemination with a mixture of the husband's semen and that of another man, which for reasons to be explained later will be referred to by the abbreviation C.A.I.

### *The Method*

In so far as reputable medical practitioners are concerned, the methods followed may be briefly described as follows. A married woman desiring to be inseminated is, on consulting her physician, carefully examined to ascertain whether she is organically able to conceive and bear a child. She is advised that conception does not invariably result from one or even any number of inseminations. She is further required to obtain the consent of her husband either to use his own semen or that of some other man. If semen other than the husband's is to be used, a donor who belongs to a suitable blood group and, so far as can be ascertained,

[4] Report of a commission appointed by His Grace the Archbishop of Canterbury, published in 1948 and reprinted 1952 by S.P.C.K. under the title "Artificial Human Insemination". See also, Artificial Insemination: Its Medicolegal Implications, A Symposium, January 1947 issue of American Practitioner, Vol. 1, No. 5, p. 227.

The author has not been able to obtain any information concerning the extent to which artificial insemination has been practised in Canada, or that it has been practised here at all. Several Winnipeg physicians have stated that they have been requested to inseminate women artificially, but have refused to do so. That such requests have been made may suggest that the women concerned have heard of instances of the practice here, but it is of course equally consistent with a knowledge of the practice elsewhere.

[5] See Parliamentary Debates, Lords, Vol. 161, pp. 386-430.

is suitable in other respects must be found. As most physicians who have engaged in this practice recommend that the identity of the donor should be unknown to the woman and to her husband, the physician has to assume the responsibility for finding the donor and certifying to his suitability. If the identity of the donor is not known, it is argued, there is less likelihood of disputes arising between the woman and her husband. Her affections could not be diverted to her child's father, nor would her husband be so likely to become jealous of a man unknown to him. Furthermore, if the identity of the mother is unknown to the donor, he would be unable later to put forward any claim based on the paternity of the child. But the main argument for secrecy is to obviate the possibility of blackmail by the donor by threats of revealing to relatives, friends or the public generally the impotency of the husband, or the defect of the wife, whose *amour propre* must be protected at whatever cost of deceit of others.

One objection sometimes made to adoption of illegitimate children is that the characters of the parents are at least open to question. Another is that the biological parents are not usually known to the adopting parents. In the case of artificial insemination donor, both these objections apply with equal force to the paternal parent. Indeed the first objection would apply with even greater force. For the only weakness of the unmarried parents of an illegitimate child may have been some lack of self-restraint. But, assuming that the man euphemistically described as the donor is in fact, as seems most generally to be the case, a mere vendor of semen,[6] he would seem to be in a similar category to a prostitute, and the doctor morally, if not legally, in the same position as a common pimp or madam, or perhaps a person living on the avails of prostitution. The moral situation would, of course, be better if the donor was indeed a donor receiving no material rewards and actuated only by a purely altruistic purpose of assuaging the pangs of frustrated desire in some woman unknown to him. If such practice is to be condoned, there can be no reason, logical or otherwise, why we should not also condone and protect prostitution. The man to whom the prostitute sells her services is present to her, his desires (or, if we must indulge in sloppy sentimentality, his frustrations) are manifest, and her motives are at least as likely

[6] Dr. J. P. Greenhill, M.D., states that "a good source of donors is interns in hospitals, most of whom are happy to earn extra money. The price paid for each specimen varies from $5.00 to $10.00." Artificial Insemination: Its Medicolegal Implications, A Symposium, January 1947 issue of the American Practitioner, Vol. 1, No. 5, p. 227, at p. 230.

to be altruistic as those of the so-called donor. We could scarcely be hypocritical enough to approve of the unnatural prostitution of a man's body by the sale of semen and condemn the more natural ministrations of the whore.

Whether the semen is that of the husband or of a donor, known or unknown to the woman, it must be obtained and brought to the physician. There are at least five possible methods of collection: first, by masturbation by the donor; secondly, from the genital organs of a woman with whom the donor has just had intercourse; thirdly, by puncturing a testicle of the donor; fourthly, rectal massage of the prostate gland and seminal vesicles with pressure on the ampulla of the *vas deferens*; and lastly by condomistic intercourse. Any invasion of privacy involved in any of these methods would of course be a matter of no consequence to anyone who is prepared to tolerate the other incidents of the practice. The semen so obtained must be brought *at once* to the physician, who by means of a syringe introduces it into the genital organs of the woman. Further details of method are irrelevant to any legal consequences.

Insemination with the semen of the woman's husband is only feasible where the previous failure to conceive has been due to either some structural defect or neurotic condition of the woman, or the physical or psychological inability of her husband to perform the sexual act. A serious objection to this form of the practice is the possibility, if not the probability, that the defect, which makes resort to it necessary, will be perpetuated in the child and in more remote offspring. The possibility of such socially undesirable results to future generations may very well far outweigh any present doubtful benefits to the mother.

The third type of insemination sometimes practised involves the use of a mixture of the husband's semen with that of some other man. It enables a moronic mother and a husband with both genital and cerebral weakness to delude themselves that the child is his own, or a husband ignorant of the mechanism of fertilization to believe that he may, as a sort of plumber's helper, claim some credit for the product. As *ex hypothesi* the husband's spermatozoa, if any, has hitherto been listless and ineffectual, the odds against them overcoming competition and arriving first at the ovarian goal of spermatozoan ambition are longer than the likelihood of winning ten consecutive Irish Sweepstakes. Having regard both to what is administered and the mental condition of those for whom it is administered, it ought to be called C.A.I.

(confused artificial insemination). It adds one more form of deceit—self-deceit—to those inherent in other types of insemination.

*Secrecy*

There is a reluctance, which I suppose may be called natural, on the part of most people to admit to any weakness or defect, physical or otherwise, and the reluctance appears to be greater when the defect in question is sterility or impotence. Perhaps this is true because the possession of procreative powers seems to many to be the essence of manhood and womanhood. In any event, this reluctance is the chief reason given by advocates of artificial insemination for their insistence that every stage in the practice must be attended by strictest secrecy.

The identity of the donor must not be known to anyone but the physician who does the insemination. One account even suggests that the semen be delivered to the physician's office by a side door.[7] The mother's ignorance of the donor's identity will protect him against any possibility of proceedings for an affiliation order and ensure that her affections will not be directed towards him as the father of her child.

Equally the identity of the woman to be inseminated must not be known to the donor. This is to prevent him from later laying any claim to the custody of the child, or to a right of inheritance from the child, or attempting to blackmail the child, its mother or the mother's husband by threats to reveal the truth concerning the child's origin.

The very fact that the insemination was artificially induced must not be known to anyone except the woman, her husband and the inseminating physician. The child and everyone else may then be led more easily to believe that it is the child of its mother's husband. This deceit makes possible, and in some cases inevitable, frauds upon the next-of-kin both of the mother and of her husband, and perhaps upon other persons whose rights to acquire interests in property may depend upon the marriage of the woman and her husband being childless. Such rights might arise not only

[7] "To eliminate all risk the donor should be asked to bring his specimen to a different place from that where the insemination is to be performed. If the specimen is to be delivered to the physician's office, it should be brought to a side door during the physician's regular office hours when there are many patients, so that the donor could not possibly identify the recipient." Artificial Insemination: Its Medicolegal Implications, A Symposium, the January 1947 issue of American Practitioner, Vol. 1, No. 5, p. 227, at p. 230.

from the provisions of statutes governing the devolution of the property of intestates, but also from the provisions of some wills. The concealment of the donor's identity necessarily results in the falsification of reports which the laws of all the provinces now require to be made by parents or physicians to the various registrars of births, with resultant inaccuracies in the vital statistical records, which would otherwise be avoided. The penalties for such falsification will be dealt with later. It also makes inevitable a deception of the child itself concerning the identity of its father and its paternal ancestors. This too may have unfortunate consequences: for example, it may result in the child unwittingly marrying its own half-sister or half-brother, and thus incurring the risk of evils which may result from inbreeding and which are sought to be avoided by the laws prohibiting incest. A writer points out that a fecund donor, submitting two specimens weekly, could, with ideal conditions, produce 400 children weekly (that is, about 20,000 annually). He goes on to say, "I apprehend that the law with regard to incest is not unsupported by scientific considerations; but A.I.D. would seem to open a very wide door to the mating of the children of one father".[8]

By some it is even advocated that the physician attending at the birth should be other than the one who performed the insemination. What consequences the resulting ignorance of the obstetrician concerning the child's paternity may have on his professional treatment of the mother or the child I cannot say, but it is easy to foresee that it will result in his making a false return to the registrar of births. In the return he will swear or certify to the truth of what are in fact incorrect statements concerning the identity, race, age and occupation of the child's father.

The deception will inevitably mislead any insurance companies who may later insure the child and fix its premiums in partial reliance on a history of longevity or freedom from disease in the family of the mother's husband—a history wholly irrelevant to the life expectancy of the child.

Persons other than insurance companies may be misled, for even in a world of wishful thinkers, where the tendency is to minimize the responsibility of individuals for their misdeeds and to attribute every defect of character to environment, there may still be some realistic persons who would deal with the A.I.D. child on the assumption that it will display qualities of character,

[8] Rt. Hon. Henry Wellinck, M.C., K.C., M.P. (1947), 158 The Practitioner 349, at p. 353.

either good or bad, which distinguished its mother's husband and his ancestors. This reliance on heredity may be scoffed at by egalitarians, but there is a bare possibility that there may be a small element of truth in the doctrine underlying the practices of racehorse and other livestock breeders—that basic characteristics are passed down genetically from generation to generation. This doctrine is indeed used by them as the chief justification for their use of artificial insemination. By artificial emasculation they deprive the weak of all hope of posterity, by artificial insemination they confer on the strong a multiplicity of progeny. In this field of course there is the reverse of secrecy. It is only the stallion that is too slow, or a bull that is too small, that is condemned to sterility and oblivion. But if he is a Nashua or a Man-of-War or the best bull in the ring at the Toronto Exhibition, his seed goes to carefully selected dams all over the country, or it may be the world and the fact is advertised in livestock journals, even in the daily newspapers, and is recorded in the pedigree records in the Departments of Agriculture at Ottawa and Washington. Also it is scarcely consistent to argue in support of the practice that heredity from the father is of no consequence when the sole cogent argument put forward in support of the practice is that a woman wants a child which may inherit her characteristics.

### *Legal Problems Created*

So far as is now known, an Englishman, John Hunter, was the first person to impregnate a woman by artificial means—probably about 1790. The first case in the United States was reported by J. Marion Sims in 1866, but it was not until 1918 that Dr. Marie Stopes asserted that she had popularized the notion; and, as previously stated, the estimated number of pregnancies so induced in the United States had not by 1941 risen beyond 10,000.

As the practice has been too restricted and too recent to have created many problems that have had to be dealt with either by courts or legislatures, it will be necessary, if anything like the full legal implications are to be discussed, to try to imagine how an act of artificial insemination may affect the interests, rights, duties or status of the physician, of the woman, of the woman's husband, of the donor, of the child when born, of the next-of-kin of the husband, the woman and the donor, of the municipality on whom the child might become a charge, and of the public generally.

The existence, nature and extent of these rights and duties depend in large measure, though by no means entirely, on the

answers which the courts or legislatures may give to two questions: first, does A.I.D., or C.A.I., constitute adultery? secondly, is a child born as a result of either method illegitimate? The answers to these two questions will not solve all the legal problems, but they affect many of the interests involved, and it will be convenient to deal with them first.

As the answers that legislatures may ultimately give depend primarily on moral, religious, economic and political considerations, no attempt will be made at this point to prophesy what legislative action will, or should, be taken. It will be assumed that the statutory law will remain as it is now. In other words, I will consider only the probable answers that courts in the present state of the law will give to the questions that we can foresee may arise.

### *Adultery*

The question whether A.I.D. or C.A.I. constitutes adultery has not been answered authoritatively by any court in the British Commonwealth or, so far as the writer is aware, by any court elsewhere. There are dicta in Canadian and American cases that A.I.D. is adultery, and one American case from which the opposite inference might be drawn. Consideration of these cases and other recent decisions in which the nature of adultery has been in question would seem to indicate that the previously accepted definitions, in so far at any rate as they included penetration of the female by the male organ as a necessary element in the act, are no longer satisfactory. Both on authority and in principle it is here suggested that a finding of adultery should not depend solely on proof of penetration, but should be made whenever there is proof of conduct between persons of opposite sexes, one of whom is married to a third person, that is so intimate in its nature as to be likely to destroy the faith of that third person in the chastity and loyalty of his or her spouse, or proof of conduct which involves the possibility that there will be born to the wife of such a third person a child not begotten by him. Let us first examine the cases in which A.I.D. or some analogous conduct has been put forward as either a ground for or a defence to a claim for legal relief.

#### *Cases involving A.I.D. or analogous conduct*

In *Russell* v. *Russell*[9] a jury found that a wife had been fecun-

[9] [1924] A.C. 689.

dated *ab extra* (not by artificial means but without penetration of her sexual organs) by a man not her husband. The conduct proved was of such an intimate nature that spermatozoa found access to her organs. Lord Dunedin at page 721 of the report said: "The appellant conceived and had a child without penetration having ever been effected by any man; she was fecundated *ab extra*. . . . The jury . . . came to the conclusion that she had been fecundated *ab extra* by another man unknown, and fecundation *ab extra* is, I doubt not, adultery."

The opinion is *obiter* as it was not essential to the decision in the case, which turned on the rule that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock. Furthermore, it does not of course deal specifically with artificial insemination.

In *Orford* v. *Orford*,[10] a wife in a suit for alimony gave as an explanation for the birth of a child, of which her husband was not the father, that she had, without his knowledge, been artificially inseminated. Orde J. found that she had in fact had sexual intercourse in the ordinary way with the co-respondent and based his judgment on this finding. Nevertheless he, while disbelieving her story, proceeded to deal with her explanation. He said beginning at page 20:

> I might rest my judgment here; but, owing to the unusual character of the plea of justification set up by the plaintiff, and to avoid the suggestion that . . . I have prevented her from establishing as a matter of law that what she asserts that she did does not constitute adultery, I think it proper that I should deal with that aspect of the case also. . . .
>
> The term 'adultery' has never had an exact meaning, nor has its meaning been the same in all countries or under all systems of law. It is not necessary here to draw distinctions between an act of incontinence by a wife and a similar act by a husband, or as to whether or not sexual intercourse between unmarried persons constitutes adultery. All the definitions, whatever may be the system of law, or whatever the country, in which the term calls for definition, use the term 'sexual intercourse' or some synonymous expression, to describe one of the necessary ingredients or characteristics of the offence. And the learned counsel for the plaintiff, in referring to these numerous definitions, lays great stress upon this uniform characteristic as supporting his argument that without sexual intercourse there is no adultery. But this argument merely shews the fallacy of relying upon the precise terms of a definition without regard to the circumstances which give rise to it, or to the branch of the law in which the offence of adultery forms an element. Some of the definitions to which reference was made are as follows:

[10] (1921), 49 O.L.R. 15.

'Adultery, by the common law, is criminal conversation with a man's wife. . . . By the canon or ecclesiastical law, adultery was sexual connection between a man and a woman, of whom one at least was lawfully married to a third person. The ecclesiastical law regarded adultery as a sin arising out of the marriage relation:' Am. & Eng. Encyc. of Law 2nd ed., vol. I, p. 747.

'Adultery, or criminal conversation with a man's wife': 3 Bl. Comm., p. 139.

'Violation of the marriage bed; the voluntary sexual intercourse of a married person with one of the opposite sex': Murray's Dictionary.

'The sin of incontinence': Wharton.

It is, of course, admitted that there is no direct authority upon the exact point raised here. And a reading of all the definitions makes it clear to my mind that, whenever any stress is laid upon actual sexual intercourse as a necessary ingredient of adultery, it is for the purpose of excluding from the term anything which falls short of that.

Mr. White pointed out that Geary's Law of Marriage and Family Relations (1892), p. 314, lays down that there must be actual sexual intercourse and that no proof of indecent liberties, etc., would be sufficient, and he referred to some American authorities, in one of which, *State* v. *Frazier* (1895), 54 Kan. 719, 725, 39 Pac. Repr. 819, it was laid down that the words 'sexual intercourse' mean 'the actual contact of the sexual organs of a man and a woman, and an actual penetration into the body of the latter'. But when this case is examined it is found to be one involving the crime of rape, and it is simply an illustration of the well-known principle that the act must have proceeded that far in order to constitute the crime.

Mr. White contended that the essential element of adultery rested in the moral turpitude of the act of sexual intercourse as ordinarily understood. With this I cannot agree. The sin or offence of adultery, as affecting the marriage-tie, may, without going farther back, be traced from the Mosaic law down through the canon or ecclesiastical law to the present date. The jurisdiction of the Supreme Court of Ontario to grant alimony is based upon the ecclesiastical law of England as it stood in 1857: Ontario Judicature Act, R.S.O. 1914, ch. 56, sec. 3; Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 34; *Nelligan* v. *Nelligan* (1894), 26 O.R. 8. In its essence, adultery was always regarded as an invasion of the marital rights of the husband or the wife. When the incontinence was that of the wife, the offence which she had committed rested upon deeper and more vital ground than that she had merely committed an act of moral turpitude, or had even seen fit to give to another man something to which her husband alone was entitled. The marriage-tie had for its primary object the perpetuation of the human race. For example, the Church of England marriage service, which in this respect may well serve as the voice of the Ecclesiastical Courts of England, gives as the first of 'the causes for which matrimony was ordained' that of 'the procreation of children'.

That no authority can be found declaring, directly or indirectly, that 'artificial insemination' would constitute adultery is not to be

wondered at. This is probably the first time in history that such a suggestion has been put forward in a Court of Justice. But can any one read the Mosaic Law against those sins which, whether of adultery or otherwise, in any way affect the sanctity of the reproductive functions of the people of Israel, without being convinced that, had such a thing as 'artificial insemination' entered the mind of the lawgiver, it would have been regarded with the utmost horror and detestation as an invasion of the most sacred of the marital rights of husband and wife, and have been the subject of the severest penalties?

In my judgment, the essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of 'adultery'.

The fact that it has been held that anything short of actual sexual intercourse, no matter how indecent or improper the act may be, does not constitute adultery, really tends to strengthen my view that it is not the moral turpitude that is involved, but the invasion of the reproductive function. So long as nothing takes place which can by any possibility affect that function, there can be no adultery; so that, unless and until there is actual sexual intercourse, there can be no adultery. But to argue, from that, that adultery necessarily begins and ends there is utterly fallacious. Sexual intercourse is adulterous because in the case of a woman it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would, therefore, be adulterous. That such a thing could be accomplished in any other than the natural manner probably never entered the heads of those who considered the question before. Assuming the plaintiff's story to be true, what took place here was the introduction into her body by unusual means of the seed of a man other than her husband. If it were necessary to do so, I would hold that that in itself was 'sexual intercourse'. It is conceivable that such an act performed upon a woman against her will might constitute rape.

Mr. White was driven, as a result of his argument, to contend that it would not be adultery for a woman living with her husband to produce by artificial insemination a child of which some man other than her husband was the father! A monstrous conclusion surely. If such a thing has never before been declared to be adultery, then on grounds of public policy, the Court should now declare it so.

In a recent case in the United States, *Doornbos* v. *Doornbos*, which does not appear to have been reported, a Chicago trial court held that the mother of a child born as a result of A.I.D. is guilty of adultery.[11] The ruling was made by Judge Gibson E. Gorman in a declaratory judgment made on the petition of a wife for a declaratory decree in divorce proceedings. The wife, who had filed a complaint for divorce in September 1954, filed

[11] This case is commented upon in (1955), 41 A.B.A.J. 263.

in October of the same year a petition for a declaratory decree. This petition set out that a child had been born to the plaintiff (petitioner) in March 1949 as the result of artificial insemination and that the donor of the semen used was not the defendant husband. The plaintiff prayed that the court should declare:

(a) That it is not contrary to public policy and good morals for a woman to be artificially inseminated.
(b) That the act of the plaintiff in permitting artificial insemination does not constitute adultery.
(c) That David, minor child of the plaintiff herein, is the child of the plaintiff only, and that the defendant has no claim, right or interest whatsoever in said child.
(d) That the court define any and all other legal rights or liabilities of the parties arising out of the aforementioned artificial insemination.

The defendant in his answer to the petitioner did not expressly deny that the plaintiff had been artificially inseminated or that her child had been born as a result of such insemination, but alleged that he had had access to the plaintiff at the time the child was conceived and relied on the presumption of law that he was therefore the natural father of the child. The defendant prayed

> that all of the matters and things stated and charged in his aforesaid answer be considered by the Court and the rights of said innocent child be determined and protected, and this Defendant decreed to be the father of said child, and that such further orders be entered according to law, equity and good conscience. Also, that Plaintiff and her attorneys should be compelled by order of this Court to disclose the name of the so-called reputable physician mentioned in said verified petition for the entry of a declaratory decree who performed the unlawful and unnatural and immoral acts charged in Plaintiff's petition, and that said physician should be required to appear before this Court to be interrogated orally as to his part in this alliance and conspiracy between said physician and the Plaintiff, and if said physician's act or acts in the premises be found unlawful and against moral and natural laws, that said physician be punished accordingly and committed to jail, and that all other persons who had any part in said conspiracy, including the Plaintiff, be punished according to law.

The court heard the testimony of witnesses, examined documentary evidence, heard arguments of counsel and decreed:

> 1. Heterologous Artificial Insemination (when the specimen of semen used is obtained from a third party or donor) with or without the consent of husband, is contrary to public policy and good morals, and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and therefore illegitimate. As such it is the child of the mother and the father has no right or interest in said child.

2. Homologous Artificial Insemination (when the specimen of semen used is obtained from the husband of the woman), is not contrary to public policy and good morals, and does not present any difficulty from the legal point of view.

The matter primarily in issue at the stage of proceedings at which the decree was made was whether or not the defendant husband had any right to visit the child. This issue was decided against the father, the determining factor being the finding that the child was illegitimate. But illegitimacy does not always involve adultery, and it might be argued that the finding of adultery was unnecessary to determine what was actually in issue at that stage of the proceedings. If this argument is correct, the decision is of the same effect as the *obiter dictum* of Orde J. in *Orford* v. *Orford* and that of Lord Dunedin in *Russell* v. *Russell.*

*Report of commission appointed by the Archbishop of Canterbury*

The distinguished legal members of the commission appointed in 1945 by the Archbishop of Canterbury "to consider the practice of human artificial insemination with special reference to its theological, moral, social, psychological, and legal implications" said at page 37 of its report: "We entertain no doubt at all that the act both of a married donor, and a married recipient constitutes adultery".[12]

Lord Merriman during the debate on the commission's report in the House of Lords on March 16th, 1949,[13] referring to this conclusion, said, "that seems to me to be absolute nonsense". He then points out that from the earliest times the courts have required proof of penetration of the woman's sexual organ as an element in adultery; that Lord Dunedin in his dictum in *Russell* v. *Russell* was not by the phrase, "fecundation *ab extra*", referring to artificial insemination, but rather to certain acts of intimacy between the man and woman concerned; that artificial insemination does not involve an act of sexual intercourse at all, and that sexual intercourse in the ordinary sense of the word is necessary to constitute adultery. In support of the proposition that "sexual intercourse in the ordinary sense of the word" is a necessary element of adultery he relies on a range of cases requiring proof of penetration, even though very slight. His argument is scarcely logical. He seems in one breath to insist on the neces-

[12] Published in 1948, and reprinted 1952, by S.P.C.K. under the title "Artificial Human Insemination".

[13] Parliamentary Debates, Lords, vol. 161, at pp. 386-430; see particularly p. 410.

sity of some degree of penetration and, in another, attempts to explain Lord Dunedin's dictum that fecundation without penetration is adultery merely on the ground that Lord Dunedin was not referring to artificial insemination. There can, however, be no doubt that Lord Dunedin was referring to an act that did *not* involve penetration, and that he stigmatized it as adultery.

*Effect of recent cases on definition of adultery*

In several very recent cases courts have expressed the opinion that some types of sexual play stopping short of actual penetration might constitute adultery.[14] In those cases, however, no line of demarcation has been drawn between the intimacies and contacts that would be adulterous and those that would not. And it does not require much imagination to appreciate that it would be difficult to establish a satisfactory criterion. These cases might seem to lend support to the opinion of some medical advocates of artificial insemination who make the essence of adultery the enjoyment of carnal pleasure. Why an act which is not otherwise illegal should become so merely because it gives the participants pleasure is difficult to understand. If these antihedonists are right, then a married woman who consents for monetary reasons to sexual intercourse with a stranger, from which she neither anticipated nor realized any pleasure, would not have committed adultery.

The effect of the cases just referred to is that we can no longer regard as accurate the definition of adultery formerly accepted as "the voluntary sexual intercourse between a married person and a person of the opposite sex during the subsistence of the marriage", if the phrase "sexual intercourse" is to be understood as referring to a physical act involving the penetration of the sex organ of the male participant into that of the female. For we now have binding decisions that penetration is no longer a necessary element, and *obiter dicta* that A.I.D., which does not involve direct physical contact between the donor and the woman, is adultery. These opinions indicate that a re-examination of the concept of adultery is necessary.

Any re-examination should begin with a consideration of the reason or reasons why law or courts of law are concerned with adultery. What legal consequences may flow from a finding by a

[14] *Rutherford* v. *Richardson*, [1923] A.C. 1, 92 L. J. P. 1, 128 L.J. 399; *Thompson (otherwise Hulton)* v. *Thompson*, [1938] P. 162, [1938] 2 All E.R. 727, aff'd [1939] P. 1 (C.A.), [1938] 4 All E.R. 1, 107 L. J. P. 150; *Sapsford* v. *Sapsford and Furtado*, [1954] P. 394, [1954] 2 All E.R. 373.

court that adultery has been committed? With some comparatively unimportant exceptions, which from considerations of space must be passed over, the legal consequences of adultery occur in common-law countries only in connection with petitions for divorce and actions for custody of infants.

The adultery of a parent will be a factor considered by a court in determining that the parent should not have the custody of a child. But there can be no doubt that the chief significance of adultery is in divorce actions. Adultery of a respondent may be a ground for granting a petition, that of a petitioner a ground for refusing it.

*Reasons for permitting divorce*

We may then ask why any act should be a ground for divorce, and what are the qualities or characteristics of conduct which should have such serious consequences. These consequences do not follow in the course of nature from the cause but are only attached to it by the will of man. Why do men wish to attach these consequences? At least two answers can be given. First, if the act is one which would destroy or tend to destroy the sense of security and the belief of the spouses in the exclusive possession of each other's affections on which marriage rests; and, secondly, if it is an act which might introduce into the family a spurious offspring, a continuing charge on the family resources, a constant reminder of infidelity and breach of marriage vows, an ever-present source of suspicion that some other person might be enjoying privileges that should belong only to a spouse.

No great amount of learning or unusual mental ability is required to recognize that insemination may be induced artificially. The possibility must have been apparent since man first realized that a cause-effect relationship existed between the ejaculation of semen into a female and her subsequent pregnancy. This stage of knowledge has been reached by the aboriginal inhabitants of Australia and was probably reached by our stone-age ancestors. Centuries ago domestic animals were impregnated artificially, but until comparatively recently there appeared to be no thought that human beings, other than perhaps zoologists for scientific purposes, would wish to substitute an artificial for the instinctive method of procreation that seems to be in accord with nature. To regard such an obvious makeshift as a mark of progress puts an unwarranted strain on the imagination. It is probably correct to say that the vast majority of those who even considered the pos-

sibility of impregnating women artificially were of the opinion that the idea was too repugnant and fantastic ever to be put into practice.[15]

In that state of public opinion the element of penetration in any act of sexual intimacy between a man and a woman had a special significance. It not only indicated a degree of intimacy which would destroy a husband's or wife's belief that he or she was the sole object of the other's affections, but it was also believed to be the only conceivable element which could cause pregnancy and the birth of spurious offspring. In other words, it would for each of the two reasons just suggested constitute a ground for dissolving the marriage.

But now it is realized that conduct stopping short of penetration may also have either of the consequences which I have suggested are the real reasons for granting divorce.

On the one hand, the court in *Sapsford* v. *Sapsford and Furtado*,[16] recognizing that voluntary submission to or participation in intimate physical contacts may be inconsistent with the duties of a wife towards her husband, granted a divorce on proof of conduct which did not involve penetration but, as the learned judge said, "some lesser act of sexual intercourse". On the other hand, while there is no reported case in which artificial insemination has been the ground on which a divorce has been decreed, yet there are *obiter dicta* that a decree might be made on such a ground and there seems no reason why on principle it should not be. The act certainly entails the risk, and indeed is performed with the intention, of introducing into the family a spurious child. Almost equally certainly, if done without the consent of the husband, it would create the suspicion that he was not the sole possessor or perhaps even one of the sharers of his wife's affections. Even if done with his consent, the consent would at most have the same effect as connivance or collusion has had in respect of the more usual type of adultery, that is, to prevent him from relying on the act as a ground for a petition for divorce.

[15] Perhaps some concession will have to be made to the twin cravings for novelty and notoriety.

"New customs, though they be never so ridiculous, nay, let them be unmanly, yet are followed."—Shakespeare, Henry VIII, Act 1, Sc. 2.

"Of all the passions that possess mankind
The love of novelty rules most the mind,
In search of this from realm to realm we roam,
Our fleets come fraught with every folly home."—Foote.

It is now possible with the help of scalpel and ligature, and the newspaper, to achieve considerable notoriety by oscillating back and forth from masculinity, through hermaphroditism to femininity.

[16] [1954] P. 394, [1954] 2 All E.R. 373.

*Derivation of the word "adultery"*

Although words frequently in the course of time and of being transferred from one context to another undergo changes of meaning, yet their derivation will usually help us to understand any one of the senses in which they may be used. We find from the New English Dictionary that the word "adultery" is derived from the latin root *adulterare*, which according to Harper's Latin Dictionary meant "to defile", to pollute, to give a foreign nature to a thing, "to counterfeit", "to adulterate", "to falsify or to corrupt". It seems reasonable then to suppose that "adultery" was originally used to describe some conduct similar to that described by the latin root, that is the introduction of something spurious or deleterious into what would otherwise be genuine or pure. As applied to the conduct of married persons it would appear more apt to describe that which might introduce a child of the half blood into the family, than that which would deprive one of the spouses of the exclusive right to enjoy the sexual embraces of the other.

*Difference between grounds for divorce by a wife and by a husband*

The view that the significant quality of the conduct described by the word "adultery" was that it might foist an intruder into the family (a cuckoo's egg into the nest) is supported by the fact that until very recently in most jurisdictions a husband has been able to obtain a divorce much more easily than a wife. Before the Matrimonial Causes Act of 1857 a divorce *a vinculo* could only be obtained by act of Parliament, but very few acts were passed on the petition of a wife. Rayden, in the historical introduction to his work on divorce, says:[17]

> Adultery was the only ground upon which a Divorce Bill could be presented, and in ordinary circumstances relief was granted *only to a husband*, although there are four cases reported in which Parliament dissolved a marriage on a wife's petition, but these were cases in which the husband had committed adultery in circumstances of aggravated enormity.

By the Matrimonial Causes Act itself a husband could obtain a divorce on the sole ground of his wife's adultery, while a wife was required to prove some other serious offence combined with that of adultery.

A further fact to be considered is the probability that the western attitude to adultery was strongly influenced by the attitude of the Jews. Horowitz says:[18] "Only sexual connection of a married

[17] (6th ed.) p. clviii.

[18] The Spirit of Jewish Law (1953) p. 204.

woman with a man other than her husband constituted the offence of adultery. Mere infidelity by a husband never was, nor now is, the capital offence of adultery." There would seem to be no rational basis for attaching any greater weight or imposing more onerous legal consequences in respect of a wife's sexual infidelities than of a husband's, apart from the one fact that hers involves the risk of the introduction of a spurious offspring into her husband's family. As a husband's adultery involved no such risk, a wife seeking divorce was required to prove some additional offence as a reason for the dissolution of the marriage.

*Possibility of two tests for adultery*

It may well be that there is not one test of adultery only, but two. First, does the act involve consent to contact of the genital organs other than by a physician for purposes of physical examination or treatment, or in other words does it involve conduct so intimate as to destroy any faith in the chastity or loyalty of the spouse? Secondly, does it involve consent by a married woman to the use by a stranger of her reproductive powers in such a way as to create the possibility of introducing into her husband's family a child not immediately related biologically to him?

That the courts have not in the past distinguished between these two types of acts and recognized them as separate types of adultery is in no way surprising. Until the last three or four decades few, if any, persons contemplated the possibility that men and women would wish to initiate the reproductive process otherwise than by normal sexual intercourse. Any conduct that was thought to involve any risk of pregnancy unquestionably involved also a high degree of intimacy. Even now, as might be expected, with the comparatively few births which have resulted from artificial insemination, no case has yet come into the courts which required for its decision that the court should say whether or not artificial insemination constitutes adultery.

The fact that the courts have in the past required evidence from which it might be inferred that sexual intercourse, including penetration, has taken place is not conclusive that penetration is a necessary ingredient of adultery. It may very well have been required simply because it was not then believed that the conception of a child would be likely to be brought about in any other way. The necessity of proof of penetration could, therefore, in the light of the then state of public opinion, be regarded merely as an in-

sistence on the presence of the possibility that conception might result from the act in question and a recognition that the real test of adultery is not penetration itself but the possibility or risk of conception.

The existence of decisions to the effect that there may be adultery where there is sexual intercourse or intimacies stopping short of penetration, without the consequent risk of pregnancy, does not logically mean that there can be no adultery where risks of pregnancy are taken without sexual intercourse in the usual sense. Sexual intercourse without risk of pregnancy, and risk of pregnacy without sexual intercourse, may be equally destructive of a happy marriage relationship, and it may therefore be that either would constitute adultery, that is, a sufficient ground for not holding a person bound in that relationship.

If there must be one test and one test only for adultery, it would seem that it should be whether the conduct in question involves risk of pregnancy. For it is more reasonable to suppose that the intention in making adultery a ground for divorce is less to prohibit fleeting pleasure and to protect exclusive right of a spouse to sexual intercourse than to prevent the introduction of a very real and continuing financial burden and a cause of discord into the family group. A spouse, who in his or her relations with a member of the opposite sex stops just short of penetration, may be just as unfaithful, just as obnoxious, as one whose conduct is slightly less restrained. So that if carnal pleasure, or preservation of exclusive rights to the enjoyment to be derived from sexual intercourse, were the sole criterion of adultery it would be difficult, if not impossible, to insist on penetration as a necessary element. To insist would be to draw the line between adulterous and non-adulterous conduct in a purely arbitrary way without any basis in reason.

Some writers imply that the essence of adultery is the fact that the unfaithful spouse receives pleasure or enjoyment. But it is difficult to believe that to such a fact alone the law would ascribe the serious consequences that flow from the act. The purpose of law is not to prohibit pleasure so much as to prevent unnecessary suffering. Pleasure and suffering are not, like rights and duties, correlatives in the sense that pleasure can be enjoyed by one person only when suffering is endured by another. Law protects interests. A married person has no interest that his wife or any other person shall not receive pleasure, provided that no suffering by him or loss or risk of loss to him or others is involved. After all,

the law, in contrast to religion, is more likely to be concerned with the protection of material welfare and interests in material things than in the emotional or psychological aspects of conduct.

If one test of adultery is the presence of the risk of pregnancy, then an act of artificial insemination, equally with intercourse involving penetration, constitutes adultery, where one of the parties to the act is married and the other is not his or her spouse.

We must not allow ourselves to be confused by the similarity between ordinary acts of adultery and fornication, because there is one important difference. Fornication is defined in the New English Dictionary as "voluntary sexual intercourse between a man (in restricted use, an unmarried man) and an unmarried woman". Adultery carries legal consequences because it tends to disrupt family life. Fornication, if neither of the parties are married, having no such tendency has no such consequence.

*A.I.D. as adultery*

With all the respect due to Lord Merriman's opinion, it would seem that A.I.D. does constitute adultery and it would do so even if the "risk of pregnancy test" is rejected and the definition approved by Lord Merriman adopted. That definition is, "voluntary sexual intercourse between a married person and a person of the opposite sex during the subsistence of the marriage". Whether the definition includes A.I.D. depends upon what is understood by "sexual intercourse".

In the past no very exact meaning has been given to the phrase in courts of law, though proof of the conduct described by it has been required to determine that rape, adultery, seduction or consummation of marriage has taken place. One specific form constitutes rape, another adultery, another seduction, and still another consummation. But the generic term has never been exactly defined. Recent cases such as *Sapsford* v. *Sapsford*,[19] in which penetration was not a factor, and cases of A.I.D. where the conduct in question involves not only a man and a woman, but also some intermediary, for example, a physician or mid-husband, makes it necessary to analyze more closely the meaning that is relevant in any legal context.

In the most general sense any activity shared by persons of opposite sexes which would normally take place only if the participants are of opposite sexes might be called sexual intercourse. Passionate kissing and embracing, "petting" and the now obsolete

[19] [1954] P. 394, [1954] 2 All E.R. 373.

New England custom of "bundling" would be included in this sense. In a narrower sense however, as descriptions of acts having any legal consequences, "sexual intercourse" might be defined as any conduct between persons involving use of, or direct contacts with, the primary sex organs of at least one of them. Such conduct would presumably be for the purpose of gratifying the desire of one or both of the persons or of procreating children, or for both purposes. Accidental contacts or the examination of sex organs by a physician for purposes of diagnosis or treatment would scarcely be called sexual intercourse. For the conduct to have any legal significance the minimum requirement would be some intentional contact by one of the parties with the primary sex organs of the other. The phrase has no absolute meaning, and the fact that the courts recognize degrees of sexual intercourse may be seen in the judgment in *Sapsford* v. *Sapsford*, where Karminski J. said, "I have no doubt that, if whole penetration was not achieved, some lesser act of sexual intercourse was performed".

Any one of, or even all the other incidents that usually or frequently accompany a sex act, such as gratification of desire, penetration, orgasm, ejaculation of semen, conception of a child, may be absent without an act losing its character as sexual intercourse. But by itself, unaccompanied by at least one of those incidents, it probably has legal significance only in the offence of indecent assault. Rape needs the addition of penetration and lack of consent by the woman. In actions of seduction, where sexual intercourse is an element at all, there must also be enticing or soliciting by the defendant and loss of service to the plaintiff. Consummation requires penetration but not orgasm or emission of semen. But direct contact of the male and female organs need not be proved, for in *Baxter* v. *Baxter*[20] it was held by the House of Lords that an act of intercourse during which the male organ was encased in a contraceptive device was sufficient to consummate a marriage.

*Essentials of adultery*

It is more difficult to be sure what incidental factors, if any, must accompany an act of sexual intercourse in order to constitute adultery. Homosexuality in none of its forms has ever been held to be adultery, though it may destroy the possibility of domestic happiness just as effectively as heterosexual acts and has, in fact, by recent enactment in England become a ground for divorce. Consequently it would seem to be necessary to attach prime im-

[20] [1945] A.C. 274.

portance to the fact that the conduct must be between persons of opposite sexes. The only significance which this fact, standing by itself, can have is that it may result in the pregnancy of the woman. Homosexual acts can have all the other characteristics of heterosexual acts. Lasciviousness or gratification of the woman's desire is unnecessary, for there would seem to be no doubt that, if a married woman permitted a stranger to introduce his sex organs into hers for financial reward or with the hope of conceiving, she would be engaging in sexual intercourse and committing adultery, even though she neither anticipated nor realized any gratification or pleasure from the act. It is not necessary that the parties be aware of each other's identity or marital status. Intercourse between two masked revellers at a masquerade ball, or between persons meeting by chance in a blackout, would be adulterous if either of them were married. In the recent decisions that intimacy stopping short of penetration may be adultery, the language used in the reasons given is so vague, and the facts so insufficiently reported, that it is not possible to be certain whether the conduct in question even involved contact of the male and female organs.

It has been held, then, or follows logically from the decided cases that the sexual intercourse of which adultery is a species need not: (a) induce pregnancy; (b) be intended or even tend to induce pregnancy (for example, where contraceptives are used); (c) involve penetration; (d) involve a knowledge of the identity of the parties; (e) result in the gratification of pleasure; or (f) even be motivated by the expectation of pleasure.

As these would seem to be the only factors that could affect either the parties to the conduct or other persons, it would also seem to follow that an act of adultery has only three essential characteristics. First, it must involve two persons of opposite sexes, one of whom must be married. Secondly, there must be contact by at least one of the actors with the primary sexual organs of the other for purposes other than a *bona fide* medical examination, treatment for a pathological condition or sick-room care. Thirdly, the person against whom adultery is alleged must have voluntarily made or submitted to such a contact. In other words, adultery may be based not only on one form of sexual intercourse but on any form that has the three essential characteristics, even if unaccompanied by any other incidental factors.

If this analysis is correct, then A.I.D. of a married woman is adultery between her and the donor, the intercourse between whom is conducted through a third person who injects the semen into the woman as an intermediary. It also constitutes adultery

between the woman and the third person, if a male. Where the third person is a woman, it would certainly require an extension of present principles to hold that the act would be adulterous.

In the opinion of the writer, artificial insemination of a married woman with semen of a man other than her husband is adultery on her part. If that opinion is correct, the consent of the woman's husband will not make it otherwise, any more than would his consent to an act of ordinary sexual intercourse between his wife and a stranger. Consent, it is reasonable to suppose, would have the same effect as collusion or condonation, and prevent him from relying on an act of artificial insemination to which he has consented as a ground for a petition of divorce.

If the two tests suggested are applied, A.I.H. would clearly not constitute adultery either by the woman or her husband, or by the physician. It is difficult to imagine any situation in which the conduct of the physician could be questioned. The husband by reason of his consent and participation would be prevented from relying on the act as a ground for divorce or any relief against the physician. The case of C.A.I. presents a little more difficulty, as by one of the tests suggested, namely, the risk of introducing a spurious offspring, the act would be adulterous, but the husband would be debarred from any claim for relief for the same reason as in the case of A.I.H.

*Adultery in Quebec law*

In the province of Quebec adultery may have several legal consequences. It may be a ground for divorce by private act of the Parliament of Canada, for separation from bed and board under articles 187 and 188 of the Civil Code, for forfeiture under article 208 of certain property of the wife in the event of separation, and for deprivation of a wife of her dower under article 1463.

It is arguable that the Civil Code, at least before it was amended in December 1954,[21] regarded adultery by a wife as more serious than by a husband, for by article 187 a husband could (and still can) obtain a separation on the sole ground of adultery, whereas under article 188 a wife had to prove not merely adultery, but the fact that the husband kept his concubine in the common habitation of the husband and wife. The only justification for this discrimination between the rights of a husband and of a wife would seem to be the one already referred to in discussing

[21] By 3-4 Eliz. II, c. 48, article 188 was amended by deleting the concluding words, "if he keeps his concubine in their common habitation", so that the article now reads, "A wife may demand the separation on the ground of her husband's adultery".

the position at common law, namely, that adultery by a wife may result in the introduction of spurious offspring into the family, whereas that of a husband does not. If this is the significant element, it would be a strong indication that artificial insemination would be considered adultery in Quebec.

The importance of this element is even greater under the Civil Code as under its provisions the presumption of legitimacy arising from birth during marriage is even more difficult to rebut than under the common law. Article 218 provides that "a child conceived during marriage is legitimate and is held to be the child of the husband". The only grounds apparently on which a husband can disown such a child are those set out in articles 219 and 220. Article 219 permits the husband whose wife has committed adultery about the time of conception and has then concealed the birth from him to set up facts tending to establish that he is not the father. Under article 220 the husband may prove that he could not be the father by reason of some impotency arising after the marriage or some physical impossibility of meeting his wife. In the absence of such reasons for repudiating his obligations he must under article 165 maintain and bring it up: he cannot disown the child even on positive proof of his wife's adultery.

(*To be continued*)

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## The Proper Study of Mankind . . .

My third, and perhaps the most important observation for the purposes of this lecture, concerns what might be called the forgotten areas of law practice, the problems which do not appear in upper court decisions — human problems, presented and solved in the lawyer's office. The case method provides a very effective way for the student to get a detailed knowledge of the law as it is administered by appellate courts. This is essential background for the students' practice. But in most instances it is little more than background. The law in many fields may be likened to a map. If you go too far this way, you will get into trouble. If you go too far that way, you may resolve your present problem, but you will then be confronted with another. The law establishes boundaries, and marks out doubtful or troubled areas. But it by no means covers the whole field of human relations. There are many situations where the lawyer's advice is not based on essentially legal considerations. Should there be a corporate or an individual trustee? What provision should be made in the will for the wayward son? Should the executor be bonded? How can an unhappy couple be brought together? In such situations the problems are not essentially legal. . . . (Erwin N. Griswold, Law Schools and Human Relations, (1955) Wash. U. L. Q. 217, at p. 221)