HIGH COURT OF AUSTRALIA

Wright

Vs.

Wright

(Latham C.J.(1), Rich(2), Dixon(3) and McTiernan(4) JJ.)

29 November 1948

CATCHWORDS

Divorce - Adultery - Standard of proof - Condonation - Onus of proof - Matrimonial Causes Act 1929-1941 (S.A.) (No. 1946 of 1929 - No. 51 of 1941), s. 10.

HEARING

Adelaide, 1948, September 21, 22; Sydney, 1948, November 29. 29:11:1948 APPEAL from the Supreme Court of South Australia.

DECISION

1948, November 29.The following written judgments were delivered: -

LATHAM C.J. In cross proceedings for divorce in the Supreme Court of South husband pleaded condonation by the wife. It was admitted by the wife that she had become aware that he suffered from a venereal disease. Sexual intercourse by a wife with knowledge of adultery by the husband is strong, though not conclusive, evidence of condonation: Cramp v. Cramp (1920) P 158, at pp 167, 168 . The wife gave evidence, however, that she did not know at the time that such a disease was almost necessarily the result of intercourse, and she said that she believed her husband's statement that he had contracted it in 1942 from contact with a lavatory seat. The husband also said that she appeared to believe him, though he philosophically added: "You can't read a woman's mind." She and a police constable gave evidence that in about November 1946 the constable informed her that it was practically certain that the disease was the result of intercourse with another woman. She then separted from her husband. (at p195)

2. The learned trial judge, Mayo J., found that the husband had committed adultery, but he was not satisfied either that the wife had condoned the adultery or that she had not condoned it. The Matrimonial Causes Act 1929-1941 (S.A.) s. 10, contains the following provision: "Upon the hearing the Court shall as far as possible satisfy itself that there is no reason why the order claimed shall not be made." His Honour held that the effect of this section was to place upon the plaintiff wife the onus of satisfying the court that she had not condoned her husband's adultery. As she did not succeed in doing this, her claim was dismissed. The wife appeals against the dismissal of her

action and the husband cross-appeals, asking that the order of dismissal be varied by striking out the finding of adultery against him. (at p195)

3. Upon a counterclaim of the husband it was held that the wife had committed adultery with a boarder named O'Hallagan (who was joined as a co-defendant to the counterclaim), and an order nisi for divorce was made in favour of the husband. (at p196)

4. The wife appeals to this Court against the last-mentioned order, contending that the learned judge was wrong in finding her guilty of adultery; alternatively, that if she should be held to be guilty of adultery, the discretion of the court should be exercised in her favour, and that the learned judge was wrong in holding that the effect of s. 10 was to place upon her the onus of proving that she had not condoned her husband's adultery. It is contended for her that, on the contrary, it was for the husband to establish his defence of condonation, and that as he had not succeeded in affirmatively establishing this defence, an order should be made in her favour for dissolution of the marriage. (at p196)

5. The parties were married in 1933. The husband was subject to epileptic fits and the married life was unhappy. In 1942 he contracted gonorrhoea. He made to his wife the statement already mentioned. He went to a doctor and attended a night clinic for treatment. He told his wife that the doctor said that he must have caught the disease in intercourse with a woman and he charged his wife with being responsible and with being guilty of adultery. He said in the witness box that he believed that his wife had given him the disease. His wife denied the charge and went to Dr. G.H. Burnell, a specialist in venereal diseases, who examined her and gave her a certificate stating that he was unable to find any evidence of gonorrhoea. Dr. Burnell gave evidence that it was not possible for a woman to infect a man with gonorrhoea without her having a sign of it discoverable upon medical examination. Another specialist said that the disease might escape detection, but that it would depend upon the nature and the particularity of the examination. In other words, a careless examination might lead to a false conclusion. The learned trial judge accepted the evidence of Dr. Burnell and there is no reason for disagreeing with this finding. He therefore did not find adultery against the wife on the ground that she had a venereal disease which she communicated to her husband. (at p196)

6. There was evidence by the husband that he saw a partiallyclothed man in the house at night, chased him away, charged his wife with adultery and beat her. She denied this charge. There is no finding by the learned judge as to the incident, but it took place in 1943 and sexual intercourse took place between husband and wife at a later date, so that, if adultery did then take place, the husband condoned it. (at p196)

7. But the husband relied also upon adultery of the wife with O'Hallagan, and upon this ground an order was made in his favour. O'Hallagan was a married man, but his wife was abroad - probably in Newfoundland. He became a boarder at the matrimonial home with the consent of the husband in October 1946. A friendship was established between him and the wife. He helped in the household and about the garden. The husband gave evidence that towards the end of November 1946 he found O'Hallagan near the house at lunch time. He became suspicious and ordered him out of the house. It was at this time that the wife saw the police constable, and she left the matrimonial home (which was owned by her) and began divorce proceedings on 3rd December 1946. She recovered possession of the home in April 1947. O'Hallagan then again resided with her. This continued for some months. The wife's solicitor gave advice to her that this continued association could be misconstrued, and that it should not continue. The result of this advice was that O'Hallagan no

longer slept at the house, but he had his meals there and spent his spare time there. The husband employed inquiry agents to watch his wife and O'Hallagan, and he himself watched them. No evidence was given of any acts of familiarity between the wife and O'Hallagan, except that on one occasion they (as she admitted) were seen in the street walking hand in hand. There was no evidence of mutual passion, or even of affection. Something more than friendship between a man and a woman is required to establish adultery. One case cannot be an authority in another case on a question of fact, but the following statement by Lord Buckmaster L.C. in Ross v. Ross (1930) AC 1, at p 7 explains the proper approach to the consideration of the question whether adultery is established in a particular case: - "Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, e.g., letters and diaries, or antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence." In the present case there is a complete absence of even the slightest affectionate interchange and, if the matter had to be determined solely upon the written record of evidence contained in the appeal book, I would say that adultery had not been proved. But the learned trial judge had the almost inestimable advantage in such a case as this of seeing and hearing the parties himself. Evidence of adultery is almost always circumstantial. The proper inference to be drawn from close association of a man and a woman providing opportunities for adultery depends very largely upon an estimate of the type and character of the persons concerned. When a husband and wife separate on account of the continued presence of another man in the home and that man then becomes, as it was put, "the man of the house," it may be that the association has no sexual features. The parties might be shown to have common interests of some kind which would explain their companionship. There is a complete absence of any such evidence in the present case. The natural conclusion is that, in the common phrase, the man and woman were "living together." It would be outrageous to assume that an association between two persons of different sex with opportunities for adultery necessarily results in adultery. Sometimes it would be sufficient to see and hear such persons in order to reach a negative conclusion. But in other cases the manner of giving evidence, the general mentality, the attitude towards sexual matters, the part played in their lives by sex interests, and the failure to provide any suggestion of common interests other than those of sex relations which would explain their sharing a common life - all these matters (only some of which appear in a transcript of evidence) may justify a finding of adultery. I am by no means free from doubt upon this matter, but, after careful consideration, I can find no adequate ground for setting aside the conclusion reached by Mayo J., after seeing the witnesses and making a very full and careful examination of the evidence, that adultery did take place between the wife and O'Hallagan. (at p198)

8. But it is urged for the wife that the learned trial judge was not satisfied beyond reasonable doubt that adultery had been committed and that therefore he applied the wrong standard of proof. In view of the decision of the Court of Appeal in Ginesi v. Ginesi (1948) P 179 the Court was asked to reconsider the decision in Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336 . In the last-named case it was held that on a petition for divorce on the ground of adultery the standard of proof required by the Marriage Act 1928 (Vict.) was not the criminal standard of proof beyond reasonable doubt, but that the civil standard of proof by preponderance of probability applied, regard being had to the serious nature of a charge of adultery. In Ginesi v. Ginesi (1948) P 179 it was held by the Court of Appeal that adultery must be proved with the same degree of strictness as is required to establish a criminal charge. Briginshaw's Case [1938] HCA 34; (1938) 60 CLR 336

was determined upon a consideration of the relevant statute, which excluded in divorce proceedings the application of the principles and rules on which the ecclesiastical courts had acted. There were other provisions in the statute which were relied upon as showing that the standard of proof in civil proceedings was that which ought to be applied in determining an issue of adultery. Ginesi's Case (1948) P 179 was determined without argument. The conclusion is based upon ecclesiastical and other authorities. These authorities do not appear to me to support the conclusion which is based upon them. In Sanchez's "Disputationum," for example, it is laid down that "violenta suspicio" is necessary, and is sufficient, to justify condemnation for adultery. I do not think that it has ever been held that violent suspicion is sufficient to justify a verdict of guilty in a criminal case. No reference is made in Ginesi's Case (1948) P 179 to any statutory provisions. It is suggested in Ginesi's Case (1948) P 179 on the basis of a reference to adultery as a "criminal act," that adultery is a crime. But it is a simple statement of fact that there is no rule of the common law and there is no statutory provision which makes adultery a crime. There can be no prosecution in any court for adultery. No penalty by way of fine or imprisonment or otherwise can be imposed for adultery. I cannot understand how an act for which no penalty of any kind can be imposed on any person can be called a crime in a purely legal context, however reprehensible that act may be from an ethical point of view. In Ginesi's Case (1948) P 179 no reference is made to the express decision of the House of Lords that adultery is not a crime - Mordaunt v. Moncreiffe (1874) LR 2 Sc & Div 374 - applied in Branford v. Branford (1878) 4 PD 72 . In my opinion no adequate reason has been adduced in the present case for reconsidering the decision in Briginshaw's Case (1938) 60 CLR 336 . (at p199)

9. The result is that there was ground (adultery of the wife with O'Hallagan) for making the order in favour of the husband on his counterclaim. It was not pleaded that this adultery was condoned, and there was no evidence whatever of any such condonation. The wife's appeal in the husband's action should be dismissed. (at p199)

10. It is now necessary to consider the wife's action. It was based upon adultery of the husband to be inferred from his contraction of gonorrhoea. The evidence is practically overwhelming that this disease is contracted only in sexual intercourse. It is a possibility that it can be contracted by some other means, but in the absence of any evidence of particular facts and circumstances showing that it has been so contracted, the Court should, as the learned trial judge did, adopt the reasonable conclusion that it was acquired in sexual intercourse. There is evidence, accepted by the learned trial judge, that the wife did not have the disease, and therefore the conclusion is that it was contracted by sexual intercourse with another woman. (at p200)

11. But the husband, in addition to denying adultery, relied alternatively on the defence that the wife condoned his adultery by allowing him to have sexual intercourse, though she knew that he had had the disease and therefore that he had been guilty of adultery. The evidence of the wife that she believed, and continued up to the time of the interview with the constable to believe, that the husband had contracted the disease innocently did not find complete acceptance by Mayo J. He was not satisfied that she had not condoned the adultery, but on the other hand he was not satisfied that she had condoned it. Thus the husband had not proved his defence of condonation, but the wife had not disproved it. His Honour held that s. 10 of the Matrimonial Causes Act 1929-1941 (S.A.) (which has already been quoted) placed upon the wife the onus of disproving the condonation by her alleged by her husband. (at p200)

12. The Act provides in the customary manner for the grounds of divorce and provides in s. 11 for absolute and discretionary bars. It is therein provided that no order shall be made if the plaintiff has condoned all the grounds proved. Under this provision the onus of proving condonation would rest

upon the party alleging it. The question is whether this position is changed by s. 10. It has been held in Martin v. Martin (1944) SASR 59 and Adams v. Adams (1944) SASR 68 that s. 10 does shift the onus of proof and that in the case of condonation, and presumably of the other grounds of defence mentioned in s. 11 (being accessory to or conniving at a ground proved, and collusion) the onus is on the plaintiff to establish that none of these reasons for not making an order exist. These decisions were based upon the following cases: Poulden v. Poulden (1938) P 63 ; Lloyd v. Lloyd (1938) P 174 ; and Germany v. Germany (1938) P 202 . In the first place, the relevant dicta in these cases, which refer to the onus of proof in the case of connivance, were disapproved in Churchman v. Churchman (1945) P 44 . Secondly, these cases were decisions upon the construction of s. 178 of the Supreme Court of Judicature (Consolidation) Act 1925 (Imp.) as enacted by s. 4 of the Matrimonial Causes Act 1937 (Imp.). That section in its present form contains provisions which are much more detailed and precise than those which are to be found in s. 10 of the South Australian Act. Section 178 (1) provides that: "On a petition for divorce it shall be the duty of the court to enquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties." Sub-section (2), so far as relevant, is as follows: - "If the court is satisfied on the evidence that - (i) the case for the petition has been proved; and (ii) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery . . . and (iii) the petition is not presented or prosecuted in collusion . . . the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition." It was said in the Court of Appeal in Churchman v. Churchman (1945) P, at p 50 "That it" (s. 178) "places the burden of proof on the petitioner is indisputable." The double provision that if the court is satisfied that there is no condonation &c., a decree shall be pronounced, but if the court is not satisfied with respect to any of the said matters the court shall dismiss the petition, is plainly intended to require the court to be satisfied of the truth of a number of negative propositions before it makes an order in favour of a petitioner for divorce. Mayo J. was of opinion that fundamentally the English statute and the Australian Act impose the same duty upon the court, and with the like consequences. Section 13 of the South Australian Act provides that: "Subject to this Act the court, upon being satisfied as to the existence of any ground, shall make the order or the order nisi claimed as the case may be." This provision corresponds to s. 178 (2) (i) of the English Act and is substantially identical with it. But the South Australian Act does not contain what is to be found in s. 178 (2) (ii), (iii) and the following words quoted, namely, a distinct and definite provision that the court shall dismiss the petition if it is not satisfied with respect to the negation of the various defences mentioned in s. 178. The decision in Churchman v. Churchman (1945) P 44 (a case of alleged connivance) cannot be said to have conclusively settled, even for the purposes of the application of the English statute, all the questions of construction which arise, because Lord Merriman P., although stating that the provisions introduced in 1937 have placed the burden of proof (really the burden of disproof of all possible defences) upon the petitioner, refers to the presumption against connivance and says that it is open to question whether a radical change in the law has been effected by the amendments made in 1937 (1945) P, at p 50 . A requirement that the onus should rest upon a petitioner to disprove both actual and possible defences would surely constitute a radical change in the law. The President adds: "The issue does not arise at all unless the circumstances are such as to lead to a suspicion of connivance calling for investigation" (1945) P, at p 50 . Thus, as the decisions at present stand, the position in England appears to be that the burden of disproof of connivance (against which there is a presumption) and of condonation (as to which there is no such presumption, for condonation may be a praiseworthy act) rests upon the petitioner, and that the court must be satisfied that neither those nor certain other grounds of defence exist, but that nevertheless, unless there are circumstances of suspicion raising a doubt as to whether such

grounds may exist, apparently the court need not concern itself with the matter, in spite of the provision of the statute prohibiting the making of a decree unless the court is satisfied that the grounds mentioned do not exist. I can see no reason why the difficulties which are becoming apparent in relation to the English statute should be imported into the consideration of the much simpler provision of s. 10 of the South Australian Act. (at p202)

13. It has been urged that the Court should follow the decision in Churchman's Case (1945) P 44 in order to establish uniformity in the law between England and Australia. The High Court is not bound by decisions of the Court of Appeal in England (Davison v. Vickery's Motors Ltd. (In Liquidation) [1925] HCA 47; (1925) 37 CLR 1 ; Cowell v. Rosehill Racecourse Co. Ltd. [1937] HCA 17; (1937) 56 CLR 605) but where the provisions of the law are identical, or substantially identical, in England and in Australia, and the law in England is well settled, there is much to be said for the proposition that this Court should follow the decisions of the Court of Appeal: Waghorn v. Waghorn [1942] HCA 1; (1942) 65 CLR 289 . But, as already stated, the provisions of the English statute are in this case not absolutely identical, and in my opinion they are not substantially identical, with the provisions of the South Australian Act. Further, as already stated, it can hardly be said that the law in England in relation to the interpretation of the English Act is settled. I have called attention to difficulties which appear upon consideration of the decision in Churchman's Case (1945) P 44 . The subsequent case of Emanuel v. Emanuel (1946) P 115 I respectfully suggest, illustrates the difficulties. In Emanuel v. Emanuel (1946) P 115 it was held that Churchman's Case (1945) P 44 involves the recognition of a presumption of innocence (with respect to connivance) which is neither an irrebuttable presumption, nor a rebuttable presumption which can be met by evidence, but is what is described as a "provisional presumption," that is, apparently, a presumption which can be displaced, not only by evidence establishing a contrary conclusion, but by suspicion that a contrary conclusion may represent the true state of facts. This appears to me to be a new kind of presumption. In my opinion this case shows that the law in England as to the construction of the English statute, which is different in its terms from the South Australian statute, cannot yet be said to be settled. In my opinion, no satisfactory reason appears for attempting to apply Churchman's Case (1945) P 44 in the construction of the South Australian statute. (at p203)

14. Section 10 of the South Australian Act was not, before the English decisions mentioned, interpreted in the manner for which the respondent to this appeal now contends. In my opinion s. 10 does not produce the result that the onus is upon a plaintiff in all cases, whether defended or undefended, to establish to the satisfaction of the court the negative propositions that the plaintiff has not condoned, has not been accessory to, and has not connived at, any of the grounds proved, and that there has not been collusion by the plaintiff in bringing or prosecuting the action. The other sections of the Act, as I have already said, require the plaintiff to establish one of the necessary grounds for the relief claimed and leave it to the defendant to establish any defence upon which he relies. In accordance with the general rule, the onus of proving an allegation rests upon the party making it. Section 10, however, is a special provision which recognizes the interests of the public in the preservation or the dissolution of the matrimonial tie. The effect of s. 10 is to impose a special duty upon the court. It means that the court is not limited as in an ordinary case (civil or criminal - see Titherage v. The King [1917] HCA 76; (1917) 24 CLR 107 and the cases there cited) to the evidence adduced by the parties. The court may make its own inquiries for the purpose of satisfying itself that there is no reason why the order claimed should not be made, even though no defence alleging such a reason has been pleaded. The court may procure an investigation by the Crown Solicitor, who performs the functions which in England are discharged by the King's Proctor. The provision not only allows, but directs, the court to satisfy itself "as far as possible" that there is no reason why the order claimed should not be made. The introduction of the words "as far as possible"

shows that the duty is imposed upon the court, and that s. 10 has no bearing upon the requirements of proof by either party. An obvious case for the application of s. 10 would be where the court suspected collusion. Collusion, if it existed, would not normally be pleaded by either party, but the court has the duty of satisfying itself "as far as possible" that collusion does not exist. A plaintiff would naturally, if the question were raised by the court, endeavour to satisfy the court that there had been no collusion, but it should not be held, in my opinion, that the section places the onus on a plaintiff of establishing that there had been no collusion. In my opinion it should not be held that s. 10 has placed upon a plaintiff the burden of disproving either the defences actually raised, or all possible defences. (at p204)

15. In the present case the husband did not satisfy the learned trial judge that there had been condonation, and, accordingly, did not establish his defence. In my opinion the onus was upon him to establish that defence. The case, in relation to condonation, was decided entirely upon the question of onus of proof. In my opinion s. 10 does not alter the onus of proof and, accordingly, as the wife established adultery on the part of the husband, an order should (subject to consideration of the disqualifying effect of her own adultery) have been made in her favour. Orders may be made for divorce upon both a claim and a counterclaim: Blunt v. Blunt (1943) AC 517 . Both parties established their allegations of adultery. The defences relied upon - traverses and, in the wife's action, a further defence of condonation - were not proved. The learned trial judge found that the husband had been guilty of adultery, but exercised his discretion in the husband's favour by making an order for divorce upon his counterclaim. The marriage is a complete failure and there are the same grounds, or stronger grounds, for exercising a similar discretion in favour of the wife in her action. (at p204)

16. The wife's appeal in her action should, in my opinion, be allowed and the order of the court varied by substituting for the dismissal of the plaintiff's claim an order for divorce on the ground of adultery by the husband with a woman unknown to the plaintiff. The wife's appeal as to the husband's counterclaim should be dismissed and the husband's cross-appeal should be dismissed. (at p204)

17. My brothers Dixon and McTiernan agree with Mayo J. that the wife's action should fail because she did not establish absence of condonation of her husband's adultery. My brother Rich and myself are of opinion that it lay upon the husband to prove his defence of condonation, that he did not establish it, and that therefore the wife's action should succeed. The result is that the decision of Mayo J. in respect of this action is affirmed: Judiciary Act 1903-1947, s. 23 (2) (a). As to the husband's cross-action, two of the justices, Dixon J. and myself, agree with the conclusion of Mayo J. that the wife was guilty of adultery (as to which there was no defence of condonation) and that therefore a decree was rightly made in favour of the husband. The result is that in this cross-action the decision of Mayo J. is affirmed: Judiciary Act 1903- 1947, s. 23 (2) (a). (at p205)

18. Both appeal and cross-appeal must therefore be dismissed and there should be no order as to costs. (at p205)

RICH J. In this appeal from the Supreme Court of South Australia (Mayo J.) two questions arose: (1) Whether the onus of disproving condonation was placed upon the plaintiff wife in proceedings by her against the defendant husband where the husband had been found guilty of adultery; and (2) whether upon the evidence the finding of adultery against the wife was justified by the evidence. On the first question I think as a general rule, where the issue of condonation has been raised in divorce proceedings, the party relying thereon has the burden of proving it. Though the Matrimonial Causes

Act 1929-1941 (S.A.) s. 10, requires the court to be satisfied that there is no reason why the order claimed shall not be made, this provision does not, I think, affect the obligations of the litigating parties to discharge such burdens of proof as arise in the course of their respective contentions. Condonation is a matter which properly belongs to the defence: see Bishop on Marriage and Divorce, 5th ed. (1873) p. 288, s. 334. The onus of establishing condonation should, therefore, rest upon the party alleging it, and in this case the onus was, I think, upon the husband and not the wife. Accordingly as there was sufficient evidence, as indeed the learned judge so held, to find the husband guilty of adultery, his Honour was not justified in dismissing the wife's action on the ground that she had not satisfied the court that she had not condoned the husband's adultery. (at p205)

2. The other question is whether the learned judge was justified in concluding that the plaintiff wife was guilty of adultery with O'Hallagan. While I think there is much reason for the opinions recently expressed requiring what is called a criminal law standard of proof, I adhere to the decision of this Court in Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336 which in effect lays it down that in charges of adultery, the balance of probabilities should be the judicial guide; "reasonable satisfaction" is reflected in the words of the section (1938) 60 CLR, at p 350 . As Bishop on Marriage and Divorce, 5th ed. (1873), s. 613, p. 512, says: "Adultery is peculiarly a 'crime' of darkness and secrecy: the parties are rarely surprised in it: and so it not only may, but ordinarily must, be established by circumstantial evidence." It is an obvious truism that suspicion does not amount to proof: and I think that the mere probability (suspicio probabilis) of adultery being committed is also no ground for finding adultery. There must be, I think, a substantial or overriding probability in the one direction in considering the competing probabilities. The proof should be strict, satisfactory and conclusive: Bishop on Marriage and Divorce, 5th ed. (1873), p. 514, note 2, Rix v. Rix [1777] EngR 15[1777] EngR 15; ; (1777) 3 Hag Ecc 74 (162 ER 1085) . One must at the present time in cases such as this take into account the manners and customs of the time. The latitude of the times in the relations of the sexes cannot, perhaps, be reconciled with the rigid conventions of the mid-Victorian era - in days when with a strange mixture of prudery and reticence the legs of tables were draped so as not to offend the delicate sensibilities of the gentler members of the household and a woman who was driven in London in a hansom cab lost her character. On the evidence in the present case, while no doubt the wife and O'Hallagan had every opportunity to commit adultery, there is, in my opinion, no evidence of circumstances which usually accompany the guilty relations of a man and a woman - instances, for example, of conduct showing passionate attachment evinced either by words or correspondence, the secret meetings of the parties and other clear and unambiguous indications of a guilty relationship. On the evidence I find no series of circumstances which would justify the finding of the learned judge that the plaintiff wife had committed adultery with O'Hallagan. If the conduct of a man or woman charged with adultery is equally capable of two interpretations, one of which is consistent with innocence, it is not sufficient to establish guilt. I am, therefore, dissatisfied, to adopt the word used by Lord Mansfield and adopted by Sir Cresswell Cresswell in Miller v. Miller [1862] EngR 461; [1862] EngR 461; (1862) 2 Sw & T 427 (164 ER 1062) with the finding of the primary judge and consider that the counter-claim against his wife ought not to succeed and that the plaintiff wife's claim ought to succeed. (at p206)

3. The wife's appeal should be allowed. (at p206)

DIXON J. This is an appeal by a wife from an order for dissolution of marriage. (at p206)

2. The order was pronounced on the ground of her adultery. The proceedings had been instituted by

her against her husband and she sought a divorce on the ground of his adultery. She established his adultery but, on the ground of condonation, she failed to secure the relief she sought. By cross proceedings, however, the husband sought an order for dissolution on the ground of her adultery. Adultery was found against her and the relief was granted to her husband. She complains of the finding of adultery and of the decision that, by reason of condonation, relief cannot be granted to her on the ground of her husband's adultery. (at p207)

3. Proof of her husband's adultery is based upon the fact that he became infected with veneral disease and upon medical evidence showing that his wife was free from it. The proofs are adequate and fully authorize the finding against him. He raised a plea of condonation which is supported by evidence of all the necessary facts except his wife's knowledge of his adultery. She knew that he was infected with veneral disease, knew that such disease was communicable from other women but did not know that it was in the last degree unlikely that it was communicated in any other way. He gave her a lying explanation which she says that she believed. Mayo J., by whom the case was heard, was not convinced by her story. His Honour said that, so far as the husband had taken the burden of proof by his plea, he was not prepared to say that he had discharged it and the learned judge did not find that condonation had been established affirmatively on a preponderance of probability. On the other hand, his Honour said that the evidence did not satisfy him that his wife did not condone her husband's adultery. (at p207)

4. In a matter in which so much depends upon an estimate of the witness, it is not possible for this Court, as the evidence stands, to be satisfied where the primary judge was not satisfied. The decision upon the issue of condonation therefore depends upon the onus of proof. Mayo J. has held, following Adams v. Adams (1944) SASR 68 , that the burden is placed upon an applicant for divorce to negative condonation. Ultimately this view rests upon the meaning of s. 10 of the Matrimonial Causes Act 1929-1941 (S.A.), which provides that upon the hearing the court shall as far as possible satisfy itself that there is no reason why the order claimed should not be made. The old rule was that knowledge and forgiveness of an offence are not presumed: Durant v. Durant [1828] EngR 56[1828] EngR 56; ; (1825) 1 Hag Ecc 733 (162 ER 734) . There was nothing, as it appears to me, in the language of s. 178 of the Supreme Court of Judicature (Consolidation Act 1925 (Imp.) or in ss. 29-31 of the Matrimonial Causes Act 1857 (Imp.) of which in part s. 178 was a re-expression, to require any different rule. In Germany v. Germany (1938) P 202, at p 206 Langton J. said: "There was not, as I understand it, ever any presumption of law in favour of or against condonation, but the burden of proving condonation lay with the party who alleged it." (at p208)

5. But s. 4 of the Matrimonial Causes Act 1937 (Imp.) substituted a new s. 178 expressed in a very different manner. The result appears to be that, at all events whenever connivance or condonation is the subject of inquiry, the burden of satisfying the court that there has not been connivance or condonation rests on the petitioner or the party in the position of a petititioner. It is not quite easy to reconcile all that Lord Merriman says in Churchman v. Churchman (1945) P 44 with the general conception of the principles governing the operation of rules with respect to burden of proof, but this seems to be the effect of the decision. With it should be read Germany v. Germany (1938) P 202, at pp 205, 206 ; Poulden v. Poulden (1938) P 63, at p 67 ; Lloyd v. Lloyd (1938) P 174, at p 195 ; Emanuel v. Emanuel (1946) P 115 , and Kafton v. Kafton (1948) 1 All ER 435 . (at p208)

6. Whatever rule may be found desirable for connivance, justice and convenience appear alike to be on the side of a rule placing the burden of proving condonation on a guilty spouse who raises that plea. But I cannot myself construe s. 10 of the South Australian statute in a way that will give room for such a rule. To say that the draftsman employed the language he used in the section alio intuitu

may be true, or at least may accord with an instinctive suspicion. But it is not an explanation which destroys or alters its meaning. It says that the court shall satisfy itself of the absence of reason against an order and this cannot be made consistent with a requirement that the party shall satisfy the court of the presence of the like reason. (at p208)

7. I agree in the decision of Mayo J. upon this point and in the decision of Reed J. in Adams v. Adams (1944) SASR 68 which Mayo J. followed. (at p208)

8. For the wife a well-ordered attack was made upon the finding that she herself was guilty of adultery. (at p208)

9. The finding was made as an inference from circumstances notwithstanding the oath to the contrary of the wife and of the man concerned. The circumstances are simple and commonplace. The husband and wife, who were married in 1933 and had one child, a girl aged about twelve, lived together in a state of relative antipathy, discord and unhappiness. He describes himself as a master mariner but he lived ashore in a house owned by his wife and occupied himself in running some ketches. At his invitation one of the hands, a man from Newfoundland who had left his wife in Canada, came to live with them. He proved more useful as a member of the household than the husband, certainly in the kitchen and the garden, and she spent much time with him. The husband became jealous and, there can be no doubt, remonstrated with his wife. The estrangement between husband and wife culminated in the wife leaving and taking her daughter with her. She lived with or near connections but she secured accommodation for the man close at hand. Then she came back to her house and her husband departed. But she gave room to the same man. He occupied the room her daughter had formerly used and her daughter slept in her room. He had his meals there, went out with her, busied himself about the house and garden and to all outward appearance might have been taken for the man of the house. The wife knew that their relations were suspected but this continued. Then when the divorce proceedings were instituted her solicitor learned of the situation. He expressed his views of the unwisdom, if not of the impropriety, of their dwelling together, though proceedings for a divorce were on foot; and he advised that the man find another place of abode. He did so literally. He took a room near by; but he went back to her house for all his meals, spent his evenings with her, changed his clothes there on his way to work and on his return from work, and, except that he retired elsewhere for the night, used the house as his abode. With full knowledge that her husband treated the relation as adulterous she can hardly complain that her persistance in maintaining it and in having the man live in her house with no one else but herself and a twelve-year-old child is construed as evidence of adultery. It is true that but slight manifestations of affection in their public behaviour were proved and that no direct proof of adultery was obtained. But the judge saw the parties concerned and heard their evidence and their cross-examination. A case of this description must depend greatly upon the estimate he forms of them. The adequacy of the circumstances as evidence of adultery can hardly be contested. Whether the inference is to be drawn or not depends, from a practical point of view, upon the credit to be attached to their explanation. What they said amounted, in effect, to an acknowledgment of mutual interest, friendship and enjoyment of one another's society falling short of a sexual attraction and association. In face of the many smaller circumstances proved showing the development of the wife's estrangement from her husband, its causes, the beginning course and persistence of her association with and attachment to the other man, it was for the judge to assess the probability of this explanation paying full attention to what he heard from the witness box and what he observed, and to decide how far it should cause him to hesitate in drawing the inference which the circumstances otherwise suggested. It would in my opinion be an error for this Court to disturb his conclusion. (at p210)

10. It was urged however that the learned judge had decided the issue according to the standard of persuasion laid down in Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336 and had not tested his conclusion by the criminal standard which requires the exclusion of all reasonable doubt. The criminal standard of persuasion, it was said, was demanded by the decision of the Court of Appeal in Ginesi v. Ginesi (1948) P 179 , which we were urged to follow in preference to our own. (at p210)

11. While our decision is that the civil and not the criminal standard of persuasion applies to matrimonial causes including issues of adultery, the difference in the effect is not as great as is sometimes represented. This is because, as is pointed out in the judgments in Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336 the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue and because the presumption of innocence is to be taken into account: cf. Edwards v. Edwards (1947) SASR 258 . But an important difference may well exist, if the Court of Appeal means that the principles of criminal proof are to be applied in full, so that if there is some reasonable hypothesis compatible with innocence that is not convincingly excluded by the proofs advanced the party is to be acquitted of adultery notwithstanding that the court has no belief in the hypothesis. I doubt whether the Court of Appeal contemplated this consequence, but it may be one making the difference of the standards important in the present case. (at p210)

12. For myself, I have in the past regarded it as better that this Court should conform to English decisions which we think have settled the general law in that jurisdiction than that we should be insistent on adhering to reasoning which we believe to be right but which will create diversity in the development of legal principle. Diversity in the development of the common law (using that expression not in the historical but in the very widest sense) seems to me to be an evil. Its avoidance is more desirable than a preservation here of what we regard as sounder principle. But there is great difficulty in being sure of what has been finally settled in England. For example, the reasoning of the majority of their Lordships in the Scots Appeal of Marshall (or Wilkinson) v. Wilkinson (1943) 2 All ER 175 , decided since Waghorn v. Waghorn [1942] HCA 1; (1942) 65 CLR 289 , somewhat reduces the certainty we there expressed that the law had been definitively settled in accordance with the decision of Herod v. Herod (1939) P 11 and Earnshaw v. Earnshaw (1939) 2 All ER 698 . Again In re Arden; Short v. Camm (1935) Ch 326 lessens the certainty that final guidance is given by In re Bostock's Settlement; Norrish v. Bostock (1921) 2 Ch 469 , in deference to which Hunt v. Korn [1917] HCA 66; ; (1917) 24 CLR 1 was overruled in Sexton v. Horton [1926] HCA 25; (1926) 38 CLR 240 . Further, the observation may be made that in the divorce jurisdiction cases have of late been decided in England that are very hard to reconcile with the settled doctrine of all Australian States, particularly in relation to desertion; doctrine settled by judicial work spread over a period of not much less than half a century before 1937, when the English legislation of that year brought forward a stream of difficulties, the greater number of which had been faced and solved long before in Australia. The observation it is true has not very much significance with reference to the question before us. For it happens that, before Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336 , some authority did exist in Australia for the view taken in Ginesi v. Ginesi (1948) P 179 . (at p211)

13. On this occasion I am prepared to concur with the opinion that we ought to adhere to our own decision and not abandon it in favour of that of the Court of Appeal in Ginesi v. Ginesi (1948) P 179 . (at p211)

14. Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336 is a well-considered decision

based on as complete an examination and survey of the subject as we could make. So much cannot be said of Ginesi v. Ginesi (1948) P 179 . Of late years English courts have from time to time dealt in almost an unconsidered fashion with the standard of persuasion in reference to issues in civil proceedings involving crime, fraud or moral turpitude, that is, without going back to earlier case law inconsistent with assertions that have been casually made. Needless to say the assertions have been made without a study of the learning collected in Wigmore on Evidence: cf. Helton v. Allen (1940) [1940] HCA 20; 63 CLR 691, at p 713 . A "full-dress" examination of the question would, I am sure, lead to some revision of the statements made in Ginesi v. Ginesi (1948) P 179 . Further, it is after all a matter of practice and procedure and not of substantive law, part of the law adjective. (at p211)

15. Some other decision, more particularly of the House of Lords, may make it necessary for us to reconsider Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336 , but I do not think Ginesi v. Ginesi (1948) P 179 does so. (at p211)

16. In my opinion the appeal should be dismissed. No order should be made as to costs. (at p212)

McTIERNAN J. In this case the learned trial judge (Mayo J.) found the husband, the respondent, guilty of adultery, as alleged by the wife, the appellant. The learned judge then considered whether the husband made out the defence of condonation which he pleaded and arrived at the conclusion that the evidence in support of the plea and the evidence denying it were evenly balanced, and as a preponderance of affimative evidence was needed to sustain the plea, Mayo J. found that the husband failed to sustain it. His Honour's next step was to apply s. 10 of the Matrimonial Causes Act 1929-1941 (S.A.), the Act under which the proceedings were taken. Mayo J. applied this section by considering whether the evidence proved that the wife did not in fact condone the adultery. His Honour was not satisfied that she had not done so because the negative evidence did not make it more probable that she had not done so than that she had. Mayo J. was right in the view that he could not find either for or against condonation unless there was a preponderating probability one way or the other. Having found that the evidence did not establish the negative, the learned judge, applying s. 10, dismissed the wife's claim for a divorce. There is no ground for disagreeing with the learned trial judge's view that the weight of the negative evidence was not greater than the affirmative evidence, relevant to the issue of condonation. Hence the question is whether Mayo J. correctly applied s. 10 by dismissing the wife's claim because she did not satisfy him that she did not condone the adultery. Section 10 says that: "The Court shall as far as possible, satisfy itself that there is no reason why the order claimed should not be made." Condonation is, of course, a "reason", and divorce is an "order" to which s. 10 refers. The section entrusts the court with the duty of disallowing any claim unless the order sought is strictly warranted by the Act irrespective of the issues which the defences may formally raise. The effect of the section is that the court must dismiss a claim for divorce unless the court is satisfied that the claimant is not disentitled to it for any reason which the Act makes a bar. The section does not in terms refer to the onus of proof, but it gives no indication that the duty which it imposes upon the court is qualified by any rule which determines where the onus of proof of any fact lies. The terms of the section imply an onus upon the claimant to satisfy the court that there is no reason why the court should not make the order claimed. The cases of Martin v. Martin (1944) SASR 59 and Adams v. Adams (1944) SASR 68 decide that the party claiming a divorce has under s. 10 the onus of proving that the matrimonial offence in respect of which the divorce is claimed was not condoned. I am of opinion that these cases correctly interpret s. 10. For these reasons I am of opinion that the wife's claim for an order nisi for divorce was rightly dismissed. (at p213)

2. The wife also appeals against the finding, made upon the husband's counterclaim, that she was guilty of adultery. In consequence of this finding the court granted the husband an order nisi for divorce. Section 13 of the Act says: "Subject to this Act the court, upon being satisfied as to the existence of any ground, shall make the order or the order nisi claimed as the case may be." The Act does not prescribe the degree of persuasion which it is necessary for the evidence to induce in the court before it ought to be satisfied that a charge of adultery is substantiated. The standard of proof is to be found in the law of England having its source in case law and other authoritative writings. In Briginshaw v. Briginshaw (1938) 60 CLR 336 this Court made a pronouncement on the question of the standard of proof required by law to substantiate a charge of adultery. But since that case was decided and before the present case was heard, the Court of Appeal made a pronouncement on the same question in the case of Ginesi v. Ginesi (1948) P 179 . This is the first pronouncement of that Court on this question. In that case, the Court directed that the authorities on the question be called to its attention and the decision was obviously well considered. Tucker L.J., after reviewing a number of authorities said (1948) P, at p 181 : "I am satisfied that Hodgson J. was correct when he said that adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence - and I limit my observations to cases of adultery. Adultery was regarded by the ecclesiastical courts as a quasi-criminal offence, and it must be proved with the same strictness as is required in a criminal case. That means that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact." The other judges agreed with this statement. The standard of proof laid down in Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336 is a different one. There is no reason arising from Australian conditions why adultery should not have the same legal aspect as that given to it by the Court of Appeal, which classifies it as a quasi-criminal offence, or why the standard of proof required to substantiate it should be different in Australia from the standard which the Court of Appeal says is part of the law of England. I am of opinion that Ginesi v. Ginesi (1948) P 179 should be followed in preference to Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336 for the reasons given in Waghorn v. Waghorn [1942] HCA 1; (1942) 65 CLR 289 , for following the English cases on desertion in preference to Crown Solicitor (S.A.) v. Gilbert (1937) 59 CLR 322 . The standard of proof laid down in Ginesi v. Ginesi (1948) P 179 was not applied in the present case. For this reason I think that the finding that the wife committed adultery should be set aside and a new trial of the husband's counterclaim had. (at p214)

3. In the result I should allow the wife's appeal in part. I should dismiss the husband's cross-appeal. (at p214)

ORDER

Appeal and cross-appeal dismissed. No order as to costs.

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