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*Feb. 19, 20
*May 12

ARVID SMITH (PETITIONER) .....APPELLANT;

AND

ELLEN SOFIA SMITH (RESPONDENT) ....RESPONDENT,

AND

JOHN SMEDMAN (CO-RESPONDENT) ..CO-RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Divorce—Evidence—British Columbia Divorce Proceedings—Standard of Proof of Adultery required—The Divorce and Matrimonial Causes Act 1857 (Imp.) c. 85 as amended by c. 108, R.S.B.C. 1948, c. 97—English Law Act R.S.B.C. 1948, c. 111.

Proceedings in divorce under the Divorce and Matrimonial Causes Act in British Columbia are civil and not criminal in their nature and the standard of proof of the commission of a marital offence, where no question affecting the legitimacy of offspring arises, is the same as in other civil actions. The rule as stated in *Cooper* v. *Slade* (1858) 6 H.L.C. 746 and in *Clark* v. *The King* (1921) 61 Can. S.C.R. 608 at 616, applies.

Mordaunt v. *Moncreiffe* (1874) L.R. 2 Sc. & Div. 374; *Branford* v. *Branford* (1879) L.R. 4 P. 72 at 73; *Redfern* v. *Redfern* (1891) p. 139 at 145 and *Doe dem Devine* v. *Wilson* (1855) 10 Moo. P.C. 502 at 532, referred to.

APPEAL by the petitioner from the judgment of the Court of Appeal for British Columbia (O'Halloran J. dissenting), dismissing an appeal from the trial judgment dismissing the petition.

I. Shulman for the appellant. The trial judge erred in that he failed to make findings of fact and credibility and in applying the case of *Stuart* v. *Stuart* (1). That case can have no application as it deals with the law in cases where inferences are required to be drawn from circumstantial evidence; and the evidence herein was direct evidence. That case holds that "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called." It is wrong. It follows *De Voin* v. *De Voin* (2), a unanimous decision based solely upon the dictum of Lord Merriman in *Churchman* v. *Churchman* (3). It is quoted three times and referred to a fourth in *Stuart* v. *Stuart,* leaving no doubt that the Court of Appeal in this case held that the criminal standard of proof is required in order to prove adultery in a matrimonial cause.

*PRESENT: Rinfret C.J., Kerwin, Taschereau, Rand, Locke, Cartwright and Fauteux JJ.

(1) [1948] 1 W.W.R. 669. (2) [1946] 2 W.W.R. 304.

(3) [1945] P. 44.

The words "evidence which clearly satisfies me beyond a reasonable doubt of the guilt of the respondent and co-respondent", used by the trial judge clearly imply, at least in this country, that he was applying the criminal standard of proof; *a fortiori* when these words are connected with and therefore explained by the reference to the onus required by *Stuart* v. *Stuart*.

It is wrong in law to require the criminal standard of proof in order to prove adultery in a matrimonial cause; that is, it is not correct to say that "The same strict standard of proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called."

(*a*) Adultery is not a crime. The criminal standard should not apply in a criminal proceeding.

(*b*) *A fortiori* the criminal standard should not apply on the grounds that it is a quasi-criminal offence.

(*c*) The word "satisfied" is used in the Act. It would have been easy to add the words "beyond all reasonable doubt" if that is what was in the "mind" of Parliament. There is no justification for adding such a distinctly qualifying phrase.

(*d*) The criminal standard of proof is neither required or justifiable as a matter of public policy to protect the interests of the State, society or the individual.

(*e*) The criminal rule was formulated out of the high regard which the law has for the liberty of the individual. The same is not called for in divorce suits where the court is concerned, not to punish anyone, but to give statutory relief from a marriage which has broken down.

(*f*) The authority of *Ginesi* v. *Ginesi* (1) upon which *Stuart* v. *Stuart* leans, in part, has been doubted in England.

(*g*) In Ontario and Saskatchewan, at least, of the Provinces in Canada, the civil standards has been clearly held to be sufficient: and this is the view preferred in Australia and in the United States *Briginshaw* v. *Briginshaw* (2).

(1) [1948] 1 All E.R. 373. (2) (1938) 60 C.L.R. 336.

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In order to determine the principles regulating the standard of proof in the divorce court, it is necessary to go to the provisions of the statute, which in this case is the *Marriage Act 1928*. S. 80 is as follows: "Upon any petition for dissolution of marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, as to the facts alleged and also to inquire into any countercharge which may be made against the petitioner."

S. 86 "Subject to the provisions of this Act, the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for dissolution of marriage." The phrase "it shall be the duty of the court to satisfy itself, so far as it reasonably can" is also used in s. 81. The sections directly relevant are ss. 80 and 86. S. 80 is a governing section applying to all the facts alleged as grounds for a petition for divorce—adultery, desertion etc. So far from the legislature having used the phrase "satisfy itself beyond a reasonable doubt" or any similar phrase, the legislature has simply used the word "satisfy". It can be assumed that the legislature was aware of the difference between the civil standard of proof and the criminal standard of proof. It would not be a reasonable interpretation of s. 80 to hold that the words "satisfy itself" meant "satisfy iself beyond a reasonable doubt". But the actual phrase is not merely "satisfy itself" but "satisfy itself so far as it reasonably can". The addition of the words "so far as it reasonably can" strongly supports the view that the legislature did not intend the court to reach that degree of moral certainty which is required in the proof of a criminal charge. The words are apt and suitable for applying in the new jurisdiction the civil standard of proof, but they are not apt words of description for the criminal standard of proof. In s. 86 the words are "The court, if it is satisfied that the case of the petitioner is established, shall pronounce a degree nisi". These words, like those in s. 80, are applicable to all the grounds upon which a petition can be presented. If they require the criminal standard of proof in the case of adultery, they also require that standard of proof in the case of desertion—a proposition which has no authority to support it. The result is that the ordinary standard of proof in civil matters must be applied to the proof of adultery in divorce proceedings,

subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation such as that of adultery is established. *Dearman* v. *Dearman* (1); *Wright* v. *Wright* (2); *George* v. *George and Logie* (3).

P. Murphy for the respondent. The trial judge dismissed the petition on the basis that the petitioner had not discharged the onus of proof cast upon him by the decision in *Stuart* v. *Stuart* (4) i.e. that the petitioner had not laid before the trial judge evidence which satisfied him beyond a reasonable doubt. The Court of Appeal sustained the decision and dismissed the appeal. The Chief Justice interpreted the reasons of the trial judge to mean that because of the conflict of evidence the trial judge was unable to find as a fact that the petitioner had discharged the onus of proof upon him to prove the adultery alleged beyond a reasonable doubt and that in that sense the trial judge had properly relied upon *Stuart* v. *Stuart*. The Chief Justice further stated that he could not say that the conclusion of fact of the trial judge based as it was upon the evidence before him and the advantage of the view he had and the demeanor of the witnesses, in a word the surrounding circumstances, was so clearly erroneous that the Court of Appeal should interfere. Mr. Justice Robertson concurred. Mr. Justice O'Halloran dissented in part holding that *Stuart* v. *Stuart* did not apply except in cases where the adultery was to be inferred from the circumstances, and would have directed a new trial so that the trial judge could make proper judicial findings on credibility which he found were lacking.

In *De Voin* v. *De Voin* (5) the Court of Appeal followed the law as laid down in *Churchman* v. *Churchman* (6) by Lord Merriman P. who said "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called". The same Court had occasion to review this aspect of the

(1) (1908) 7 C.L.R. 549.
(2) (1948) 77 C.L.R. 191.
(3) [1951] 1 D.L.R. 278.
(4) [1948] 1 W.W.R. 669.
(5) [1946] 2 W.W.R. 304.
(6) [1945] P. 44.

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law in *Stuart* v. *Stuart* where a number of authorities bearing on the issue were considered—*Loveden* v. *Loveden* (1); *Allen* v. *Allen and Bell* (2); *FitzRandolph* v. *FitzRandolph* (3); *L.* v. *L. and K.* (4); *Churchman* v. *Churchman, supra; Ginesi* v. *Ginesi* (5).

In *Davis* v. *Davis* (6) the principle in *Churchman* v. *Churchman* seems to be adopted by the Court of Appeal in England.

In *Fairman* v. *Fairman* (7) Lord Merriman giving judgment for himself and Ormerod J. stated that in *Ginesi* v. *Ginesi* (5) the Court of Appeal unreservedly approved the observation made by him in *Churchman* v. *Churchman* in relation to a charge of adultery, including as Wrottesley L.J. expressly said, connivance, while leaving open the question whether the current generality of the observation applied to other matrimonial offences. Here again, insofar as adultery is concerned, that principle is laid down as the standard of proof required. It must be noted that this was a case where direct evidence of adultery was involved. This case seems to be in harmony with the decision of the Court of Appeal, at bar, to the extent that in applying the principles, no distinction is to be drawn, whether or not the evidence of adultery is direct or circumstantial.

The latest decision on the point is *Preston-Jones* v. *Preston-Jones* (8) in which the House of Lords seemed to accept and enunciate the principle that where it was sought to prove adultery the law demanded that the same be established beyond all reasonable doubt. In *Gower* v. *Gower* (9) Denning L.J. by way of obiter dicta seems to cast some doubt on the principles set out in the *Ginesi* case. Ontario formerly adopted the standard laid down in *Churchman* v. *Churchman; DeFalco* v. *DeFalco* (10); *Jones* v. *Jones* (11). In *Robertson* v. *Robertson* (12) the view of Hogg J.A. seemed to be that adultery could not be regarded as criminal or quasi-criminal, but that a high standard of proof is required in divorce cases. In *George* v. *George* (13),

(1) (1810) 161 E.R. at 648, 649.
(2) [1894] P. 248.
(3) (1918) 41 D.L.R. 739.
(4) [1922] 1 W.W.R. 224 at 227.
(5) [1947] 2 All E.R. 438.
(6) [1950] 1 All E.R. 376.
(7) [1949] 1 All E.R. 938.
(8) [1951] 1 All E.R. 124.
(9) [1950] 1 All E.R. 804.
(10) [1950] 3 D.L.R. 770.
(11) [1948] O.R. 22.
(12) [1951] 1 D.L.R. 498.
(13) [1950] O.R. 787.

Roach J.A. giving judgment for the Court, reviewed all the authorities and said "the standard of proof is not that imposed upon the Crown in a criminal prosecution, but is the standard required in a civil action only. The judicial mind must be 'satisfied' that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal —be it judge or jury—acting with care and caution, to the fair and reasonable conclusion that the act was committed." In *Bruce* v. *Bruce* (1) the Court of Appeal in Ontario decided that where adultery was to be inferred from circumstances, it was not correct to say that the circumstances adduced in evidence not only must be consistent with the commission of the act of adultery, but must be inconsistent with any other rational conclusion.

It is submitted, therefore that the test applied by the trial judge that the allegations of adultery should be proved beyond a reasonable doubt was not misdirection, but that he directed himself properly in accordance with the law that is in effect in Canada, and that the appeal should therefore be dismissed.

I. Shulman in reply.

The judgment of the Chief Justice, Kerwin, Taschereau, Locke and Fauteux, JJ. was delivered by:—

LOCKE J.:—This is an appeal by the petitioner in a divorce action from a judgment of the Court of Appeal for *British Columbia* (2), dismissing his appeal from the judgment of Wilson J. which dismissed his petition: O'Halloran J.A. dissented and would have directed a new trial.

By the petition the appellant asserted that his wife had at various times committed adultery with the co-respondent and claimed a dissolution. These allegations were put in issue by the pleadings filed by the respondent and the co-respondent. It is sufficient to say of the evidence adduced at the trial that there was, what must be exceedingly rare in actions of this nature, direct evidence of the

(1) [1947] O.R. 688. (2) [1951] 4 D.L.R. 593.

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commission of the marital offence given by the petitioner and another eye witness and in addition evidence of other circumstances from which adultery might have been inferred. The direct evidence was denied by the respondent and the co-respondent as was the fact that they had at any of the times complained of been guilty of adultery.

In dismissing the petition Mr. Justice Wilson said that the petitioner had not brought forward evidence which satisfied him beyond reasonable doubt of the guilt of the respondent and co-respondent and, considering himself to be bound by the decision of the Court of Appeal of British Columbia in *Stuart* v. *Stuart* (1), the action failed.

In the Court of Appeal the Chief Justice of British Columbia, with whom Mr. Justice Robertson agreed, considered that, in view of the reasons delivered by the learned trial judge, the matter was governed by the decision in *Stuart's* case. Mr. Justice O'Halloran was of the opinion that the decision in that case did not apply where there was, as in the present case, direct evidence of the commission of the marital offence, while in *Stuart's* case and an earlier case of *De Voin* v. *De Voin* (2), where the Court had arrived at the same conclusion on a point of law, the evidence was circumstantial.

By the *English Law Act* (R.S.B.C. 1948, c. 111) the civil and criminal laws of England, as the same existed on the 19th day of November 1858 and so far as the same are not from local circumstances inapplicable, are in force in the Province of British Columbia, save to the extent that such laws shall be held to have been modified or altered by legislation having the force of law in the province or in any former colony comprised within the geographical limits thereof. The statute conferring jurisdiction upon the Supreme Court of British Columbia in divorce and matrimonial causes is The Divorce and Matrimonial Causes Act 1857 (Imp.) (20-21 Vict. c. 85) as amended by 21-22 Vict. c. 108 and it was under the terms of that statute that the proceedings in the present action were taken. The latter statute provides that in all suits and proceedings other than proceedings to dissolve any marriage the court should proceed and act and give relief on principles and

(1) [1948] 1 W.W.R. 669.

(2) [1946] 2 W.W.R. 304.

rules which, in the opinion of the court, should be, as nearly as may be, conformable to the principles and rules on which the ecclesiastical courts had theretofore acted and given relief, subject, however, to the provisions of the Act and rules or orders made under it. The ecclesiastical courts, while empowered to grant divorce *à mensâ et thoro* were without jurisdiction to dissolve a marriage, relief which could in England be obtained only by an Act of Parliament. The Act of 1857 declared, *inter alia,* that it should be lawful for any husband to present a petition for the dissolution of the marriage on the ground that his wife had since the celebration thereof been guilty of adultery and provided that:—

> In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved.

The question to be determined is whether, in order to find that the case of the petitioner has been proven, the court must be satisfied beyond a reasonable doubt that adultery has been committed, or whether, as in the case of other civil proceedings, the Court may act on what Willes J. described in *Cooper* v. *Slade* (1), as the "preponderance of probability" or, as expressed by Duff J. (as he then was) in *Clark* v. *The King* (2), "on such a preponderance of evidence as to shew that the conclusion the party seeks to establish is substantially the most probable of the possible view of the facts."

The decision of the Court of Appeal in *De Voin* v. *De Voin supra,* adopted as an accurate statement of the law a passage from the judgment of Lord Merriman P. speaking for the Court in *Churchman* v. *Churchman* (3), reading:—

> The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called.

(1) (1858) 6 H.L.C. 746. (2) (1921) 61 Can. S.C.R. 608 at 616.
(3) [1945] P. 44 at 51.

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In the interval between this decision and that in *Stuart's* case a divisional court in England had adopted and followed Lord Merriman's statement of the law in the case of *Ginesi* v. *Ginesi* (1), a judgment later affirmed by the Court of Appeal (2).

While in *Allen* v. *Allen* (3), Lopes L.J., delivering the judgment of the Court of Appeal in a case where the evidence was circumstantial, had said in part (p. 252):—

> A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated.

I have been unable to find any decision either in England or in Canada where, prior to the judgment in *Churchman's* case, it has been said that the standard of proof required in the case of a matrimonial offence was that required in criminal cases, this irrespective of the nature of the matrimonial offence or whether the evidence was circumstantial or direct.

It is of importance to note that the point which Lord Merriman was considering in *Churchman's* case was as to whether there was evidence of connivance between the parties to the action and that, in so far as his statement of the law related to or could be related to other matrimonial offences such as adultery, it was simply *obiter*. The passage referred to must be read with its context: after discussing the question as to whether the burden of proof in relation to connivance had been shifted by some recent statutory enactments in England, Lord Merriman said (p. 51):—

> But it is not necessary to express any final opinion on the question where the burden of proof lay under the earlier Acts or on the reasons for the change in the wording. Assuming that the present Act deliberately imposes a new burden on the petitioner this cannot in our opinion mean that there is now a presumption of law that he has been guilty of connivance. The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called. Connivance implies that the husband has been accessory to the very offence on which his petition is founded, or at the least has corruptly acquiesced in its commission, and the presumption of law has always been against connivance.

(1) [1947] 2 All E.R. 438. (2) [1948] P. 179.
(3) [1894] P. 248.

While support for the view that some higher degree of proof was necessary on the issue of connivance might have been found in the judgment of Dr. Lushington in *Turton* v. *Turton* (1), in my humble opinion the application of the principle to the marital offence of adultery is not supported by authority.

The appeal in *Ginesi* v. *Ginesi* was first heard before a divisional court consisting of Hodson and Barnard, JJ. The trial had been before the Bradford justices and the proceedings are not reported. A separation order obtained by the wife by reason of her husband's wilful neglect to maintain her was discharged on the ground that she had committed adultery. After saying that the justices had apparently not been alive to the standard of proof requisite in a case of that class, Hodson J. said in part (p. 438):—

> It is a matter of history that in matrimonial cases, adultery having been described as a quasi-criminal offence, the standard of proof is a high one, and if authority is required it is to be found in the language used by Lord Merriman, P., in *Churchman* v. *Churchman*.

and quoted the statement which had been adopted in the *De Voin* and *Stuart* cases: he then proceeded to say that the error made by the justices was in thinking that the standard of proof required was that in an ordinary civil case where merely the "preponderance of evidence, or even the balance of probability" might be applied. Barnard, J. agreed that this was error. On the appeal to the Court of Appeal, counsel for the husband apparently conceded the correctness of the rule as stated by Lord Merriman, as applied to the charge of adultery. Tucker, L.J., however, considered some of the early authorities such as *Rix* v. *Rix* (2); *Williams* v. *Williams* (3) and *Loveden* v. *Loveden* (4), which I will refer to later, and certain remarks of Lord Buckmaster and Lord Atkin in *Ross* v. *Ross* (5), and decided that Hodson J. was correct in saying that adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence. Wrottesley L.J. agreed that the rule applied to cases of adultery, leaving it to other occasions to decide whether it was equally applicable to other matrimonial offences "in addition, of course, to

(1) (1830) 3 Hag. Ecc. 339.
(2) (1777) 3 Hag. Ecc. 74.
(3) (1798) 1 Hag. Con. 299.
(4) (1810) 2 Hag. Con. 1, 3.
(5) [1930] A.C. 17.

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connivance, the offence which Lord Merriman P. must have had in mind in *Churchman* v. *Churchman*." Vaisey J. expressed his complete agreement with the other members of the Court and said (p. 186):—

> The close similarity of the offence of adultery to acts which are properly to be described as criminal today is beyond question.

In *Fairman* v. *Fairman* (1), Lord Merriman, P., dealing with a case where the offence charged was adultery, after noting that what he had said in *Churchman's* case had been adopted and followed in the Divisional Court and in the Court of Appeal in *Ginesi's* case, said that he would like to add that he had always directed himself and directed juries that adultery is a quasi-criminal offence and that, therefore, the same principles should be applied as in the case of criminal offences properly so called but that, in relation to offences such as desertion, cruelty or wilful neglect to provide reasonable maintenance, he had never charged that the same strictness applied.

In *Preston-Jones v. Preston-Jones* (2), an action for divorce which would result, if successful, in bastardising a child, the judgment of the Court of Appeal in *Ginesi* v. *Ginesi* was referred to by Lord Morton and Lord MacDermott. Certain statements made in other judgments delivered in the matter are also to be noted. Lord Simonds who did not refer to Ginesi's case said in part (p. 127):—

> A question was raised as to the standard of proof. The result of a finding of adultery in such a case as this is in effect to bastardise the child. That is a matter in which from time out of mind strict proof has been required. That does not mean, however, that a degree of proof is demanded such as in a scientific inquiry would justify the conclusion that such and such an event is impossible. In this context at least no higher proof of a fact is demanded than that it is established beyond all reasonable doubt.

and referred to *Head* v. *Head* (3). Lord Oaksey, after referring to the nature of the proceedings, said (p. 133):—

> In such circumstances the law, as I understand it, has always been that the onus on the husband in a divorce petition for adultery is as heavy as the onus which rests on the prosecution in criminal cases. That onus is generally described as being a duty to prove guilt beyond reasonable doubt, but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case and the punishment which may be awarded. The principle on which this rule of proof depends is that it is better that many criminals should be acquitted than that one

(1) [1949] 1 All E.R. 938.
(2) [1951] 1 All E.R. 124.
(3) (1823) Turn. & R. 138; 37 E.R. 1049.

innocent person should be convicted. The onus in such a case as the present, however, is founded, not solely on such considerations, but on the interest of the child and the interest of the State in matters of legitimacy since the decision involves not only the wife's chastity and status but in effect the legitimacy of her child: see *Russell* v. *Russell* (1).

Lord Morton said that (p. 135):—

> In *Ginesi* v. *Ginesi* (2) the Court of Appeal, after a survey of the authorities, held that a petitioner must prove adultery "beyond reasonable doubt." In my view, the burden of proof is certainly no heavier than this, and counsel for the husband did not contend that it was any lighter.

Lord MacDermott, after saying that for the wife it was contended that as the finding of adultery would in effect bastardise the child and that it was conceded that the adultery alleged had to be proved beyond reasonable doubt, expressed views which, it appears to me, went beyond the issues involved in the appeal. Section 4 of the Matrimonial Causes Act 1937 requires the Court, on hearing of a petition for divorce, to pronounce a decree if "satisfied on the evidence" that the cause for the petition has been proved. Lord MacDermott, after referring to a passage in the judgment of Viscount Birkenhead, L.C. in *Gaskill* v. *Gaskill* (3), a case involving legitimacy, where it was said that there should be a decree only if the court comes to the conclusion that it was impossible that the petitioner should be the father of the child, and stating his disagreement with that view said (p. 138):—

> The evidence must, no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what Sir William Scott described in *Loveden* v. *Loveden* (4) as "the guarded discretion of a reasonable and just man," but these desiderata appear to me entirely consistent with the acceptance of proof beyond reasonable doubt as the standard required. Such, in my opinion, is the standard required by the statute. If a judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence relied upon by a petitioner as ground for divorce, he must surely be "satisfied" within the meaning of the enactment, and no less so in cases of adultery where the circumstances are such as to involve the paternity of a child.

While the subject Lord MacDermott was considering was the nature of the proof required in proceedings involving legitimacy, the latter part of the passage quoted goes

(1) [1924] A.C. 687.
(2) [1947] 2 All E.R. 438; [1948] 1 All E.R. 373.
(3) [1921] P. 425.
(4) (1810) 161 E.R. 648.

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beyond such an issue and that he intended to do so appears from what follows. The succeeding paragraph reads (p. 138):—

> On the other hand, I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word "satisfied" is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be "satisfied," in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt* v. *Moncreiffe* (1), that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned.

The decisive point is the meaning to be assigned to the language of section 15 and 16 of the Act as it appears in c. 97, R.S.B.C. 1948. The law as thus declared has not been modified or altered by any legislation of the nature referred to in section 2 of the English Law Act. Proceedings under the Act are civil and not criminal in their nature. By the Evidence Act (c. 113, R.S.B.C. 1948), the Legislature has dealt generally with the matter of evidence in all proceedings respecting which it has jurisdiction. Section 8 provides that no plaintiff in any action for breach of promise of marriage shall recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise: section 11 provides that in claims against the heirs, executors, administrators or assigns of a deceased person, the plaintiff shall not obtain a verdict on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. Subsection 2 of section 8 provides that, notwithstanding any rule to the contrary, a husband or wife may in any proceeding in any court give evidence that he or she did not have sexual intercourse with the other party to the marriage at any time or within any

(1) (1874) L.R. 2 Sc. & Div. 374.

period of time before or during the marriage. Sections 27 to 50 prescribe the manner in which various matters may be proven. The Act contains nothing to differentiate the nature of the proof required or permitted in divorce as distinguished from other civil proceedings. Divorce rules regulating the procedure in the Supreme Court of British Columbia in divorce proceedings have been adopted and the matter with which we are concerned is not dealt with.

In *Mordaunt* v. *Moncreiffe* (1), where proceedings for divorce were taken under the Act of 1857, Lord Chelmsford said in part (p. 384):—

> In confining our attention strictly and exclusively to the Act, it becomes unnecessary to consider (as some of the learned judges have done) whether proceedings for a divorce are of a civil, or criminal, or quasi-criminal nature. No aid to its construction can be obtained by determining the exact character of the proceedings, nor from analogies derived from considerations applicable to cases of these different descriptions respectively. It is only necessary to bear in mind that the Act gives a right not previously existing to obtain the dissolution of marriage for adultery, by the decree of a newly-created Court of Law, and from its provisions alone we must learn the conditions upon which the jurisdiction is to be exercised.

Since, however, some of the decisions in England, above mentioned, refer to cases decided prior to 1857 as an aid to the interpretation of the Act, it may be helpful to determine the principle upon which the ecclesiastical courts proceeded in granting decrees *à mensâ et thoro*. In *Rix* v. *Rix* (2), where a decree was sought by reason of the wife's adultery, Sir George Hay said that if the fact was proved either directly, or presumptively (which was the general case), the court was bound to grant its sentence and said (p. 74):—

> Ocular proof is seldom expected; but the proof should be strict, satisfactory and conclusive.

In *Williams* v. *Williams* (3), Sir William Scott, afterwards Lord Stowell, said (pp. 299, 300):—

> It is undoubtedly true, that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proximate circumstances proved, as by former decisions, or on their own nature and tendency, satisfy the legal conviction of the Court, that the criminal act has been committed.

(1) (1874) L.R. 2 Sc. & Div. 374. (2) (1777) 3 Hag. Ecc. 74.
(3) (1798) 1 Hag. Con. 299.

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and that the Court (p. 303):—

> must recollect that more is necessary, and * * * * must be convinced, in its legal judgment, that the woman has transgressed not only the bounds of delicacy, but also of duty.

In *Loveden* v. *Loveden* (1), referred to in the judgment of Tucker L.J. on the appeal in *Ginesi's* case and by Lord MacDermott in the case of *Preston-Jones*, Sir William Scott employed the language so constantly referred to on the subject (pp. 2, 3):—

> It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books: at the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations—neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man.

In *Turton* v. *Turton* (2), where the wife sought a separation on the ground of the husband's adultery and there were pleas of condonation and it was argued further that there had been connivance, Doctor Lushington (p. 351) said that as connivance necessarily involves criminality on the part of the individual who connives and as the blame sought to be imputed is the more serious, so ought the evidence in support of such a charge to be "the more grave and conclusive." In *Grant* v. *Grant* (3), in the Court of Arches, Sir H. Jenner said (p. 57):—

> The principle applicable to cases of this description, where there is no direct and positive evidence of an act of adultery, at any particular time or place, is laid down in a variety of cases, to which it is not necessary for the Court to advert. It is not necessary to prove an act

(1) (1810) 2 Hag. Con. 1. (2) (1830) 3 Hag. Ecc. 339.
(3) (1838) 2 Curt. 16.

of adultery at any one particular time or place; but the Court must look at all the circumstances together, and form its own opinion whether they lead to a fair and natural conclusion that an act of adultery has taken place between the parties at some time or other.

A note to the report of this case in 163 E.R. at p. 340 says that the judgment was affirmed by the Judicial Committee of the Privy Council on February 24, 1840, but I have been unable to find any other report of this.

In Shelford's work on the Law of Marriage and Divorce published in 1841, after referring to the fact that adultery can hardly be proved by any direct means, the learned author adopts the language employed by Lord Stowell in *Williams* v. *Williams* (*supra*) and *Loveden* v. *Loveden* (*supra*) as stating the general rule applicable as to proof of the fact. In Ernst on Marriage and Divorce published in 1879, the language of Lord Stowell in *Loveden's* case as to the general rule is adopted as stating the law that was applied in the ecclesiastical courts.

Lord Merriman did not refer to any authority in *Churchman's* case in support of the proposition that the same strict proof is required in the case of a matrimonial offence as is required in prosecutions for criminal offences. The reason for his conclusion, however, appears from what he subsequently said in *Fairman's* case (1). It does not appear from the reports that his attention was drawn to what had been said on this subject in the House of Lords in *Mordaunt* v. *Moncreiffe* above referred to, or by Sir James Hannen in *Branford v. Branford* (2), or by Lord Lindley in *Redfern* v. *Redfern* (3). In *Mordaunt* v. *Moncreiffe,* the action was for a divorce under the provisions of the Act of 1857. Owing to the insanity of the wife, the respondent in the action, the court, on insanity being found, appointed a guardian ad litem and suspended the proceedings; the husband appealed to the House of Lords insisting that her insanity ought not to bar the investigation of the charge of adultery brought against her. The House of Lords took the opinion of five of the judges: of these, Keating, J. was of the opinion that the proceedings in the Divorce Court were criminal in their nature and, therefore, could not be proceeded with: Lord Chief Baron Kelly, however, with whom Denman, J. and

(1) [1949] 1 All E.R. 938 at 939. (2) (1878) L.R. 4 P. 72 at 73.
(3) (1891) P. 139 at 145.

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Pollock, B. agreed said in dealing with the contention that the suit was analogous to a criminal proceeding, (p. 381):—

> I am not aware of any species of suit or action known to the law, of which the incidents are to be determined by its analogy to criminal or civil proceedings. This proceeding is either a criminal prosecution or a civil suit. If a criminal prosecution, it can neither be instituted nor carried on while the accused is lunatic. If it be a civil suit, lunacy is no bar.

and, after considering the same sections of the statute as those with which we are concerned in the present matter, expressed the view that the court was obligated, if satisfied that adultery had been committed, to grant the decree. Lord Chelmsford, having said, as above noted, that the rights of the parties must be determined by interpreting the statute, said that, while great stress has been laid on the argument upon the judgments of Sir Cresswell Cresswell in the case of *Bawden* v. *Bawden* (1), and of Lord Penzance in *Mordaunt's* case and on the fact that these learned judges were particularly conversant with the procedure of the Divorce Court, since the question was simply one of statutory construction this gave them no peculiar advantage. Lord Hatherley, who agreed with Lord Chemsford that the appeal must be allowed, dealt with the argument that the suit was in the nature of a criminal proceeding and said in part (p. 393):—

> Much has been said, both in the Court below and before your Lordships, as to the analogy of the suit for a divorce to a criminal proceeding, and it has been inferred, that inasmuch as every step in the proceedings against a criminal is arrested by his or her becoming lunatic, so by parity of reasoning lunacy should bar all procedure against a Respondent in a divorce case. But the procedure in divorce is not a criminal procedure. It is true that the consequences of a divorce may be far more severe than those in any merely civil suit, but it is consequentially only that this result takes place. The divorce bills in Parliament were not bills of pains and penalties. They proceeded on the ground of relieving the petitioner for the bill from his unhappy position, that of indissoluble union with one who had herself, as far as was in her power, broken the marriage tie. The remedy applied was simply dissolution of the tie. No ordinary Divorce Act punished the adulterous party personally, or inflicted any pecuniary penalty. They usually, indeed, debarred the woman of dower and thirds, but that consequentially, because she ceased to be the wife; and, on the same grounds, they usually required the husband to give up his marital rights in the wife's property. The new Court was instituted to administer the same relief in the same manner.

(1) (1862) 2 Sw. & Tr. 417.

In *Branford* v. *Branford,* Sir James Hannen referred to the judgment in *Mordaunt* v. *Moncrieffe,* saying in part (p. 73):—

> I think the point taken by the Queen's proctor is concluded by the decision in the House of Lords that proceedings of this kind are not criminal, and if not criminal then they must be civil, for there cannot be quasi-civil or quasi-criminal cases.

In *Redfern* v. *Redfern,* Lindley L.J., after referring to the decision in the House of Lords, said that (p. 145):—

> The cases there cited shew clearly that no indictment lies at common law for adultery: see 2 Salk., p. 552; neither is there any statute making it punishable.

In *Fairman's* case Lord Merriman's expression is that adultery is a "quasi-criminal" offence. It is true that in many of the proceedings before the ecclesiastical courts reference is made to the "crime" of adultery, this, I must assume to be, due to the fact that adultery was an ecclesiastical offence but, as pointed out by Lindley L.J., it was not an offence at common law and it was not a criminal offence in England and is not in the Province of British Columbia. The principle stated by Lord Merriman and adopted by the Court of Appeal in *Ginesi's* case, while accepted as correctly stating the law in British Columbia and in Manitoba in the case of *Battersby* v. *Battersby* (1), was rejected by the Court of Appeal of Ontario in *George* v. *George* (2). In that case Roach, J. pointed out that in *Gower* v. *Gower* (3), Denning L.J. said that he did not think that the Court of Appeal was irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge to be proved beyond all reasonable doubt, and indicated his own doubts that *Ginesi* v. *Ginesi* had been correctly decided, pointing out that the question had not been fully argued since counsel had conceded that the standard of proof of adultery was the same as in a criminal case and, further, that the decision in *Mordaunt* v. *Moncrieffe* had not been cited. In *Briginshaw* v. *Briginshaw* (4), the High Court of Australia in a proceeding for the dissolution of marriage where the statute giving jurisdiction required the Court "to satisfy itself, so far as it reasonably can, as to the facts alleged" and to pronounce a decree *nisi*

(1) [1948] 2 W.W.R. 623.
(2) [1950] O.R. 787.
(3) [1950] 1 All E.R. 804.
(4) (1938) 60 C.L.R. 336.

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if "it is satisfied that the case of the petitioner is established," held that the standard of proof was not that of proof beyond reasonable doubt which obtains in respect of issues to be proved by the prosecution in criminal proceedings. The matter was again dealt with by that Court in *Wright* v. *Wright* (1), where the Court considered the decision of the Court of Appeal in *Ginesi* v. *Ginesi* and declined to follow it, preferring their own decision in *Briginshaw's* case.

If the statement of Lord Merriman adopted by the Court of Appeal was intended as a statement of the law of England, as it was at the time the Divorce and Matrimonial Causes Act of 1857 was enacted, in my opinion, it is not supported by authority. If it was intended as the proper construction to be placed upon the requirement of the statute that the court shall "be satisfied on the evidence that the case of the petitioner has been proved," I think it is inaccurate and should not be followed. In *Doe D. Devine* v. *Wilson* (2), Sir John Patteson, delivering the judgment of the Judicial Committee in an appeal from New South Wales, where in civil proceedings the genuineness of a deed was question, said that while it had been the practice to direct the jury in criminal cases that if they have a reasonable doubt the accused is to have the benefit of that doubt, whether on motives of public policy or from tenderness to life and liberty, or from any other reason, but that none of these reasons apply to a civil case.

The question we are to determine in the present matter is restricted to the standard of proof required in divorce proceedings in British Columbia, where the issue is as to whether adultery has been committed. No question affecting the legitimacy of offspring arises. The nature of the proof required is, in my opinion, the same as it is in other civil actions. If the court is not "satisfied" in any civil action of the plaintiff's right to recover, the action should fail. The rule as stated in *Cooper* v. *Slade* is, in my opinion, applicable.

I would allow this appeal, set aside the judgments of the Court of Appeal and of Wilson, J. except to the extent that they award costs to the respondent and direct that

(1) [1948] 77 C.L.R. 191. (2) (1865) 10 Moo. P.C. 501 at 532.

there be a new trial. The appellant should have his costs in this Court and in the Court of Appeal as against the co-respondent. There should be no costs as between the petitioner and the respondent of the proceedings in this Court. The costs of the first trial as between the petitioner and the co-respondent and the costs of all parties of the new trial to be in the discretion of the trial judge before whom the same is heard.

RAND J.:—I agree with the reasoning and conclusion of my brother Locke that in an action for divorce on the ground of adultery the standard of proof is that required in a civil proceeding and I have only one observation to add. There is not, in civil cases, as in criminal prosecutions, a precise formula of such a standard; proof "beyond a reasonable doubt", itself, in fact, an admonition and a warning of the serious nature of the proceeding which society is undertaking, has no prescribed civil counterpart; and we are not called upon to attempt any such formulation. But I should say that the analysis of persuasion made by Dixon J. in the High Court of Australia, in part quoted by my brother Cartwright, is of value to judges as illuminating what is implicit in the workings of the mind in reaching findings of fact. No formula of direction is here involved; instructions to juries are left exactly where they were; but it is at all times desirable to have these elusive processes progressively made more explicit.

CARTWRIGHT J.:—I agree with the conclusion of my brother Locke that in divorce proceedings in British Columbia the standard of proof in determining the issue whether adultery has been committed is the standard required in civil actions only.

It is usual to say that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be

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so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.

I would like to adopt the following passage from the judgment of Dixon J. in *Briginshaw* v. *Briginshaw* (1):—

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

and the following from the judgment of Roach J.A. in *George* v. *George and Logie* (2):—

> The judicial mind must be "satisfied" that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal—be it judge or jury—acting with care and caution, to the fair and reasonable conclusion that the act was committed.

There is, I think, no difference between the law of British Columbia and that of Ontario in this matter.

In my opinion the tribunal of fact deciding an issue of adultery in a proceeding for divorce should be instructed in the sense of the above quoted passages, not because the standard of proof required differs from that in other civil actions but because the consideration entering into the formation of judgment which Dixon J. describes by the

(1) (1938) 60 C.L.R. 336. (2) [1951] 1 D.L.R. 278.

words "the gravity of the consequences flowing from a particular finding" assumes great importance in such a case.

I would dispose of the appeal as proposed by my brother Locke.

Appeal allowed and new trial directed.

Solicitors for the Petitioner: *Shulman, Fouks & Tupper.*

Solicitor for the Co-Respondent: *A. E. Branca.*

Solicitor for the Respondent: *H. P. Wyness.*