Briginshaw ⇨ v ⇦ Briginshaw ⇨ [1938] HCA 34; (1938) 60 CLR 336 (30 June 1938)

HIGH COURT OF AUSTRALIA

⇦ **Briginshaw** ⇨ Petitioner, Appellant; and ⇦ **Briginshaw** ⇨ and Another Respondent and Co-respondent, Respondents.

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On appeal from the Supreme Court of Victoria.

30 June 1938

Latham C.J., Rich, Starke, Dixon and McTiernan JJ

Ashkanasy and Smithers, for the appellant.

Mark Lazarus and Joan Rosanove, for the respondent.

H. Woolf (with him Adam), for the co-respondent.

Smithers, in reply.

The following written judgments were delivered:—

June 30

Latham C.J.

This is an appeal from a judgment of *Martin* J. whereby the appellant husband's petition for divorce on the ground of adultery was dismissed. The appeal is based upon the following grounds: (1) That the learned judge wrongly decided that he could not hold that adultery was proved unless he was satisfied of the fact of adultery beyond reasonable doubt; that is, that it was wrongly held that the criminal standard of proof should be applied in divorce proceedings, at least in relation to a charge of adultery; (2) that the reasons for judgment given by the learned judge showed that he was satisfied of the fact of adultery according to civil standards of proof, that is, upon a preponderance of probabilities, and that therefore the petition should have been granted; (3) alternatively, that upon the evidence the learned judge should have been so satisfied; (4) alternatively, a new trial is sought.

The question of the standard of proof required in order to establish adultery in divorce proceedings has been expressly considered in three cases in the Supreme Court of New South Wales. The cases are *Godfrey v. Godfrey*[1], *Tuckerman v. Tuckerman and Hogg*[2] and *Doherty v. Doherty*[3].

In the former two cases it was held that, in a suit for dissolution of marriage, a charge of adultery must be proved to the satisfaction of the judge or jury beyond reasonable doubt, and

this principle was applied in the third case in relation to proceedings for variation of a maintenance order under the *Deserted Wives' and Children's Act 1901*. It is argued for the respondent that a charge of adultery should be treated in the same way as a criminal charge, and that this proposition is established by the principles applied in the ecclesiastical courts in relation to such charges.

The ecclesiastical courts had no jurisdiction to pronounce a decree of divorce *a vinculo*, but questions of adultery arose in suits for divorce *a mensa et thoro*, and in other courts in proceedings involving legitimacy of issue. In *Dillon v. Dillon*[4], which was a suit for divorce *a mensa et thoro*, Dr. *Lushington* said that where a charge of adultery was made against a wife the proceeding was in effect a criminal proceeding, and that, if there were any reasonable doubt, she was entitled to the benefit of it. He dismissed the suit because he was unable to say that the evidence was free from reasonable doubt. Dr. *Lushington*, however, described the case as "a case of grave doubt"[5]. Therefore, in this case, the question did not really arise as to any difference between civil and criminal standards of proof, although the language used tends rather towards the adoption of the criminal standard. In more recent times, after the *Matrimonial Causes Act 1857*, there is but little authority on the subject, and what there is is not very satisfactory in character. In *Allen v. Allen*[6] the Court of Appeal approved the words of Sir *William Scott* in *Loveden v. Loveden*[7]: "In every case almost the fact" (of adultery) "is inferred from circumstances that lead to it by fair inference as a necessary conclusion." The judgment of the Court of Appeal proceeds:—"To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. 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"[8].

I am unable to regard either *Loveden v. Loveden*[9] or *Allen v. Allen*[10] as conclusive of the question which arises. In the first place, the phrase "circumstances which lead to it by fair inference as a necessary conclusion" is not very informative. The phrase combines in one sentence two quite different ideas. A "necessary conclusion" is one thing—a conclusion reached by what is generally described as "fair inference" is another thing. A "necessary conclusion" partakes of the character of a conclusion reached by mathematical demonstration. "Fair inference" is a phrase which is more properly descriptive of a process of thought leading to a conclusion which, on the whole, is regarded as justifiable as a proper conclusion, but which cannot be said to be absolutely demonstrated. Further, the subsequent reference in *Allen v. Allen*[11] to "the infinite variety of circumstantial evidentiary facts" suggests reasonable inferences rather than "necessary conclusions" in such infinitely varying cases. The final advice that a jury should exercise its judgment "with caution, applying their knowledge of the world and of human nature to all the circumstances" is a statement which tends against the requirement that any conclusion should be a necessary conclusion in the ordinary logical sense. On the other hand, the question with which the quotation which I have made concludes, namely, whether the circumstances are capable of any other reasonable solution than that of guilt, is a statement which rather supports the applicability of the criminal standard of proof, which involves the exclusion of any other reasonable hypothesis

than that of guilt (*Wills' Circumstantial Evidence*, 5th ed. (1902), p. 262). Thus, I am unable to regard *Allen v. Allen*[12] as decisive of the questions raised.

In the case of *Ross v. Ross*[13] there was a difference of opinion in the House of Lords upon an appeal on facts on the subject of adultery. None of the learned Lords, however, suggested that the rule of proof beyond reasonable doubt was applicable in such a case. The matter was determined in exactly the same way as any appeal in a civil case upon a question of fact would have been determined. But the question of the proper standard of proof was not raised, and the case can hardly be regarded as a decision upon that point.

There is no mathematical scale according to which degrees of certainty of intellectual conviction can be computed or valued. But there are differences in degree of certainty, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty. No court should act upon mere suspicion, surmise or guesswork in any case. In a civil case, fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue—See *Wills' Circumstantial Evidence* (1902), 5th ed., p. 267, note *n*: "Men will pronounce without hesitation that a person owes another a hundred pounds on evidence on which they certainly would not hang him, and yet all the rules of law applying to one case apply to the other and the processes are the same."

In criminal cases it has long been established that there must be a moral certainty of the guilt of the accused; the presumption of innocence must be definitely displaced either by direct evidence of facts which constitute the offence charged or by evidence from which the jury can draw an inference which satisfies the mind beyond reasonable doubt. The difference between the civil standard of proof and the criminal standard of proof has been examined and explained in this court in the case of *Brown v. The King*[14]. Accordingly I am not prepared to adopt the view, which was suggested in argument, that the difference between the criminal and civil standards of proof is really only a matter of words.

What, then, is the rule to be applied to proof of adultery in proceedings for divorce? In the first place, I am of opinion that little attention should be paid to any decisions of the ecclesiastical courts upon such a matter and that they should not be accepted as binding. The jurisdiction in divorce, conferred in England by the *Matrimonial Causes Act 1857*, and in the various States of Australia by similar legislation, was a new jurisdiction. The ecclesiastical courts had never had power to pronounce a divorce *a vinculo*. Such a divorce could only be obtained by legislative procedure. The new legislation not only permitted divorce to be obtained by legal proceedings, but also gave persons a right to obtain a divorce if the conditions of the statute were satisfied. The legislation was strongly resented in many quarters. It was evidently feared by Parliament that the old rules of the ecclesiastical courts, belonging to an entirely different order of ideas, might be used so as to impede the exercise of the new jurisdiction and to deprive the public of its benefits. Accordingly, sec. 22 of the Act of 1857, while providing that in other matters the new court established by sec. 6 should proceed and act and give relief on principles and rules as nearly as might be conformable to those on which the ecclesiastical courts had theretofore acted and given relief, expressly excepted from this provision "proceedings to dissolve any marriage." The section corresponding to sec. 22 of the English Act is to be found in the *Victorian Marriage Act 1928*, sec. 109, and also in the *New South Wales Matrimonial Causes Act 1899*, sec. 5. Therefore, prima facie, any special principle according to which the ecclesiastical courts

acted in relation to proof of adultery in proceedings for divorce *a mensa et thoro* or other proceedings is irrelevant and not applicable in proceedings for divorce *a vinculo* in the new jurisdiction.

Next, the House of Lords has stated in most explicit terms that the new jurisdiction is not a criminal jurisdiction and that it is to be exercised according to the provisions of the applicable statute and not in accordance with any analogy derived from the administration of the criminal law. In *Mordaunt v. Moncreiffe*[15] the House of Lords took the opinion of the judges with respect to the question of the power of the court to grant a decree of divorce where the respondent was insane. It was held that, by the law of England, "adultery, though a grievous sin, is not a crime; and the analogies and precedents of criminal law have no authority in the divorce court, a civil tribunal" (Headnote). *Brett* J. regarded divorce proceedings as criminal in character, but Lord Chief Baron *Kelly, Denman* and *Pollock* BB. and *Keating* J. took the opposite view, being of opinion that divorce proceedings were civil in character. Lord *Chelmsford* said that it was unnecessary to consider whether proceedings for a divorce were of civil or quasi-criminal nature and that no aid to the consideration of the Act could be obtained from analogies applicable to cases of those different descriptions respectively. He said: "It is only necessary to bear in mind that the Act gives a right not previously existing to obtain the dissolution of a 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"[16]. Lord *Hatherley* said: "The procedure in divorce is not a criminal procedure"[17], and, referring to the *Divorce Acts*, said: "Every enactment indicates an analogy to civil and not criminal process"[18].

Accordingly, 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*. Sec. 80 of that Act 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."

Sec. 86 is in the following terms: "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 sec. 81 with reference to a petitioner being accessory to or conniving at or condoning adultery. In secs. 82 and 83 the word "find" is used in relation to collusion and the other matters mentioned. In sec. 84 (1) it is provided that the court shall not be bound to pronounce a decree of dissolution of marriage if it "finds" that the petitioner has during the marriage been guilty of adultery. The same word is used in sec. 84 (2), but with reference to desertion.

The sections which are directly relevant to the present case are secs. 80 and 86. Sec. 80 is a governing section applying to all the facts alleged as grounds for a petition for divorce—adultery, desertion, &c. So far from the legislature having used the phrase "satisfy itself beyond 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 sec. 80 to hold that the words "satisfy itself" meant "satisfy itself beyond 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 sec. 86 the words are simply: "The court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi." These words, like those in sec. 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. This view is supported by the decision of this court in *Dearman v. Dearman*[19]—an appeal on facts in a divorce suit where adultery was the ground of the petition. *Barton* J. stated the rule which he applied in the following words: "Before we infer adultery from circumstances we must have strong circumstances, such as would impel a reasonable mind to the conclusion that a petitioner had proved adultery"[20]. *Isaacs* J. adopted language from *Grant v. Grant*[21] as "an authoritative statement as to what is sufficient to establish the charge of adultery"[22]: "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"[23]. Accordingly, I agree with the contention of the appellant that it is not the law that adultery in a divorce proceeding must be proved beyond reasonable doubt; that is, in my opinion, the criminal standard is not applicable in such a case.

It is next argued for the appellant that the learned judge stated in his reasons for judgment that, according to the civil standard of proof, he was satisfied that adultery had been committed. In my opinion the words of the learned judge will not bear this construction. The reasons for judgment show, in my opinion, that the learned judge was left in a state of complete uncertainty on the issue of adultery. He was not prepared to accept or to act upon the evidence of any witness in the case. His Honour said: "I have read the evidence several times, and the more I read it the more difficult the case seems." He then recited the evidence against the co-respondent. He said: "In fact all the witnesses gave their evidence well, and I could gather nothing adverse to them from their demeanour." Coming to the case against the respondent he recited the relevant evidence, referred to discrepancies, and said: "I am unable to draw any certain conclusions from the discrepancies." He added: "Then there is a total denial by the" wife "on oath, and there was nothing in her demeanour in the box to suggest that she was lying." The nearest approach to a definite finding of fact is the statement of his Honour that the account of a particular conversation given by the co-respondent was "the more feasible."

His Honour concluded his judgment by saying:—"I do not know what to believe. I have been very troubled." After a reference to a witness who was not called, the learned judge said:—"I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

The appellant relied upon the statement, "If this were a civil case I might well consider that the probabilities were in favour of the petitioner." But this statement, in the whole of the

context to which I have referred, cannot be regarded as a finding that the witnesses for the petitioner or any of them were to be accepted as having spoken the truth. I am unable to discover in the reasons for judgment any finding of any fact. It therefore cannot, in my opinion, be said that the learned judge has made findings upon which the petitioner is entitled to a decree.

It is then argued for the petitioner that, even if this be so, the learned judge should have been satisfied by the evidence for the petitioner that adultery had been committed, and emphasis is placed upon his Honour's statement that he could gather nothing adverse to the witnesses from their demeanour. It is, therefore, urged that this court is in as good a position as the learned judge to determine all questions of fact and that it should accordingly do so. For myself, in the absence of any findings of fact by any tribunal I should be most reluctant, save in a quite exceptional case, to find any person guilty of adultery upon conflicting evidence of conversations (as in this case) when I could not see the parties and other witnesses who gave evidence. If one regards only the evidence given (there being no findings of fact based on that evidence), this is an ordinary case of a conflict of evidence, with probabilities and improbabilities on both sides. The learned judge has been unable to make up his mind on the issue of adultery. The petitioner carries the onus of persuading a judge to make up his mind in his favour. If he does not succeed in so persuading a judge, he fails in his petition and the matter is at an end.

There is, however, in my opinion, a special circumstance in this case which makes it proper that a new trial should be ordered. That special circumstance is to be found in the fact that the learned judge (in my opinion, wrongly) considered that he was bound to be satisfied of the fact of adultery beyond reasonable doubt, that is, according to the criminal standard of proof. He regarded the following statement at the end of his judgment as decisive of the case: "I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted." Accordingly the learned judge did not actually consider the evidence according to the relevant and proper standard of proof. It is true that he says: "I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner." This statement is, however, discarded by the learned judge as irrelevant, and there is no actual decision according to the probabilities of the case. There ought to have been such a decision, with, as I have already stated, a realization of the serious nature of the charge made against the wife. His Honour limits himself to saying: "I might well consider." He did not actually direct his mind to a consideration of the evidence upon a proper basis. The petitioner is entitled to have his case considered and decided upon such a basis.

I am, therefore, of opinion that there should be an order for a new trial.

Rich J.

The divorce and matrimonial jurisdiction of the Supreme Court of Victoria depends upon legislation which substantially reproduces the English legislation of 1857-1858 (20 & 21 Vict. c. 85 and 21 & 22 Vict. c. 108). By sec. 80 of the *Marriage Act 1928*, which is taken from sec. 29 of the English Act it is provided that "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." The phrase "satisfy itself, so far as it reasonably can" obviously reflects the influence of the common expression "reasonable satisfaction." In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative

conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion. But to say this is not to lay it down as a matter of law that such complete and absolute certainty must be reached as is ordinarily described in a criminal charge as "satisfaction beyond reasonable doubt." A petition for dissolution of marriage is not quasi-criminal, whatever the grounds (*Mordaunt v. Moncreiffe*[24]; *Branford v. Branford*[25]; *Sims v. Sims*[26]; *Tickner v. Tickner [No. 2]*[27]).

The appeal in the present case raises what is purely a question of fact. In deciding it *Martin* J. gave effect to the burden of proof and used expressions which are said to show that if he had not applied the criminal standard of proof he might or would have found that adultery had been proved. I do not think that this is a correct interpretation of his judgment. No doubt he demanded a high degree of certainty, and it is not surprising that the inclination of his mind was towards the view that the balance of probabilities made it more likely than not that adultery had been committed. But I gather from his judgment that he did not feel reasonably satisfied that adultery had been committed, that he had no definite and clear opinion of the truth of the charge. We had the benefit of a full discussion of the evidence in the case, and I must acknowledge that my mind felt the full force of the considerations advanced by counsel for the appellant that as a court of appeal we should reverse the finding of fact. But, in spite of what *Martin* J. says about the demeanour of the witnesses, the personality and the characteristics of the parties and of the witnesses remain a very important factor in considering such a case as the present, depending, as it largely does, upon admissions alleged to have been made out of court and on admissions made in the witness-box. I have not been able on the mere printed record to satisfy myself that adultery was in fact committed.

Starke J.

This is an appeal on the part of a husband from a decision of the Supreme Court of Victoria dismissing his petition praying the dissolution of his marriage on the ground of the adultery of his wife.

The *Marriage Act 1928* Vict. provides, in sec. 80, that upon any petition for the 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, in sec. 86, that, subject to the provisions of the Act, the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for the dissolution of marriage.

The trial judge examined the evidence given in the cause with some care and finally concluded:—"I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted." One might think, on such a grave charge as adultery, that "no reasonable or just man" ought to infer guilt unless the evidence satisfied him beyond reasonable doubt of the truth of the charge. We, however, listened over two days to arguments directed to the point that the measure of proof required by the judge was too high and that he ought to have been satisfied on a balance or preponderance of probabilities. Even on the argument addressed to us the matter is one of degree: it depends upon "the strength of conviction that must be produced in the mind of the tribunal." Sir *James FitzJames Stephen*, referring to the rule that a criminal offence must be

proved beyond all reasonable doubt, observes:—"The word reasonable is indefinite, but a rule is not worthless because it is vague. Its real meaning, and I think its practical operation, is that it is an emphatic caution against haste in coming to a conclusion adverse to the prisoner" (*A General View of the Criminal Law of England*, 2nd ed. (1890), p. 183). Professor *Thayer* in his *Preliminary Treatise on Evidence* (1898), pp. 552 and 337, says: "In civil cases it is enough if the mere balance of probabilities is with the plaintiff but in criminal cases there must be a clear, heavy, emphatic preponderance." *Phipson* (*Evidence*, 7th ed. (1930), p. 11) states the proposition in a few words: "Civil cases may be proved by a preponderance of evidence; criminal charges must be proved beyond reasonable doubt." (See also *Motchall v. Massoud*[28].) The difference in measure has never been defined (*Sodeman v. The King*[29]).

Matrimonial causes are in their nature civil proceedings, but the method in which judges have from time to time dealt practically with the proof of adultery and other charges in matrimonial cases is instructive. In *Loveden v. Loveden*[30] Sir *William Scott* said:—"In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion." "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." In 1894 the Court of Appeal cites the case with approval (*Allen v. Allen*[31]). In 1842, in *Dillon v. Dillon*[32], Dr. *Lushington* said: "As far as concerns the wife, in effect, this is not a civil but a criminal proceeding, and, if there be any doubt, she is entitled to the benefit of it; the evidence, perhaps, may preponderate in favour of the husband, but I cannot say that it is free from reasonable doubt." It is strange to find so near a parallel in Dr. *Lushington's* language to that used by the judge in the present case.

Adultery was not indictable at common law, though it exposed the guilty party in other days to ecclesiastical censure and to penance. But Dr. *Lushington* regards the effect and not the actual character of the proceeding. In modern times we find the Lord Chancellor *Birkenhead* saying that an allegation of adultery is a serious allegation which must be strictly proved (*Gaskill v. Gaskill*[33]); and in a case praying a decree of nullity on the ground of impotency the Lord Chancellor stated that the petitioner must remove all reasonable doubt, "for the charge ... is ... a grave and wounding imputation" (*C. v. C.*[34]). Again, the Supreme Court of New South Wales invariably requires that a matrimonial offence be established beyond reasonable doubt (*Doherty v. Doherty*[35]). And in *Edmunds v. Edmunds and Ayscough*[36] *Lowe* J. made the common-sense observation that the distinction was "more a matter of words than of substance." (See also *Ross v. Ross*[37]; *Statham v. Statham*[38].) The truth is that civil causes may, not must, be decided on a balance of probabilities. If the proof brings no strength of conviction to the mind of the tribunal or, what is much the same thing, does not satisfy the tribunal beyond reasonable doubt of the truth of the fact alleged, especially in the case of serious allegations such as adultery or fraud or crime, then the allegation remains unproved, or, to use the language of the *Marriage Act*, which is the test in this case, the court is not satisfied as to the facts alleged and the case for the petitioner is not established. But this was the position of the judge in the present case, though I do not understand why he did not keep to the words of the *Marriage Act*, especially as this court is so meticulous in its scrutiny of the language used in judgments and in charges to juries. Even if the probabilities of the case preponderated in favour of the petitioner's allegations, they brought no strength of conviction to the judge's mind and did not satisfy him beyond reasonable doubt of the truth of the allegation of adultery. Consequently the court was not satisfied of the fact alleged or that the petitioner had established his case. Looking at the evidence printed in the transcript I am not surprised. Both the respondent and the co-respondent denied adultery on oath, and all that the

petitioner relied upon was the evidence of paid agents of statements made by the respondents which were wholly denied by them in all essential matters. Such evidence does not necessarily lead the "guarded discretion of a reasonable and just man to the conclusion" that the adultery charged in this case is proved. And the appeal should be dismissed.

Dixon J.

The decree from which this appeal is brought dismissed a husband's petition for dissolution of marriage on the ground of adultery.

At the time of the marriage, which took place in 1932, the husband was twenty-three years of age and the wife twenty-one. There are no children of the marriage. For three years husband and wife lived together in a flat. Then, in July 1935, the wife took up her residence in a boarding-house and the husband went to live with a relative. But the termination of their domestic relations seems to have been considered an appropriate occasion for establishing an association of a business nature. The husband and his father carried on a manufacturing business together, and the wife forthwith entered into their employment as a female clerk. She was paid an ordinary wage, but she also received a weekly allowance from her husband. After about six months the relation of employer and employee was found no more satisfactory than that of husband and wife and she left the service of the firm. Her allowance was increased somewhat, but in course of time her husband's payments became irregular. During the period from the end of January 1936, when the wife's employment in her husband's business ended, until April 1937, when she took up work at Devonport, Tasmania, their estrangement steadily increased. He made some complaint about the freedom of her conduct at the boarding-house; she resorted to the law to secure her maintenance. About the time of her departure for Tasmania, of which she did not inform her husband, she obtained an order requiring him to pay a weekly sum of thirty-five shillings for her upkeep.

At Devonport she was employed as a hairdresser at a store. She lived at an hotel, under her maiden name, as an unmarried woman. Soon after her arrival she went out to some dances with other people staying at the hotel. At one of these, held on 19th June 1937, she met the co-respondent, and it is alleged that after the dance they committed adultery. The evidence relied upon to prove the fact consists of admissions said to have been made by the respondent and by the co-respondent, a bank clerk twenty-one years of age. *Martin* J., who heard the suit, decided the case entirely on the burden of proof, and dismissed the petition because he was not sufficiently satisfied of the adultery. The husband's appeal is based upon the contentions that the learned judge set too high a standard of proof or persuasion and that, in any case, the inference of adultery ought to be drawn from the evidence.

The version given by the respondent and co-respondent of the nature and extent of their relations makes a convenient starting point in the discussion of the evidence on which these contentions arise. According to their version, the respondent and co-respondent first met at a dance. They were introduced by a man living at the hotel in whose company she had come. During the evening this man got drunk. The co-respondent and a friend gave him some attention and resolved to take him home to his hotel. He had come in his car, and to take him home meant that the co-respondent should drive the car and its drunken owner to the hotel while the friend followed in his own car to bring the co-respondent back to the dance. The respondent appeared while they were still doctoring up the drunken man, and she offered to accompany them. When they got to the hotel their charge revived sufficiently to say that he would not spoil the night and to give the co-respondent the keys of his car. The respondent

sat in the car while the two men put its owner to bed. Then she drove back with the co-respondent to the dance. It finished about midnight, and the co-respondent drove her home to the hotel, in front of which they sat in the car for about twenty minutes talking. He kissed her twice, but in his own phrase, "she did not appear very interested. She did not wait for more but got out and walked into her hotel." Except for passing one another in the street, they did not meet for about a month afterwards. Then, on 17th July, he took her in a car to another dance, from which he drove her home. On this occasion, before reaching the hotel, he stopped the car and put his arm around her and tried to kiss her. She objected. According to the co-respondent, she said: "I don't want you to kiss me, I have turned over a new leaf and I am going to live very quietly." So he drove her home and she went into her hotel.

Four days earlier two persons had come to Devonport for the purpose of obtaining evidence on behalf of her husband against the respondent. One of these, an inquiry agent, put up at the same hotel. Another, a young woman, said to be a friend of the petitioner's sister, had volunteered for the work. The respondent learned of their visit and its purpose, and it may have been for that reason that she said that she had turned over a new leaf. The professional inquiry agent apparently met with no success. But the amateur says she secured an admission or confession from the co-respondent. The petitioner obtained for her a letter of introduction to a resident of Launceston named Lamprill, who, in turn, introduced her to the co-respondent. The introduction took place on 22nd July 1937. Her mission was candidly stated to the latter at the outset. According to him, he lent his assistance by mentioning the names of three young men as having taken the respondent out and admittedly he gave an account of what took place between himself and the respondent on the nights of 19th June and 17th July 1937. He says that he gave the same version of what occurred as that already stated. But the young woman who received his confidence swore that his story went much further and included an unmistakable admission that, on the night of 19th June 1937, he had sexual intercourse with the respondent. On the following day, the young woman returned to Melbourne and reported the result of her inquiries. On 9th August 1937 she arrived back at Devonport accompanied by the petitioner and by another inquiry agent. Next day, she began work by inducing the co-respondent to meet the inquiry agent. The interview took place in a car standing in the street at about half-past four in the afternoon. If the evidence of the inquiry agent and his ally is to be believed, upon the former's stating that he understood that the co-respondent had admitted to the latter his misconduct with the respondent, the co-respondent returned an answer which could hardly mean anything but that he had done so. He refused, however, to sign any statement. According to his version he said that there had never been any question of misconduct. His account of the interview leaves the impression that he was vainly pressed to make a full admission of adultery, preferably in writing, but that his refusal to do so was accompanied by no firm or explicit denial of the fact. Some time after the interview with the co-respondent had terminated, the inquiry agent brought the respondent to the car and in the presence of the petitioner embarked upon an interrogation or discussion of her relations with other men. This proceeding seems to have evoked no indignant remonstrance from the respondent, who as a preparation obtained her coat and went off with her husband and his inquiry agent to have tea at a restaurant. After the meal they returned to the car. There, according to her evidence, the inquiry agent requested her to sign a statement admitting adultery with the co-respondent. He said that the latter had admitted the adultery. He also said that no one but the judge would see her signature, that she could be identified by means of a photograph which he carried, that there would be no publicity and that her people would know nothing about it. She observed that her people had her full confidence. At the beginning she had said that she would sign nothing and that they could see her solicitor. As she left the car she says that she told them that she was innocent and did not intend to argue

about the matter; she would see the co-respondent and find out why he had told lies and she would speak to her employer. The time was then a quarter to nine, and the inquiry agent said that, before leaving for Launceston, they would wait until ten o'clock to see if she changed her mind. She answered that it would make no difference, but, if it pleased them, she would see them again at that hour. This is her version of the interview.

A very different account of her conversations was given by the petitioner and the inquiry agent. The effect of it is that she was told by the latter that the co-respondent had informed them of the occurrences of the night of 19th June and had said that she had misconducted herself with him and the inquiry agent asked her to make a similar admission. The petitioner deposed that she replied that, if the co-respondent had admitted it, she would: the inquiry agent, that her reply was that, if the co-respondent had stated it, she would make a statement. Both agreed in attributing to her a request first to see the co-respondent and in saying that the purpose of the appointment at ten o'clock was for her to let them know what she would do. After leaving them she sought out the co-respondent, but they anticipated her and found him first. The inquiry agent told him of the impending visit of the respondent and, according to his own version, said:—"You know what you have stated regarding your conduct with her, and it is for you to judge what you will tell her. You are not compelled to make any explanation to her; but please yourself." According to the co-respondent, the inquiry agent told him that he would be worried by her and he wanted him to say that he had told the truth and nothing more. However, at this point, the respondent herself came up. She drew the co-respondent away, and the inquiry agent says that he overheard her ask what the co-respondent had told them; to which the latter answered that he had told them the truth. She said: "See what a mess you have got us into." He replied: "I did not know that you were married"; to which she said: "Even if you didn't, why should you talk about these things?"

Her version is that she said that she was sorry that she had got the co-respondent into the mess and that they said he had admitted adultery, which he denied. Before she parted with them she renewed her appointment for ten o'clock. At the time and place appointed, she told her husband and his inquiry agent that her employer had advised her to sign nothing. She appears also to have said something about a divorce in two year's time on the ground of desertion, and she said that she had not changed her mind and they could see her solicitor.

Evidence was given by an independent witness of a very direct and explicit admission of adultery made by the co-respondent about three weeks after the filing of the petition; but this was denied both by the co-respondent and another independent witness who had been present when it was said to have been made. Lamprill, who had been responsible for the original introduction of the co-respondent to the young woman in whom he confided, was also present on the occasion of the last alleged admission. He was not called as a witness. Just before the hearing, the petitioner notified the co-respondent that the petitioner would not call him and the co-respondent said in his cross-examination that, on his side, his advisers did not think his presence was necessary as he was not mentioned in the affidavit in support of the petition.

In the course of reviewing the evidence, which I have summarized above, *Martin* J. said that all the witnesses gave their evidence well and that he could gather nothing adverse to them from their demeanour. He concluded his reasons for judgment thus:—"I do not know what to believe. I have been very much troubled. I think that Lamprill holds the key. It seems he may have held the pistol at both parties' heads. I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not

satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

The view which his Honour has thus expressed places the appellant in an unusually favourable position in attacking what otherwise might have been regarded as a finding of fact upon which the opinion of the primary judge must prevail. For it not only excludes the demeanour of the witnesses as a source of enlightenment, but it suggests at least an inclination of mind towards the acceptance of the version of the facts supporting the appellant's case. At the same time, the learned judge, in expressing his want of certainty as the ultimate reason for his decision, adverts to a standard of persuasion the application of which to an issue of fact in a matrimonial cause is open to dispute. The case thus comes to depend in a great measure upon a proper understanding of the exact opinion which his Honour formed and of the degree to which his mind was affected by the strength of the petitioner's case. My own interpretation of what he said is that not only had the evidence fallen far short of satisfying his mind beyond reasonable doubt of the adultery alleged, but that he had not formed an actual belief that the adultery took place, although he thought that possibly he might consider that the probabilities disclosed by the evidence were greater in favour of that conclusion than against it.

At common law two different standards of persuasion developed. It became gradually settled that in criminal cases an accused person should be acquitted unless the tribunal of fact is satisfied beyond reasonable doubt of the issues the burden of proving which lie upon the prosecution. In civil cases such a degree of certainty is not demanded. The distinction obtained long before the publication in 1824 of *Starkie's Law of Evidence*; but the form in which the higher standard of persuasion is described is said to have been influenced by passages in that work. The learned author, who occupied the Downing Chair of Common Law, wrote:—"It is to be observed, that the measure of proof sufficient to warrant the verdict of a jury varies much, according to the nature of the case. Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable. Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of the particular fact. The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt" (1st ed. (1824), pp. 450, 451; 4th ed. (1853), pp. 817, 818). When, however, he passes to the standard of proof in other cases, he describes it in less positive and definite terms (1st ed. (1824), p. 451; 4th ed. (1853), p. 818):—"But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale. This happens, as it seems, in all cases where no presumption of law, or prima-facie right, operates in favour of either party; as, for example, where the question between the owners of contiguous estates is, whether a particular tree near the boundary grows on the land of one or of the other. But even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully

disproving a legal right once admitted or established, or of rebutting a presumption of law." This mode of stating the rule for civil issues appears to acknowledge that the degree of satisfaction demanded may depend rather on the nature of the issue. In the course of a discussion of the matter containing no less wisdom than learning, Professor *Wigmore* says:— "In civil cases it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. But it is customary to go further, and here also to attempt to define in words the quality of persuasion necessary. It is said to be that state of mind in which there is felt to be a preponderance of evidence in favour of the demandant's proposition. Here, too, moreover, this simple and suggestive phrase has not been allowed to suffice; and in many precedents sundry other phrases—satisfied, convinced, and the like—have been put forward as equivalents, and their propriety as a form of words discussed and sanctioned or disapproved, with much waste of judicial effort" (*Wigmore* on *Evidence*, 2nd ed. (1923), vol. *v.*, sec. 2498). It is evident that Professor *Wigmore* countenances as much flexibility in the statement and application of the civil requirement as did Mr. *Starkie.* 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. Thus, *Mellish* L.J. says: "No doubt the court is bound to see that a case of fraud is clearly proved, but on the question at what time the persons who have been guilty of that fraud commenced it, the court is to draw reasonable inferences from their conduct" (*Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha, and Telegraph Works Co.*[39]). In the same way, in dealing with the question in what county the publication of a criminal libel had taken place, *Best* J. said: "I admit, where presumption is attempted to be raised, as to the corpus delicti, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall" (*R. v. Burdett*[40]). It is often said that such an issue as fraud must be proved "clearly", "unequivocally", "strictly" or "with certainty" (Cf. *Mowatt v. Blake*[41]; *Kisch v. Central Railway Co. of Venezuela Ltd.*[42]; *Lumley v. Desborough*[43]). This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed,

the standard of persuasion is, according to the better opinion, the same as upon other civil issues (*Doe d. Devine v. Wilson*[44]; *Boyce v. Chapman*[45]; *Vaughton v. London and North Western Railway Co.*[46]; *Hurst v. Evans*[47]; *Brown v. McGrath*[48]; *Motchall v. Massoud*[49]; *Nelson v. Mutton*[50]; *Gerder v. Evans*[51]; *sed quœre* as to the statement of *Swift* J. in *Herbert v. Poland*[52]; see, further, *Wigmore* on *Evidence*, 2nd ed. (1923), vol. *v.*, p. 472, par. 2498 (2) (1)). But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.

These illustrations show the good sense of Professor *Wigmore's* statement that, in civil cases, it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain.

But the development of the two standards of proof or persuasion is the work of the common law. In jurisdictions which do not derive from the common law there has been some uncertainty as to their recognition or adoption. In the ecclesiastical courts before the passing of the *Matrimonial Causes Act 1857* no attempt had been made to define the degree of certainty which should be felt before finding a spouse guilty of adultery. But, as the issue in most cases depended upon circumstantial evidence and as the testimony was taken out of court, it was natural that the reasons given by the court for its decision in particular cases often should contain general observations as to the nature and amount of evidence required to justify a finding. Many expressions and statements of Lord *Stowell* upon the subject are reported. Thus:—"The court representing the law draws that inference which the proximate acts unavoidably lead to" (*Elwes v. Elwes*[53]). "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" (*Williams v. Williams*[54]). "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 of such things differently from what would strike the careful and cautious consideration of a discreet man" (*Loveden v. Loveden*[55]). "To prevent ... the possibility of being misled by equivocal appearances, the court will always travel to this conclusion with every necessary caution; whilst, on the other hand, it will be careful not to suffer the object of the law to be eluded, by any combination of parties, to keep without the reach of direct and positive proof" (*Burgess v. Burgess*[56]).

The test formulated twenty years later by Sir *Herbert Jenner Fust* where the evidence was not direct differed only in expression: "It is not necessary to prove an act 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" (*Grant v. Grant*[57]). Up to that time no analogy appears to have been sought in criminal proceedings. But in *Dillon v. Dillon*[58] Dr. *Lushington* said: "As far as concerns the wife, in effect, this is not a civil but a criminal proceeding, and, if there be any doubt, she is entitled to the benefit of it; the evidence perhaps may preponderate in favour of the husband, but I cannot say that it is free from reasonable doubt." Later in the same judgment he described the case as one "of great doubt." In *Davidson v. Davidson*[59] he referred to the presumption of adultery arising from proof of what he called a criminal intention and of opportunity, but added that the court required "to

be satisfied that actually adultery has been committed." When Sir *Cresswell Cresswell* came in 1858 from the Common Pleas to the new Court of Divorce and Matrimonial Causes he seems to have been content to describe the standard of proof of adultery in the language ordinarily employed at nisi prius. For instance, in *Alexander v. Alexander*[60] he says:—"In deciding this question" (of adultery) "we must act upon the same principles as juries are directed to act upon in deciding similar cases. It is a well-known principle of our jurisprudence that the party who alleges misconduct against another is bound to establish such misconduct by affirmative evidence. Unless, therefore, it is proved to the satisfaction of the court, that the respondent has been guilty of the misconduct imputed to her, it is bound to dismiss the petition." In *Miller v. Miller*[61], in refusing to disturb a jury's finding against adultery the same learned judge said: "The petitioner was in this case, as in others, bound to prove the affirmative; and if he failed to do so to the satisfaction of the jury, they were bound to find against him." In another such case—*Gethin v. Gethin*[62]—Sir *Cresswell Cresswell* upheld the finding on the view that the jury may have said: "We are not satisfied with the evidence; we are left in such doubt that we feel we cannot safely draw the inference suggested, and therefore we find that the charge is not proved."

Putting aside the line of authorities which deal with the special question of confessional evidence, no further attempt to formulate or define the measure of proof of adultery appears to be reported until *Allen v. Allen*[63], when *Lopes* L.J., after setting out the statement of Lord *Stowell* in *Loveden v. Loveden*[64], dealt with proof by circumstantial evidence as follows:—"To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. 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." Lord *Stowell's* statement in *Loveden v. Loveden*[65] and the comments of *Lopes* L.J. were applied in *Woolf v. Woolf*[66]. Apparently these passages adequately describe the nature and amount of proof of adultery required in England in ordinary daily practice. The language used by more than one of their Lordships in *Ross v. Ross*[67] shows, I think, that satisfaction beyond all reasonable doubt is not the criterion applied where proof of adultery depends on circumstances. For, if that had been the accepted test, it would indeed be strange if it were not applied or relied upon as part of the reasons for holding, as a majority of the House of Lords did, that the circumstances failed to establish guilt. So far from applying this standard, Lord *Buckmaster* first speaks of proof of adultery "as a matter of inference and circumstance" and then, in denying the sufficiency of the fact that the parties are thrown together in an environment which lends itself to the commission of the offence, states the necessary qualification thus. "Unless it can be shown ... 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"[68]. Lord *Atkin*, alluding to the circumstances telling in favour of innocence, says simply: "Such a charge in such circumstances ought to be fully proved"[69]. Lord *Thankerton* said: "Admittedly the respondent must prove facts which are not reasonably capable of an innocent construction"[70].

Although confessional evidence has been the subject of special or independent treatment in the authorities, the result has been to establish no different measure of persuasion.

Corroboration should be looked for, but "the true test seems to be whether the court was satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true" (per Sir *Samuel Evans* P., *Weinberg v. Weinberg*[71]; cf. *Getty v. Getty*[72]).

There are, however, two English cases containing statements that particular issues should be proved in the matrimonial-causes jurisdiction beyond reasonable doubt. In *Statham v. Statham*[73] Lord *Hanworth* M.R. says that an allegation of sodomy should be proved beyond reasonable doubt with due and cautious consideration of the witnesses and their evidence. No such expression is used by the two Lords Justices. In *Gaskill v. Gaskill*[74] Lord *Birkenhead* applied to matrimonial causes the rule relating to legitimacy, namely, that to bastardize a child conceived and born during wedlock it is not enough to establish a mere preponderance of probability in favour of the inference that the husband did not beget the child; the presumption of legitimacy is not rebutted unless the proof excludes all reasonable doubt. The use of the phraseology of the criminal jurisdiction is due to Lord *Lyndhurst* in *Morris v. Davies*[75], a case the course of which is fully examined by *Cussen* J. in *In the Estate of L.*[76]. *Cussen* J. concludes his consideration of the legitimacy rule by saying:— "The expression beyond reasonable doubt recalls the ordinary direction in criminal cases that it is necessary that the jury should be satisfied of guilt beyond reasonable doubt before they disregard the primary presumption of innocence. It may be that the origin of the rules in cases like the present is that adultery was, and to a certain extent still is, regarded as an offence, and is not to be imputed on a mere balance of probabilities as in an ordinary civil case"[77]. This does not appear to me necessarily to imply that his Honour considered that always and for all purposes adultery must be established beyond reasonable doubt. In New South Wales, however, it has come to be the accepted rule that on a trial with a jury of a petition for dissolution on the ground of adultery the direction should be that the jury must be satisfied of adultery beyond reasonable doubt (See *Godfrey v. Godfrey*[78]; *Tuckerman v. Tuckerman and Hogg*[79]; *Doherty v. Doherty*[80]).

In *Edmunds v. Edmunds and Ayscough*[81] *Lowe* J., after referring to the rule adopted in New South Wales and comparing it with that expressed in *Allen v. Allen*[82], said, in effect, that the difference was only a matter of expression. No doubt in most cases the difference is of no importance whatever. For it must very rarely happen that a tribunal of fact, upon a careful scrutiny and critical examination of the circumstances proved in evidence or of the testimony adduced, forms a definite opinion that adultery has been committed and yet retains a doubt, based upon reasonable grounds, of the correctness of the opinion. For the very practical reason that the decision of cases has not been found to depend upon the distinction the necessity has not arisen in England of attempting to define with precision the measure or standard of persuasion required before adultery is found in a matrimonial cause. At the same time, I think that the foregoing discussion of the authorities makes it clear that in England the high degree of persuasion exacted in the criminal jurisdiction has not been adopted as the standard where adultery is in issue in the matrimonial jurisdiction. It is a common experience that in criminal matters the great certainty demanded has a most important influence upon the result. The distinction between that and a lower standard of persuasion cannot be considered unreal.

Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state

of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.

This view of the law makes it necessary to return to the conclusion expressed by *Martin* J. If I thought that his Honour had formed a definite opinion that the respondent had committed adultery with the co-respondent, and had abstained from giving effect to his opinion because he applied the standard of persuasion appropriate to criminal cases, I should regard a rehearing as necessary. But, as in effect I have already said, I do not so interpret his reasons. Nor do I think that his Honour means to convey that he has not directed his mind to any other question than whether adultery was established beyond reasonable doubt. From the whole tenor of his reasons, I think that it clearly appears that his Honour found himself unable to arrive at any satisfactory or firm and definite conclusion that adultery had been committed although conceding that perhaps in the probabilities arising upon the evidence there was some preponderance of those for, over those against, such a conclusion. It follows that, in order to succeed upon this appeal, the petitioner must satisfy this court, either that the learned judge ought to have been satisfied of the adultery alleged or that his conclusion was determined by some mistake or error in his reasoning upon the facts. As for the first alternative, I must acknowledge that the respondent's and co-respondent's account of the matter, as recorded, has filled me with much misgiving, but I do not think that the materials warrant a court of appeal in finding affirmatively the adultery of which the trial judge was not satisfied.

As for the second alternative, his Honour's reasons were made the subject of criticisms of which two deserve express reference. It was said that one of the hypotheses mentioned by the learned judge as perhaps explaining the failure of the respondent to make an indignant denial of adultery was opposed to the evidence. He said that perhaps she was too thunderstruck to reply. This observation was nothing more than one of two suggestions as to why she did not behave as might have been expected *a priori*. It is not, I think, an essential step in the reasoning determining the conclusion.

The second of the two criticisms related to the failure of either party to call Lamprill. His Honour evidently desired to hear his evidence, which he felt might remove some of the difficulties presented by the case. It is said that the learned judge ought to have inferred that Lamprill would not support the co-respondent's case. Lamprill's evidence could not affect the respondent. But, in any case, I regard his Honour, not as drawing any inference adverse to the petitioner from his failure to call Lamprill, but simply as explaining that he felt that Lamprill was in a position to solve certain of the difficulties he felt. As they remained unsolved, he was unable to arrive at any affirmative conclusion.

In my opinion the appeal should be dismissed.

McTiernan J.

In my opinion the appeal should be dismissed.

Martin J., in dismissing the petition, said: "I have done my best to decide, but the petitioner must satisfy me that his story is true." There his Honour professed to fulfil the duty, which is imposed on the court by secs. 80 and 86 of the *Victorian Marriage Act 1928*, to consider whether it was proved to his reasonable satisfaction that the petitioner's allegation of adultery

was true. If his Honour had limited his observations to that statement, the contention would hardly have arisen that he misdirected himself as to the minimum of proof required to establish an allegation of adultery. That contention is based on the observations which follow. They were in these terms: "I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

It is contended, firstly, that it is apparent from these observations that the evidence did produce in the mind of the court such a degree of persuasion of the truth of the petitioner's allegations of adultery as to entitle him to a divorce; and, secondly, that the court did not find in his favour because it treated the allegations as allegations of a crime which the law required to be proved beyond a reasonable doubt. It would be quite contrary to settled principle to accede to the contention that the court ought to find that an allegation of adultery is established when the court thinks that it is more probable that adultery was committed than that it was not, and the court's state of persuasion rises no higher than that; and, regarding the second contention, it is, I think, based on a misunderstanding of the learned judge's observations. It assumes that he treated the case as a criminal trial in which he was bound to apply the criminal standard of proof. But it is apprehended that the purpose of this observation was not to indicate that the trial was criminal as distinguished from civil but to indicate that it was not a case in which the mere preponderance of evidence would suffice to establish the petitioner's allegations of adultery. Indeed, it is well established that the procedure in divorce is not a criminal procedure (*Mordaunt v. Moncreiffe*[83]; *Redfern v. Redfern*[84]; *Branford v. Branford*[85]). It is not conceivable that his Honour laboured under the misconception which the leading case of *Mordaunt v. Moncreiffe*[86] long ago removed. But in referring to the case as one to be distinguished from a purely civil case, his Honour has the support of high authority. In *Mordaunt v. Moncreiffe*[87] Lord *Hatherley*, after saying that the procedure in divorce was not criminal procedure, added: "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" (italics mine) (Cf. *In the Estate of L.*[88], per *Cussen* J.). Moreover, the *Rules of the Supreme Court* of Victoria do not include divorce and matrimonial causes within the classification of civil proceedings (*Rules of the Supreme Court* of Victoria, 1916, chapters I. and II.; see also *Victorian Supreme Court Act 1928*, secs. 15 and 19).

The contention that *Martin* J. ascribed the character of a criminal proceeding to the trial must fail. But do his observations show that he required an unduly strict standard of proof of the allegations? He declared that he was not satisfied beyond reasonable doubt. I agree with my brother *Rich* J. in the view that the validity of this direction depends on whether it departs from the standard of proof required by the Act. The Act does not expressly import the standard of proof applicable to a merely civil suit, that is, a preponderance of evidence. Nor does it import the criminal standard as such, that is, proof beyond reasonable doubt. The duty of the court in trying an issue of adultery is to consider whether it is satisfied that the allegation is true. Strictness of proof is required generally in the matrimonial jurisdiction of the court. "Decrees of dissolution of marriage are to be made only upon strict proof" (*Russell v. Russell*[89], per Lord *Sumner*). English law adopts the reasonable rule that the strictness of the proof of an issue should be governed by the nature of the issue and its consequences. Lord *Brougham's* speech in defence of Queen Caroline describes an ascending scale of issues which illustrates this principle: "The evidence before us," he said, "is inadequate even to prove a debt, impotent to deprive of a civil right, ridiculous for convicting of the pettiest offence, scandalous if brought forward to support a charge of any grave character, monstrous

if to ruin the honour of an English Queen." The law presumes against guilt of vice and immorality (*Best* on *Evidence* 2nd ed. (1855), pp. 309, 349). A learned authority says, however, that the presumption against moral wrong-doing is not so strong as the presumption against criminal wrong-doing (*Kenny*, *Outlines of Criminal Law*, 14th ed. (1933), p. 343). The proof of the issue of adultery involves the displacement of this presumption of innocence in favour of the person charged with serious misconduct. The presumption is not to be regarded as a weak one. The consequences of the proof of the charge include the dissolution of the marriage bond and the loss of status. The courts, therefore, in the exercise of their jurisdiction to grant a dissolution of marriage on the ground of adultery have adopted a standard proportionate to the gravity of the issue. The measure of proof necessary to satisfy the court has been described in this court in these terms:—"Before we infer adultery from circumstances we must have strong circumstances, such as would impel a reasonable mind to the conclusion that a petitioner had proved adultery. Mere suspicion is not enough. The view taken by his Honour that the case contained nothing stronger than suspicion was one that it was perfectly open to him to take on the evidence" (*Dearman v. Dearman*[90], per *Barton* J.). The strictness of proof required is illustrated by the attitude taken by the courts to admissions of adultery made by the accused spouse. In *Robinson v. Robinson and Lane*[91], which was decided in the first year of the operation of the English *Matrimonial Causes Act 1857*, it was decided that the admissions of a wife charged with adultery, unsupported by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce, provided that the court is satisfied that the evidence is trustworthy, and that it amounts to a clear, distinct and unequivocal admission of adultery (See also *Williams v. Williams and Padfield*[92] and *Read v. Read*[93]). The standard of proof which the courts require has been frequently explained. The following instance may be given. In *Allen v. Allen*[94] *Lopes* L.J., adopting the words of Sir *William Scott* in *Loveden v. Loveden*[95] said:—"It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time or place, because, to use the words of Sir William Scott in Loveden v. Loveden5(1810) 2 Hag. Con., at p. 2; 161 E.R., at p. 648., 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. To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as the modifications and combinations of events in actual life. 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."

It is not correct to say that the Act requires a charge of adultery to be proved with the same strictness as a grave charge of crime. But *Martin* J. did not adopt an erroneous standard. He declined to be satisfied that the allegation of adultery was established because he had a reasonable doubt. It is impossible to say that he ought to have felt that degree of satisfaction which the law requires the tribunal to have before finding a spouse guilty of adultery, while he was oppressed with a reasonable doubt.

We are asked to say that the learned judge was wrong in not finding the issue of adultery proved. The evidence has already been discussed in detail. The learned judge said that he could gather nothing adverse to any of the witnesses from their demeanour. The evidence affords ground for suspicion, but, in my opinion, the evidence is not such as should satisfy a reasonable mind that the petitioner's allegations of adultery are true.

Appeal dismissed with costs.

Solicitor for the appellant, Dudley A. Tregent.

Solicitor for the respondent, Joan Rosanove.

Solicitors for the co-respondent, Rodda, Ballard & Vroland.

[1] (1907) 24 W.N. (N.S.W.) 57.

[2] (1932) 32 S.R. (N.S.W.) 220; 49 W.N. (N.S.W.) 59.

[3] (1934) 34 S.R. (N.S.W.) 290; 51 W.N. (N.S.W.) 89.

[4] (1842) 3 Curt. 86; 163 E.R. 663.

[5] (1842) 3 Curt., at p. 117; 163 E.R., at p. 674.

[6] (1894) P. 248.

[7] (1810) 2 Hag. Con. 1; 161 E.R. 648.

[8] (1894) P., at p. 252.

[9] (1810) 2 Hag. Con. 1; 161 E.R. 648.

[10] (1894) P. 248.

[11] (1894) P. 248.

[12] (1894) P. 248.

[13] (1930) A.C. 1.

[14] [1913] HCA 70; (1913) 17 C.L.R. 570. See particularly at pp. 584 et seq. and pp. 595, 596.

[15] (1874) L.R. 2 Sc. & Div. 374.

[16] (1874) L.R. 2 Sc. & Div., at p. 384.

[17] (1874) L.R. 2 Sc. & Div., at p. 393.

[18] (1874) L.R. 2 Sc. & Div., at pp. 394, 395.

[19] [1908] HCA 84; (1908) 7 C.L.R. 549.

[20] (1908) 7 C.L.R., at p. 557.

[21] (1839) 2 Curt. 16; 163 E.R. 322.

[22] (1908) 7 C.L.R., at pp. 562, 563.

[23] (1839) 2 Curt., at p. 57; 163 E.R., at p. 336.

[24] (1874) L.R. 2 Sc. & Div. 374.

[25] (1879) 4 P.D. 72, at p. 73.

[26] (1878) 1 S.C.R. (N.S.) (N.S.W.) (D.) 1.

[27] (1937) N.Z.L.R. 802, at p. 805.

[28] (1926) V.L.R. 273.

[29] (1936) 55 C.L.R., at p. 233.

[30] (1810) 2 Hag. Con., at pp. 2, 3; 161 E.R., at pp. 648, 649.

[31] (1894) P., at p. 252.

[32] (1842) 3 Curt., at p. 116; 163 E.R., at p. 674.

[33] (1921) P. 425, at p. 431.

[34] (1921) P. 399, at p. 400.

[35] (1934) 34 S.R. (N.S.W.) 290; 51 W.N. (N.S.W.) 89.

[36] (1935) V.L.R., at p. 183.

[37] (1930) A.C., at pp. 17, 23, 25.

[38] (1929) P. 131.

[39] (1875) 10 Ch. App. 515, at p. 530.

[40] (1820) 4 B. & Ald. 95, at p. 123; 106 E.R. 873, at p. 884.

[41] (1858) 31 L.T. (O.S.) 387.

[42] (1865) 12 L.T. 295.

[43] (1870) 22 L.T. 597.

[44] [1855] EngR 708; (1855) 10 Moo. P.C.C. 502, at pp. 531, 532[1855] EngR 708; ; 14 E.R. 581, at p. 592.

[45] [1835] EngR 942; (1835) 2 Bing. N.C. 222; 132 E.R. 87.

[46] (1874) L.R. 9 Ex. 93.

[47] (1917) 1 K.B. 352.

[48] (1920) S.A.L.R. 97.

[49] (1926) V.L.R. 273.

[50] (1934) 8 A.L.J. 30.

[51] (1933) 45 Ll. L. Rep. 308, at p. 311.

[52] (1932) 44 Ll. L. Rep. 139, at p. 142.

[53] [1796] EngR 2463; (1796) 1 Hag. Con. 269, at p. 278[1796] EngR 2463; ; 161 E.R. 549, at p. 552.

[54] [1798] EngR 130; (1798) 1 Hag. Con. 299, at pp. 299, 300; 161 E.R., at p. 559.

[55] (1810) 2 Hag. Con., at p. 3; 161 E.R., at pp. 648, 649.

[56] [1817] EngR 626; (1817) 2 Hag. Con. 223, at p. 227[1817] EngR 626; ; 161 E.R. 723, at p. 724.

[57] (1839) 2 Curt. 16, at p. 57; 163 E.R. 322, at p. 336.

[58] (1842) 3 Curt., at p. 116; 163 E.R., at p. 674.

[59] (1856) Dea. & Sw. 132, at p. 135[1856] EngR 533; ; 164 E.R. 526, at p. 527.

[60] (1860) 2 Sw. & Tr. 95, at p. 101[1860] EngR 681; ; 164 E.R. 928, at p. 931.

[61] (1862) 2 Sw. & Tr. 427, at p. 433[1862] EngR 461; ; 164 E.R. 1062, at p. 1064.

[62] (1862) 2 Sw. & Tr. 560, at p. 563[1862] EngR 377; ; 164 E.R. 1114, at p. 1116.

[63] (1894) P., at p. 252.

[64] (1810) 2 Hag. Con. 1; 161 E.R. 648.

[65] (1810) 2 Hag. Con. 1; 161 E.R. 648.

[66] (1931) P. 134.

[67] (1930) A.C. 1.

[68] (1930) A.C., at p. 7.

[69] (1930) A.C., at p. 23.

[70] (1930) A.C., at p. 25.

[71] (1910) 27 T.L.R. 9.

[72] (1907) P. 334.

[73] (1929) P., at p. 139.

[74] (1921) P., at pp. 432-434.

[75] (1837) 5 Cl. & Fin. 163, at p. 215[1837] EngR 1126; ; 7 E.R. 365, at p. 385.

[76] (1919) V.L.R., at p. 30; 40 A.L.T., at p. 159.

[77] (1919) V.L.R., at p. 36; 40 A.L.T., at p. 161.

[78] (1907) 24 W.N. (N.S.W.) 57.

[79] (1932) 32 S.R. (N.S.W.) 220; 49 W.N. (N.S.W.) 59.

[80] (1934) 34 S.R. (N.S.W.) 290; 51 W.N. (N.S.W.) 89.

[81] (1935) V.L.R. 177.

[82] (1894) P. 248.

[83] (1874) L.R. 2 Sc. & Div. 374.

[84] (1891) P. 139.

[85] (1879) 4 P.D. 72.

[86] (1874) L.R. 2 Sc. & Div. 374.

[87] (1874) L.R. 2 Sc. & Div., at p. 393.

[88] (1919) V.L.R., at p. 36; 40 A.L.T., at p. 161.

[89] [1924] UKHL 1; (1924) A.C. 687, at p. 736.

[90] (1908) 7 C.L.R., at p. 557.

[91] (1858) [1858] EngR 1196; 1 Sw. & Tr. 362; 164 E.R. 767.

[92] (1865) L.R. 1 P. & D. 29.

[93] (1905) V.L.R. 424; 27 A.L.T. 8.

[94] (1894) P., at pp. 251, 252.

[95] (1810) 2 Hag. Con., 1; 161 E.R. 648.

[96] (1810) 2 Hag. Con., at p. 2; 161 E.R., at p. 648.