As will have been gathered from my remarks, my opinion is that the plaintiffs are not entitled to succeed on the ground of infringement (paragraph 3), but are entitled to succeed on the ground of breach of contract (paragraphs 6, 7, 8).

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NATIONAL PHONOGRAPH CO. OF AUSTRALIA LTD. v. MENCK.

Judgment for the defendant with costs of the reference to the Full Court and such other costs as the Judge of first instance may direct.

Nov. 10.

ISAACS J. refused an application for costs on the higher scale, and awarded the defendant all the costs of the action other than those provided for by the Full Court.

Solicitors, for the plaintiffs, *Lynch & McDonald* for *Piggott & Stinson*, Sydney.

Solicitor, for the defendant, *M. C. Larkin.*

B. L.

[HIGH COURT OF AUSTRALIA.]

DEARMAN . . . . . APPELLANT;
RESPONDENT,

AND

DEARMAN . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 10, 11, 14.

Appeal from Judge without jury—Appeal on question of fact.

Although on an appeal from a Judge of first instance sitting without a jury, it is the duty of the Court of Appeal to reconsider the evidence and give its judgment according to its own opinion, yet where the evidence has been given

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vivâ voce, and there has been a conflict of evidence, the Court of Appeal will not reverse the decision of the Judge on questions of fact depending upon the credibility of witnesses, unless it sees clearly that the decision was wrong.

Per Griffith C.J. :—A Court of Appeal is more reluctant to reverse a decision of a Judge of first instance which is against the party on whom the burden of proof lies than where the contrary is the case.

A decision of the Full Court, reversing a decision of the Judge in Divorce, dismissing a petition for dissolution of marriage on the ground of adultery, was reversed by the High Court on the ground that, the Judge having refused to accept the evidence of the main witnesses called by the petitioner to prove the adultery, there was nothing in the evidence to justify the Court in holding that the Judge was wrong in so doing or in declining to find on the rest of the evidence that adultery had been committed.

Decision of the Supreme Court : (*Dearman* v. *Dearman and Pettitt*, (1908) 8 S.R. (N.S.W.), 457), reversed, and judgment of *Simpson* J. restored.

APPEAL from a decision of the Full Court of New South Wales, reversing a decision of *Simpson* J. in the Supreme Court, Matrimonial Causes Jurisdiction.

The appellant, Daisy Gertrude Dearman, was respondent in a suit by Melbourne Nathan Dearman, respondent in this appeal, for dissolution of marriage on the ground of adultery with Walter Pettitt, who was joined as co-respondent. At the hearing before *Simpson* J. the Judge in Divorce, sitting without a jury, a great many witnesses were called on both sides. The evidence for the petitioner was mainly directed towards proving adultery on two distinct occasions, viz. 23rd and 30th July, and two witnesses, Nathan Dearman, father of the petitioner, and a witness named Campbell, were called for that purpose. The former gave evidence which, if believed, established that adultery had been committed by the respondent and co-respondent on the first of those dates, and produced a note-book containing what purported to be full notes of what he saw and heard, and certain entries in this book were put in evidence on behalf of the petitioner. Campbell's evidence did not support Nathan Dearman in essential particulars. The respondent and co-respondent in their evidence contradicted these witnesses as to the most important details, and denied the adultery. The learned Judge stated that he was unable to accept the evidence of Dearman as

to the adultery, and dismissed the petition on the ground that he was not satisfied on the rest of the evidence that adultery had been committed ; but on appeal his decision was reversed by the Full Court on the ground that on the evidence the inference was irresistible that adultery had been committed on 23rd July: *Dearman* v. *Dearman and Pettitt* (1).

From this decision the present appeal was brought by the respondent.

It is not necessary for the purposes of this report to refer to the facts in further detail.

Appellant, in person. The Judge did not accept the evidence of the elder Dearman, and without that evidence it was quite open to him to find that the charge of adultery had not been established. He was not bound to accept the evidence of any witness, if he had good reason to doubt it. There were good reasons for his refusal to accept the evidence of Dearman senior, and without that evidence he was quite justified in finding as he did. There was a direct conflict of evidence. The Full Court, not having had an opportunity of seeing and hearing the witnesses, were not in a position to say whether the Judge was wrong in refusing to accept the evidence that he rejected, and they were wrong in holding that the only reasonable conclusion from the rest of the evidence was that of guilt. [She referred to *Wallis* v. *Wallis* (2).]

Respondent, in person. Though the Judge was perfectly entitled to reject the evidence of any witness, he could only do so on valid grounds. He stated his reasons for rejecting the evidence of Dearman senior, and they are not sufficient. They were founded on misconception. But apart from the evidence of that witness as to the actual adultery, much of his evidence was not denied by the respondent and co-respondent ; and even from that evidence no reasonable man could fail to draw the inference that adultery was committed on the 23rd July, and if it was committed on that occasion, it is impossible to suppose that it was not also committed on 30th July when there was equal opportunity. Any

(1) (1908) 8 S.R. (N.S.W.), 457. (2) 12 N.S.W. L.R. (Div.), 1, at p. 6.

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husband who knew that such things took place between his wife and a stranger would be taken to have connived at adultery if he did not interfere.

The Supreme Court was not in the position of a Court of Appeal from the finding of a jury. It was not necessary for them to hold that the decision of the Judge was such as no reasonable man could give. They were bound to reconsider the evidence and draw their own conclusions both of fact and law. If in their opinion the Judge's decision was wrong they were bound to allow the appeal. There is no rule that the decision of a Judge of first instance on questions of fact is unassailable. The Full Court was able to judge whether the reasons given by the Judge for refusing to accept the evidence of Dearman, senior, were sound. At any rate, there was no valid reason for discarding all his evidence, and on the balance the Full Court was justified in holding that the Judge was wrong. This Court cannot say that they were wrong. They were rehearing the case. [He referred to *Thurburn* v. *Steward* (1); *R.* v. *Mollison* (2); *Colonial Securities Trust Co.* v. *Massey* (3); *Coghlan* v. *Cumberland* (4).] Apart altogether from the demeanour and manner of witnesses, there was material before the Full Court, with which they were just as qualified to deal as the Judge of first instance, which completely justified them on a rehearing in coming to the conclusion that the Judge was wrong. [He referred to the evidence at length.]

Appellant, in reply.

December 14.

GRIFFITH C.J. The Court is called upon to decide this case according to the rules of law. The petition was a husband's petition for dissolution of marriage on the ground of adultery. The petitioner undertook to prove, not by circumstantial evidence, but by the direct evidence of eye witnesses, that adultery was committed. Apart from that evidence there was nothing in my opinion fit to be left to the consideration of any tribunal. The learned Judge who presided, who has had a very large experience

(1) L.R. 3 P.C., 478.
(2) 3 V.L.R. (L.), 3.
(3) (1896) 1 Q.B., 38.
(4) (1898) 1 Ch., 704.

in cases of this kind, heard the evidence given by the witnesses, and came to the conclusion that he could not rely upon their testimony. The Supreme Court on appeal took a different view, that is, they thought that the learned Judge ought to have relied upon that testimony.

Now, it is well settled that upon an appeal from a Judge of first instance who has had the advantage of hearing the witnesses, especially in a case where there is a conflict of evidence, the Court of Appeal cannot reverse his decision on questions of fact unless it sees that the decision is manifestly wrong. There is, perhaps, a distinction between a case where the Judge has found in favour of a plaintiff, or the party upon whom the onus of proof lies, and a case where he has found in favour of the other party. If the Judge has found in favour of the party upon whom the burden of proof lies the Court of Appeal may review the case with greater freedom, for instance, in the case of an application to enter a non-suit on the ground that, though there was some scintilla of evidence, there was nothing upon which reasonable men ought to act. But if the tribunal of first instance, having seen and heard the witnesses, comes to a conclusion in favour of the party upon whom the burden of proof does not lie, it is almost hopeless to try to induce a Court of Appeal to interfere with that finding unless it has clearly proceeded upon a wrong principle. That is the general rule of law which prevails in Courts of Appeal. I need not refer to the numerous authorities in which that rule has been laid down beyond the case of *Coghlan* v. *Cumberland* (1), which was referred to in argument and has been adopted in this Court as a governing authority. The same rule must apply to the Supreme Court sitting as a Court of Appeal from a Judge of first instance. I will only mention one other authority, *Robertson* v. *Robertson* (2), an appeal from the Judge in Divorce. There *Jessel* M.R. said (3) that two questions had been raised by the appeal, the first being of great importance, whether the judgment pronouncing the respondent guilty of adultery was right; and, after referring to the other point which related to costs, he went on :—" As to the

(1) (1898) 1 Ch., 704.

(2) 6 P.D., 119.

(3) 6 P.D., 119, at p. 121.

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first point, it was a fixed rule that when the Judge in the Court below had heard the witnesses, and had come to a conclusion on their evidence, the Court of Appeal only interfered in very peculiar cases." *Brett* L.J. said (1) "that it had been frequently laid down, that where in the Court of first instance, witnesses on both sides had been examined *vivâ voce* before the Judge, the Court of Appeal would not interfere with the judgment of the learned Judge upon matters of fact, unless the Court of Appeal could see very clearly that the decision was wrong. This case was within the rule, and all the Court had to say was that they could not see that the Judge in the Court below was wrong." That would be sufficient to dispose of the case. I cannot see that the Judge below was wrong in declining to think the evidence of the witnesses in question credible. But I think it proper to say a few words as to the nature of the evidence.

Adultery was alleged to have been committed. There is, in my opinion, only one circumstance in the evidence worthy of serious consideration, and we know nothing of the case except what appears in the evidence. That is said to have occurred on the evening of 23rd July. [His Honor then referred to the evidence of Dearman senior and Campbell, in reference to that occasion, from which he read portions, and also to the entries in the note-book of the former witness, and continued:] That is the petitioner's evidence. That really is his case. I have had some experience as a Judge of first instance and heard a number of divorce cases with a jury, and I must say that I should have hesitated before allowing such evidence to go to the jury at all, and, even if I had allowed it to go to them, I should have advised them to act on it with great caution. The learned Judge did not accept the evidence, and I am not at all surprised. At any rate, it seems to me impossible to say that the learned Judge was wrong in refusing to accept the evidence. If he had decided otherwise it might have been very arguable whether he was right. There is a passage in the judgment of the Full Court which should, I think, be referred to as showing the view that the learned Judges of that Court may

(1) 6 P.D., 119, at p. 124.

have taken, and which may possibly have coloured their conclusion. The learned Chief Justice, after referring to the facts and to this particular portion of the evidence, said that he accepted the evidence of the first-named witness as indisputable, that, entirely apart from the question what was the fair inference to be drawn from admitted facts, this was irresistible evidence of guilt. The learned Chief Justice stated the position thus: [His Honor read from the transcript the following passage, which is not printed in the authorized report.] "Here we have this man and woman in the depth of winter meeting surreptitiously in a side street, then going straight to this place in Fairfax Road, sitting there for an hour or so, and then returning direct to the place where they met." If that is to be taken as irresistible evidence of adultery, taken in connection with the other circumstances, that it was a bright moonlight night, a public place, an open spot surrounded by places affording ample concealment, and so on, then I can only express the hope that divorces are not granted in New South Wales on such grounds.

There was another point in the case, that the respondent and co-respondent had endeavoured to prove a false *alibi*. I may remark that the whole of the evidence given on that point was in my opinion inadmissible. The learned Judge very properly pointed out that even innocent persons who have foolishly placed themselves in a compromising position may endeavour to establish a false *alibi*, though if that defence fails it may seriously injure their case, being sometimes sufficient to turn the scale against them in a doubtful case, and convert what would otherwise have been insufficient into sufficient evidence of guilt.

For these reasons I think it impossible on the evidence before the Court to say that the learned Judge was bound to come to any other conclusion than that to which he did come. And, in view of the very strong language used by the learned Judge of first instance, I feel myself inclined to say that, while the conduct of the respondent was highly reprehensible, I do not think that the comment made upon it by the learned Judge was altogether deserved. For my part I do not think I can regard the case as one of such grave suspicion as the learned Judge seems to have thought it.

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BARTON J. I am of the same opinion. I need not follow my learned brother the Chief Justice in his analysis of the evidence, but will say that I totally agree with what he has said about it. As to the note-book upon which reliance was placed by the petitioner, there is a very great peculiarity about the entry with respect to the 23rd July, and that is the only day really in question, because there is no other part of the evidence upon which it is seriously attempted to base an inference of the actual commission of adultery. [His Honor then dealt with certain portions of the evidence in relation to that day and the entries in the note-book, and concluded his remarks on that subject by stating that in his opinion the peculiarity of the whole transaction lay in the fact that the notes intended to clinch the guilt of the respondent did not contain any mention of the two principal matters upon which the witness relied at a later date, though those notes were alleged to have been made immediately after seeing the occurrences to which they refer and were in other respects very full notes indeed. His Honor continued]: This peculiarity seems to me to illustrate how reasonable was the view entertained by the learned Judge of the evidence of the elder Dearman. He did not suggest that he was committing perjury, but thought that he was either mistaken, or that there was an alternative, and did not feel himself bound to adopt either view. That seems to me an entirely reasonable attitude to take up, and if we turn to the evidence of Campbell it appears still more reasonable. [His Honor then referred to the evidence of that witness and continued.] Now the petitioner came into Court to prove a direct charge of adultery and brought evidence to establish it. The witness to whom the learned Judge, after observing the demeanour and in its light weighing the evidence of all of them, was inclined to attach the most credence was Campbell. But if the case rested on his evidence there could be no justification for a finding on the issue of adultery in favour of the petitioner. The doubt is made much stronger by the evidence of the elder Dearman in the circumstances detailed, and by the suspicion that must attach to it on the ground of the peculiarity in the notes to which I have referred. To my mind it is not a fair thing to draw from the evidence of the elder Dearman, which

is not corroborated by the evidence of Campbell in essentials, a conclusion which would amount to accepting the evidence of the more doubtful witness instead of giving the preference to the evidence of the less doubtful. I do not think that would have been a judicial attitude for his Honor to take up. But he has not taken up that attitude, and while I am not prepared to say that there were not very suspicious circumstances in this case, that does not mean that the conduct of the respondent was more than indiscreet, and in many respects most improper. 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 Honor that the case contained nothing stronger than suspicion was one that it was perfectly open to him to take on the evidence. We may deal with the case on the lines suggested by the case of *Coghlan* v. *Cumberland* (1), in which *Lindley* M.R. said:—"The case was not tried with a jury, and the appeal from the Judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns upon the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns upon manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be

(1) (1898) 1 Ch., 704.

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other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning upon the credibility of witnesses whom the Court has not seen." An instance of the last mentioned state of affairs would be where, apart from any question of manner or demeanour, there were undoubted documents turning the scale in favour of one witness, who might seem not to be all that could be desired, as against another witness considerably more plausible. But that has not been the case here. Even if the note-book could be called documentary evidence, it is practically the only documentary evidence in the case, and it seems to me that the view that the note-book cast a doubt upon the evidence of the elder Dearman rather than confirmed it, was not only reasonable but one that most persons in his Honor's position would have taken. Looking at the case in the light of what was said in *Coghlan* v. *Cumberland* (1), and taking the other cases cited by the respondent before us as a guide to the fullest extent, the weight to be given to the demeanour, manner and credibility of the witnesses was a matter as to which his Honor had the best opportunity for coming to a reasonable conclusion. Even on the merely transcribed evidence I do not think that conclusion wrong. The question is whether the Full Court was right in setting aside the decision of his Honor, and it does seem to me that under these circumstances setting it aside was not in accordance with the principles that ought to guide a Court when dealing with such cases on appeal.

ISAACS J. This case came before the Full Court of New South Wales upon appeal from *Simpson* J. under sec. 82 of the *Matrimonial Causes Act* 1899, which provides that any person aggrieved by any decree or order of the Court may within a certain time enter in the prescribed manner an appeal against such order or decree to the Full Court, and on appeal every decree or order may be reversed or varied as the Full Court thinks proper. The law, therefore, gives a dissatisfied party a full and free opportunity of seeking what the law presumes to be

(1) (1898) 1 Ch., 704.

a superior, and is certainly a more authoritative, decision in the opinion of the Court of Appeal.

The respondent in the present appeal succeeded before the Appeal Court, and the decision of that Court is now challenged upon the ground that under the circumstances of the case that Court had no right to give the decision that it gave. We have, therefore, to consider what is the duty of a Court of Appeal. There is no doubt that its duty is to reconsider the evidence and to give its own judgment according to its own opinion. That is insisted upon by the respondent, and rightly, I think. But that rule has its necessary limitations. What those limitations are and how far the appellate tribunal is at liberty to disregard the decision of the primary tribunal, have at various times been the subject of serious consideration. My learned brothers the Chief Justice and Mr. Justice *Barton* have stated the rule, in terms with which I entirely agree, and they have read from the decision in *Coghlan* v. *Cumberland* (1), which has been already accepted as a guide by this Court. When that decision was given in England it appears that the appellate tribunals there had acted, in some cases at all events, not in complete conformity with the rules laid down, and the House of Lords had found it necessary in 1896 to state the position clearly. The case in which that was done was *Riekmann* v. *Thierry* (2). In the course of argument learned counsel urged that there was a question of fact involved or that it was wholly a question of fact, and that the appellate Court ought not to reverse a finding on the question of fact. Lord *Halsbury* L.C. took occasion to state the law formally in his judgment. The report is not so accessible as the reports of the House of Lords usually are, so I will read in full what was there said, because it completely reaffirms in all its branches what is laid down in *Coghlan* v. *Cumberland* (1), and is a decision of the highest authority. His Lordship said (3):—"But, my Lords, I must add that I am entirely unable to yield to the argument which has been, not unnaturally, pressed upon us by counsel. I say not unnaturally, since more than one of the learned Judges have given countenance to it by observations made in the course

(1) (1898) 1 Ch., 704.
(2) 14 R.P.C., 105.
(3) 14 R.P.C., 105, at p. 116.

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of their judgments. I mean the argument that there is a presumption that we ought not to interfere with what the Judge of first instance has done. I absolutely refuse to acquiesce in any such argument. The hearing upon appeal is a rehearing, and I do not think there is any presumption that the judgment in the Court below is right. That one's mind may be, and ought to be, affected so as to lead one to distrust one's own judgment, if the appeal is from a very able or learned Judge, for whose judgment one may have great respect, is true; and, again, if the Judge of first instance has had an opportunity of hearing the witnesses, and testing their credit by their demeanour under examination and the like, which the appellate tribunal does not possess, I can quite understand that, under those circumstances, great weight should be attached to the finding of fact at which the learned Judge of first instance has arrived. And it may also be that where a jury has found a fact, it is not a rehearing of such a fact, because the Constitution has placed in the hands of the jury, and not in the hands of the Court, the jurisdiction to find the fact, and in such a case the Court can only disturb the verdict where, in their judgment, the jury have not done their duty; short of that, the Court is bound to accept the finding of the jury, though they may think they would have found a different verdict. But upon appeal from a Judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the Court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the Judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision. The judgment to be pronounced by the Court of Appeal is the judgment that ought to have been pronounced by the Judge of first instance.

"My Lords, the error which I believe is involved in the argument seems to me, I confess, to raise a principle of far wider application, and of much greater importance than any point in the particular appeal which has given rise to it upon the patent itself, if we are to lay down such a proposition as that the judgment of the Court below is to prevail, although the judgment of the appellate Court

might be the other way, and is the other way as I read the opinions of the learned Judges whom I have quoted. For these reasons, I have thought it right to protest against the notion that when the Judge of first instance has decided a question he has done something which is binding upon the Court of Appeal, and that unless they think it very wrong, according to the language of the learned Judges, they must acquiesce in his judgment." His Lordship then went on to say that in his opinion the Judge of first instance was wrong, and the Court of Appeal was wrong, and that the appeal should be allowed. Lord *Macnaghten* concurred in that statement of the law, and so also did Lord *Davey*. So that the position is clearly laid down by the very highest authority that the primary duty, and in fact the whole duty, of every Court of Appeal is to give the judgment which in its opinion ought to have been given in the first instance. But there are natural limitations, that is to say, in some cases, where the evidence below is solely upon written documents, if for instance it is upon affidavit as it used to be in the old Court of Chancery, the appellate Court is in as good a position as the primary Judge to say what ought to have been the decision; but where *viva voce* evidence is taken there is a large amount of material upon which the primary Judge acts that is altogether outside the reach of the appellate tribunal. The mere words used by the witnesses when they appear in cold type may have a very different meaning and effect from that which they have when spoken in the witness box. A look, a gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence, will often lead a Judge to find a signification in words actually used by a witness that cannot be attributed to them as they appear in the mere reproduction in type. And therefore some of the material, and it may be, according to the nature of the particular case, some of the most important material, unrecorded material but yet most valuable in helping the Judge very materially in coming to his decision, is utterly beyond the reach of the Court of Appeal. So far as their judgment may depend upon these circumstances they are not in a position to reverse the conclusion which has been arrived at by the primary tribunal. Now it may be that in some cases the effect of what I call the unre-

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corded material is very small, indeed insignificant, and utterly outweighed by other circumstances. It may be, on the other hand, that it guides, and necessarily guides, the tribunal to the proper conclusion. If that is the case, as I have said before, the Court of Appeal cannot say that the conclusion is wrong without disregarding the material which it knows must have been existent before the tribunal below, and is necessary to a just conclusion. Now apply these considerations to this case where adultery is charged. It has been said, and rightly said, that direct proof is not necessary. A rule requiring direct proof in all cases would be unworkable and would defeat the ends of justice. The rule is very distinct. The case of *Loveden* v. *Loveden* (1) was referred to. That was the earliest case on the subject, having been decided in 1810. There *Sir William Scott* said (2):—"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. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and Courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtilties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same." In *Grant* v. *Grant* (3) *Sir H. Jenner* said:—"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 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

(1) 2 Hag. Con., 1.

(2) 2 Hag. Con., 1, at p. 3.

(3) 2 Curt., 16, at p. 57.

taken place between the parties at some time or other." That judgment was affirmed by the Judicial Committee of the Privy Council (1), so that it may be accepted as an authoritative statement as to what is sufficient to establish the charge of adultery. In my opinion, speaking for myself alone, *Simpson* J. had evidence before him upon which he might lawfully and rightly have found that adultery had been committed. That, I say, is my own opinion. [His Honor then referred to the evidence of Dearman senior and Campbell and continued.] His Honor, however, did not accept that evidence, and we are therefore left without those facts which, whether right or wrong, were necessary at all events to draw the inference which it would be necessary to draw in order to hold that the learned Judge was wrong, or, as I think, necessary to enable the Court of Appeal to form its own opinion upon the question whether adultery was committed on 23rd July. Why I say that is this. If these facts had been established it then became a mere matter of inference depending not upon the credibility of any witness except to this extent, that the respondent and co-respondent not only deny the act, but also deny that these facts took place, and if the learned Judge had disbelieved them as to the denial of these facts it would have resulted in a mere question of inference based upon our knowledge of human nature, and the Court of Appeal is in as good a position as the primary tribunal to judge of that. I will only refer to two instances where it has been held by a Court of Appeal that it may draw such an inference. In *The Glannibanta* (2), *Bagallay* J.A., who delivered the judgment of the Court, after referring to the cases of *The Julia* (3) and *The Alice* (4), said :—" Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the

(1) 2 Curt., 16, at p. 71.
(2) 1 P.D., 283, at p. 287.
(3) 14 Moo. P.C.C., 210.
(4) L.R. 2 P.C., 245.

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decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect. In the present case it does not appear from the judgment, nor is there any reason to suppose, that the learned Judge at all proceeded upon the manner or demeanour of the witnesses; on the contrary, it would appear that his judgment in fact proceeded upon the inferences which he drew from the evidence before him, and while we have really the same means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence as well as the evidence itself made the subject of elaborate and able discussion on both sides." And the same thing was said in the House of Lords by Lord *Blackburn* in *Smith* v. *Chadwick* (1):—"The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the Judge who tried the cause, and saw the witnesses and their demeanour. That gives him considerable advantages over those who only draw their information from perusing the notes. But still, though the Court of Appeal ought not lightly to find against the opinion of the Judge who tried the cause, I think that the Court of Appeal, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way." Well, that is the position, and the only difficulty in the way of the respondent here is that he does not reach the point where these inferences can be legitimately drawn. He fails to maintain that the two important facts deposed to by Dearman senior and Campbell, and assuming indeed that I am right in what inference might be drawn, he fails to substantiate the position that that inference ought to have been drawn by the learned Judge. That, as I say, depends upon circumstances not before the Court of Appeal, and, therefore, not within their power to deal with. Under these circumstances the case of *The Alice* (2) and the rule laid down in *Coghlan* v. *Cumberland* (3) applies, and in the result the appeal must succeed upon the ground that

(1) 9 App. Cas., 187, at p. 194.
(2) L.R. 2 P.C., 245.
(3) (1898) 1 Ch., 704.

the Full Court of New South Wales had no right upon the materials before them to reverse the decision of *Simpson* J.

HIGGINS J. I am glad to find that there is no difference as to the legal principle applicable between this Court and the Full Court. I am perfectly prepared to accept the view of the learned Chief Justice of New South Wales that an appeal should not be allowed from a Judge who saw the witnesses and found the facts unless the circumstances are not capable of any other reasonable solution than that of guilt. It is to be remembered that the Full Court may have been influenced by the fact that the respondent and co-respondent did not appear in support of the judgment they had obtained. Perhaps they were unconsciously influenced by that common feeling that is expressed in the proverb *les absents ont toujours tort.* But the facts here are capable of another solution, especially having regard to the free and easy manners and wholesome freedom from reserve common in Australia. In this country we do not accept the view that is accepted, I believe, in some countries in Europe that for a woman to be alone with a man upon a roadside is proof of adultery. There is no doubt that there has been gross impropriety on the part of the respondent, and that she has herself to blame largely if she is misunderstood. But there is no direct evidence of any act of adultery except upon 23rd July. [His Honor referred to the evidence in relation to the events of that date and continued:] It is not for us to say whether adultery was committed, but whether *Simpson* J. was wrong in saying that he was not satisfied that it had been committed. He saw the witnesses and heard them give evidence. All we have before us is evidence of some suspicious circumstances, and those circumstances are such that a Judge might reasonably come to the conclusion that the adultery had not been proved. Then as to the effect of trying to set up a false defence, that is not in itself sufficient to prove that there is not a true defence, although an attempt to set up such a defence must necessarily have very strong weight with any Court. Speaking for myself, I do not find any evidence connecting the respondent or the co-respondent with the attempt, if there was one, to set up a false defence. But that is a matter as

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to which I would rather lean upon what the learned Judge who saw the witnesses has found. I agree without hesitation in the judgment of this Court that the appeal should be allowed.

Appeal allowed. Judgment appealed from discharged, and judgment of Simpson J. restored. Respondent to pay the costs of the appeal, all costs before the order giving leave to proceed in forma pauperis, and after that order only such costs as are allowed to an appellant in forma pauperis.

C. A. W.

ROBERTS v. ROBERTS AND MOFFATT AND OTHERS.

EX PARTE ROBERTS AND MOFFATT AND OTHERS.

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SYDNEY, *Nov.* 27.

Griffith C.J., and Barton J.

Practice—Appeal from interlocutory judgment—Order dismissing suit as frivolous and vexatious—Notice of appeal not filed in time—Rules of High Court 1903, *Part* II., *Sec.* I., *rr.* 4, 5.

An order made by a Justice of the High Court dismissing a suit as frivolous and vexatious is not a final judgment within the meaning of r. 4 of the *Appeal Rules*, Sec. I., and, therefore, notice of appeal from such an order must be filed within 10 days from the date of the order, as required by rr. 4 (sub-sec. (2)), and 5.

Notice of appeal by the plaintiff from an order made by *Barton* J., on 22nd October 1908, dismissing the plaintiff's suit as frivolous and vexatious, struck out on the ground that it was not filed in time.

MOTION to strike out notice of appeal.

The plaintiff brought an action in October 1907 against the defendants for a number of alleged causes of action. Some of the defendants were dismissed from the suit while it was pending, and the remaining defendants took out a summons to have the statement of claim struck out on the ground that it disclosed