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themselves to many arguments irrelevant and untenable in point of law, still the owners sought to maintain the finding that the timber was not shipped at all, despite the evidence given on their behalf and the admission made by them of the fact of shipment.

Appeal allowed. Judgment for the appellant with costs. Respondent to pay costs of appeal.

Solicitors for the appellant, *Herman & Stretton.*

Solicitors for the respondent, *Blake & Riggall.*

B. L.

[HIGH COURT OF AUSTRALIA.]

ROBERT JOHNSON . . . . . APPELLANT;
PETITIONER,

AND

ELIZABETH ESTHER JOHNSON AND ANOTHER . . . . . RESPONDENTS.
RESPONDENT AND CO-RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 17, 18; *May* 3.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Husband and Wife—Divorce—Adultery—Insanity as defence—Evidence—Costs of respondent wife—Guardian ad litem—Costs of appeal to High Court—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *secs.* 12, 18, 19, 47.

On a petition by a husband against his wife under the *Matrimonial Causes Act* 1899 (N.S.W.) for dissolution of the marriage on the ground of adultery it was proved that, although she suffered from occasional attacks of acute mania, at the time when she had sexual intercourse with the co-respondent she knew the nature of that act, that the co-respondent was not her husband and that the act was opposed to her duty as a wife.

Held, that the wife had been "guilty of adultery" within the meaning of sec. 12 of the Act, and that a decree nisi for dissolution should be made.

Quœre, whether insanity relieves a person from responsibility for an act which would otherwise be a matrimonial offence.

A petition by a husband against his wife for dissolution of the marriage on the ground of adultery was defended by the Master in Lunacy, who had been appointed guardian *ad litem* of the wife. The Supreme Court of New South Wales having dismissed the petition, the Master appeared to oppose an appeal by the husband to the High Court, but was unsuccessful in his opposition and a decree nisi for dissolution was made.

Held, that the husband should be ordered to pay the Master's costs of the appeal as well as of the hearing.

Decision of the Supreme Court of New South Wales (*Ralston* A.J.) reversed.

APPEAL from the Supreme Court of New South Wales.

In the Supreme Court in its matrimonial jurisdiction, before *Ralston* A.J., a suit was heard whereby Robert Johnson petitioned for a dissolution of his marriage with his wife, Elizabeth Esther Johnson, on the ground of her adultery with James Dodd. On the suit coming on for hearing, it appeared that the respondent was then a patient at the Gladesville Hospital for Insane; and thereupon William Arthur Parker, the Master in Lunacy, was appointed guardian *ad litem* for her, and he thereafter defended the suit on her behalf. After hearing evidence the learned Judge made an order dismissing the suit.

From that decision the petitioner now appealed to the High Court.

The other material facts appear in the judgments hereunder.

Telfer, for the appellant. On the evidence, the wife at all material times was capable of understanding the character of the acts charged against her and their consequences, and knew that what she was doing was wrong. If that be so, the fact that she was otherwise insane is not a defence (*Yarrow* v. *Yarrow* (1); *Hanbury* v. *Hanbury* (2)). Under sec. 12 of the *Matrimonial Causes Act* 1899 (N.S.W.), if the evidence is consistent with the wife understanding the nature and import of her act, the burden is upon her to establish that she did not (*Cosham* v. *Cosham* (3)); just as in a criminal case the burden is on the accused to prove insanity (see *M'Naghten's*

(1) (1892) P., 92. (2) (1892) P., 222.
(3) (1899) 25 V.L.R., 418; 21 A.L.T., 140.

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Case (1)). *Rae* v. *Rae* (2) does not apply. That was a case of desertion, which, under sec. 13 of the Act, must be " without just cause or excuse." Adultery by itself is sufficient to satisfy sec. 12. In any event insanity is not a defence to a suit for divorce on the ground of adultery. [Counsel also referred to *Hall* v. *Hall* (3).]

Davidson (with him *Cordell*), for the respondent wife. Assuming that the respondent has to show that at the time of the act of sexual intercourse she was insane, that burden is satisfied by showing, as has been shown here, a case of general insanity, which may be with or without lucid intervals. That is a civil issue as to which a preponderance of evidence one way or the other is sufficient, and there is no necessity to prove the case beyond reasonable doubt as there is in a criminal case (*Mordaunt* v. *Moncreiffe* (4)). General insanity being proved, the burden is then upon the petitioner to prove that the act was committed during a lucid interval (*McLaughlin* v. *Daily Telegraph Newspaper Co.* (5) ; *Attorney-General* v. *Parnther* (6)), and that fact must be proved beyond reasonable doubt, for under secs. 18 and 19 the Court has to be satisfied that the matrimonial offence has been committed. If in a suit for divorce on the ground of adultery the respondent raises the defence of insanity, that has to be decided according to the ordinary rules of civil proceedings. If then the respondent raises a doubt as to insanity, the burden is upon the respondent to solve that doubt. There is no definite authority that insanity is an answer to a suit for divorce on the ground of adultery, but in *Yarrow* v. *Yarrow* (7), *White* v. *White* (8) and *Curtis* v. *Curtis* (9) it seems to be assumed that it is. Adultery must involve capacity to know that the act is wrong. The respondent is entitled to her costs (*Fremlin* v. *Fremlin* (10)).

Telfer, in reply, referred to *Dunstall* v. *Dunstall* (11) ; *McConville* v. *Bayley* (12) ; *Long* v. *Long* (13) ; *Burge* v. *Burge* (14).

Cur. adv. vult.

(1) (1843) 10 Cl. & Fin., 200.
(2) (1905) 22 N.S.W.W.N., 220.
(3) (1864) 33 L.J. (P. M. & A.), 65.
(4) (1874) L.R. 2 H.L. (Sc. & D.), 374.
(5) (1904) 1 C.L.R., 243, at p. 277.
(6) (1792) 3 Bro. C.C., 441.
(7) (1892) P., 92.
(8) (1859) 1 Sw. & Tr., 591.
(9) (1858) 1 Sw. & Tr., 192, at p. 213.
(10) (1913) 16 C.L.R., 212.
(11) (1913) 32 N.Z.L.R., 669.
(12) (1914) 17 C.L.R., 509, at p. 513.
(13) (1890) 15 P.D., 218.
(14) (1893) 9 N.S.W.W.N., 172.

The following written judgments were delivered :—

KNOX C.J. This is an appeal from the judgment of *Ralston* A.J. dismissing a petition for divorce on the ground of adultery between the respondent and the co-respondent.

The learned Judge found that sexual intercourse had taken place between the respondent and the co-respondent, but dismissed the petition because he had a doubt as to whether the respondent was sane enough to know what she was doing at the time she was alleged to have committed adultery. He said she might have had more or less lucid intervals, but that he had a doubt whether at the time she committed adultery she was in a lucid interval or whether she was insane. The effect of the evidence as to the mental condition of the respondent and as to her conduct while at Cessnock is summarized in the statement of his reasons about to be published by my brother *Starke*; and I desire to add only this: that the petitioner gave evidence (1) that at the time when the confession was signed the respondent and co-respondent stated, in effect, that they had talked it over and had agreed to get married, and (2) that at one or other of the interviews on that day the respondent told the petitioner to "go back and get a divorce."

I agree with my brother *Starke* in the conclusions at which he has arrived as to the mental condition of the respondent at the relevant time. I agree also that it follows from these conclusions that the respondent must be held responsible in law for the acts of adultery committed by her, and that in the circumstances of this case it is unnecessary to decide whether insanity relieves a person from responsibility for an act which would otherwise be a matrimonial offence.

For these reasons I am of opinion that the appeal should be allowed and a decree nisi be made for dissolution of the marriage, not to be made absolute until after the expiration of six months.

With regard to the costs of the respondent, I can find no reason in this case to justify a departure from the rule recognized in *Fremlin* v. *Fremlin* (1) that, in a suit for divorce by a husband in which he is successful, he must pay the respondent's costs reasonably incurred unless it is proved that she has sufficient means to pay them after

(1) (1913) 16 C.L.R., 212.

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providing for her reasonable maintenance. There is no evidence in the present case as to the respondent's financial position. The petitioner is, however, entitled to an order, for what it may be worth, that the co-respondent pay the costs of the suit, including the costs paid by the petitioner to the respondent.

ISAACS J. Before the ultimate question in this appeal can be determined, we have to consider various antecedent matters. The question is whether the sexual intercourse that took place between the respondent and the co-respondent amounted to adultery by her. That the sexual intercourse took place in fact, the learned primary Judge had no doubt; nor have I. What is meant by "adultery" within the meaning of the law relating to divorce? In that sense it is "the voluntary sexual intercourse of a married person with one not the husband or wife" (*Bishop on Marriage and Divorce*, 6th ed., sec. 703). The word "voluntary" is all important. A woman carried off by force and compelled to submit, or imposed on by fraud, or drugged so as to be unable to comprehend what she was doing, would not, by the mere act of intercourse, be an adulteress. She could not be said to be voluntarily unfaithful to her marriage vows. The relevant section in the *Matrimonial Causes Act* 1899 for this purpose is sec. 12: "Any husband may present a petition to the Court praying that his marriage may be dissolved on the ground that his wife has since the celebration thereof been guilty of adultery." The word "guilty" indicates the operation of the will to commit the wrongful action. The word "guilty" in that collocation suggests the responsibility for a culpable act; an act done when the person had the mental capacity to choose between guilt and innocence (see *Felstead* v. *The King* (1)). Whatever deprives a person of the capacity to understand the nature and import of the physical act deprives it of the essential quality of volition, and, therefore, of the character of a matrimonial offence. It is plain, then, that insanity, which is mental disorder, may have that effect. But it may not. If the sexual act is established, the exculpation must be shown, because the law presumes sanity until the contrary is proved. It is not enough to prove that the person

(1) (1914) A.C., 534, at p. 543.

was insane. The word " insanity " covers a field so large as to be consistent with full responsibility for a given act. The proof, to amount to exculpation for sexual intercourse, must satisfy the tribunal that the aberration of mind was of such a nature and so great as to render the person incapable of appreciating the nature and import of the act (see *Yarrow* v. *Yarrow* (1)). If it was, then the act was not a volitional act of adultery.

The facts of this case, to my mind, establish that the respondent was an afflicted woman. Her mother was insane. The respondent inherited the trait. She has four times been interned in a lunatic asylum, twice as a girl, once since marriage, and again at the present time. I have no doubt from the evidence, particularly that of the doctor, that she is abnormal, that she is mentally deranged, that it is impossible to say at the best of times she is quite normal. I am also satisfied that during the time she was staying with Mrs. Ferguson she was at times quite insane, though at other times she recovered her usual approach to normality. I have, therefore, very anxiously considered how far the finding of the learned primary Judge as to this woman, incapable of defending herself now, ought to be sustained or altered. I have come to the conclusion that, granting all I have said and granting, for the sake of argument, the force of Mr. *Davidson's* very lucid contention that in the circumstances the burden lies on the petitioner of displacing the effect of the wife's general insanity, that burden has been sustained. I state the reasons why I so conclude.

When the petitioner, on 13th January, found his wife and the co-respondent together, she addressed him in terms that appear to be quite rational and the result of a determination, not momentary, and with a full appreciation of results. It is true that she was abusive, and that she did an extraordinary act of standing on a bed. But what weighs with me finally is this : after the petitioner left the place where he found her and returned to Mrs. Ferguson's house, the respondent and the co-respondent came there, and apparently in cool blood said, in effect, that they had decided to make a confession. The confession was there and then written out by the co-respondent and signed by the wife. Her signature is a free, well-written

(1) (1892) P., 92.

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Isaacs J.

signature. Some days later, on 23rd January, while she was still at Cessnock, she was served with the citation; she took it and signed her name in full to a receipt for it in a clear handwriting that betrays no symptoms of aberration. Looking at these three circumstances together, I am forced to the clear conclusion that, at the critical time of her companionship with the co-respondent and at the time of the confession, not only was she capable of understanding but she did fully understand the nature and import and, if that were necessary, the consequences of her conduct, and, therefore, was, well within the meaning of sec. 12 of the Act, "guilty of adultery."

I therefore agree that the appeal should be allowed.

As to the costs, I agree with my brother *Rich*.

HIGGINS J. One of the grounds of the husband's appeal in this case is that insanity of the wife is not a defence to a suit for dissolution of the marriage for her adultery. As the learned Judge at the trial said, it has never yet been decided whether insanity is a defence; but he dismissed the husband's petition on the ground of insanity, on the authority of a case of *Rae* v. *Rae* (1). That was a case of desertion; and desertion, as a ground for dissolution, must be "without just cause or excuse" (*Matrimonial Causes Act* 1899, sec. 13). For my part, I am not at all convinced that insanity is in itself a defence, at all events under the New South Wales Act as it stands. Under sec. 12 dissolution of the marriage may be sought on the ground that the wife has since the celebration thereof been "guilty of adultery." Under sec. 19, whenever a petition is presented under sec. 12, "the Court *shall* pronounce a decree declaring the marriage to be dissolved if it is satisfied on the evidence that the case of the petitioner has been proved, and does not find against the petitioner any" of certain specified facts—connivance at the adultery or condonation, or collusion in the proceedings. Sec. 19 says also that the Court shall not be bound to pronounce such a decree if it finds that the petitioner has himself been guilty of adultery, or guilty of unreasonable delay, or of cruelty, or of desertion before the adultery, or of such wilful neglect or misconduct as has conduced to the adultery. There is no mention of insanity among these exceptions from the duty imposed on the Court to decree dissolution:

(1) (1905) 22 N.S.W.W.N., 220.

and *expressio unius exclusio alterius*. At the same time, it has to be remembered that, to constitute adultery, there must be the co-operation of the will. According to the *Oxford Dictionary*, adultery is "the *voluntary* sexual intercourse of a married person with one of the opposite sex, whether unmarried, or married to another"; and to be voluntary, the person must know the nature of the act to which he or she consents. But this aspect of the New South Wales Act has not been discussed in the argument before us; and I prefer to rest my opinion on the simple ground that, on the evidence, and assuming that sanity is necessary, the wife wilfully had sexual connexion with Dodd, knowing the nature and quality of the act, and knowing (if that is necessary) that she was doing wrong, and desiring that what she calls in her written confession "misconduct" should secure for her freedom from the matrimonial tie, so that she might live with Dodd. There is certainly no indication of any delusion on her part. The only doubt that I have about the woman's conduct and utterances when her husband was brought by a friend of hers to see her in the bedroom with Dodd—in the presence of her child six years old—is not as to her sanity, but that the whole morning drama was a deliberate device of hers with the view of getting the husband to bring a suit for dissolution. But such a view of the case was not suggested in the argument; and I shall not act on this possibility.

I need not recapitulate the nauseous evidence. The evidence was loosely given, and loosely recorded; but after hearing the long discussion, and after re-reading the evidence carefully, I am of opinion that the learned Judge ought to have found that the woman was sane, in any relevant sense, at the time of the misconduct. She was not called as a witness; and we are therefore in as good a position to draw our conclusions of fact from the evidence of her husband, her brother and the other witnesses, whose veracity is not impugned. The medical evidence—the evidence of the medical superintendent at the Gladesville asylum—shows that the woman had been confined in the asylum at the age of thirteen (1909), again for eight months (1919-1920), and that she was again confined on 1st February 1922, shortly after the scene with her husband when she was found in the bedroom with Dodd, and after she had been served with the petition and citation. The superintendent had discharged her absolutely

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Higgins J.

on the two previous occasions of confinement, after testing her by trial leave. True, he says, "it is quite possible in a recurrent case such as hers that she may have been less acute but still *practically* insane for some time before"; but he does not say that in fact she was "practically insane" for some time before. The superintendent has a "doubt if the woman was ever quite right"; but he says "In my opinion, she would be perfectly capable of knowing what she was doing when she was discharged." At the close of his evidence he says:—"When she would not be subject to maniacal outbursts, she would know the difference between right and wrong, I think. When she was all right, in my opinion, she would know she was doing wrong in living with co-respondent. I think it quite likely she knew she was doing wrong." There is really no substantial evidence of lasting insanity between maniacal attacks, and no substantial evidence that at the time of her misconduct she was suffering from such an attack.

In my opinion, the appeal should be allowed. As to costs, the State Court has power to make any order that it thinks fit (sec. 47). Usually, a husband has to pay the costs even of a guilty wife without separate estate in order that she may be enabled to defend herself; and I see no sufficient reason for refusing to follow that practice in favour of one whom the Court has appointed to defend the suit as the wife's guardian *ad litem*. Perhaps the Crown will not insist on its officers getting costs in such a case, and thereby adding to the burden of this innocent petitioner. But, in any event, an order should be made, for what it may be worth, that the co-respondent pay to the petitioner the latter's costs of the suit and of the appeal, including any costs paid to the guardian *ad litem*.

RICH J. Adultery in divorce law is the voluntary sexual intercourse with one of the opposite sex not being his or her wife or husband. The basis of the offence is the voluntary violation of the marriage bed. Whatever facts exclude voluntariness are sufficient to show that the necessary offence has not been committed. I use the word "offence" not only because that was the way in which adultery was regarded by the canon law, but also because by sec. 12 of the *Matrimonial Causes Act* 1899 the expression is "guilty of adultery."

There are many things which negative voluntariness, e.g., coercion and imposition (cf. *Long* v. *Long* (1)). Without attempting to enumerate them, which would be impossible, insanity, if it so affects the mind and consciousness as to cause incapacity to appreciate the real nature of the act done, so that in a sense it becomes mechanical rather than rational, does negative voluntariness. The question of fact here is whether the prima facie nature of the act of intercourse is shown to have been wanting in voluntariness on the wife's part by reason of her insanity. Putting it most favourably for the respondent, I cannot agree with the learned primary Judge that the evidence leaves the matter in doubt. The facts which happened when the petitioner called at the draper's shop, and afterwards when the respondent and co-respondent made the confession, satisfy me that what the respondent did was voluntary in the sense I have stated.

The costs of the hearing are in the discretion of the Court below (*Matrimonial Causes Act* 1899, sec. 47), but that discretion must be exercised in a judicial way, and the rule has been dealt with in *Fremlin* v. *Fremlin* (2). But the costs of an appeal may stand on a different ground, as appears from that case and from *Moses* v. *Moses* (3). The wife, by her guardian *ad litem*, being respondent, the case falls within the doctrine of *Medway* v. *Medway* (4), and not of *Otway* v. *Otway* (5). Applying the law as there laid down, I think the proper order is that the Master in Lunacy should have his costs in this Court and at the hearing. There should also be an order against the co-respondent to pay the petitioner's costs, including those paid to the Master.

STARKE J. This was a petition by a husband for dissolution of marriage, in which adultery by the wife was alleged. It came for hearing before the Supreme Court of New South Wales, but upon the fact being proved that the wife was an inmate of an institution for the care and protection of insane persons, *Ralston* A.J. ordered that the Master of Lunacy be served with a copy of the proceedings and

(1) (1890) 15 P.D., 218.
(2) (1913) 16 C.L.R., 212, particularly at pp. 241, 243.
(3) (1920) 27 C.L.R., 490.
(4) (1900) P., 141.
(5) (1888) 13 P.D., 141.

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the evidence in the cause. Subsequently the Master was, by order, appointed the guardian *ad litem* of the wife. The cause came again before the learned Judge; and he dismissed the petition, because he doubted whether the wife was sane enough to know what she was doing at the time she was alleged to have committed adultery. Undoubtedly the unfortunate woman was afflicted with some form of disease of the mind, but the question whether or not that disease affected her responsibility for a matrimonial offence must depend for its answer upon the character, nature and extent of the disease.

The parties do not seem to have appreciated the delicate nature of the inquiry upon which they had embarked, and the evidence of the mental condition of the wife is very meagre and therefore greatly embarrasses me. Further, the report of that evidence leaves much to be desired. It is, however, necessary to form some definite opinion as to the mental condition of the wife before any safe conclusion can be reached either as to the fact of sexual intercourse or as to the responsibility of the wife for such intercourse if it in fact occurred.

The evidence suggests that the family history of the wife was bad. Her mother was "insane before her" according to medical testimony. And she herself was confined in Gladesville—an institution for the care of insane persons—at the age of ten years and again at the age of sixteen. She married the petitioner in 1915, at the age of twenty, and there were two children of the marriage, a boy born in 1916 and a girl born in July 1919. Throughout this period, up to the time the daughter was born, the wife, so far as one can gather, was quite rational, discharged her household duties, and attended to her elder child in the ordinary way. But after the birth of the daughter, her mind gave way, and she was once more admitted to Gladesville, but was discharged in February 1920. She returned to her home, and apparently attended again to her household duties and the care of her children until 1921. In that year, with the approval of her husband and accompanied by her daughter, she went to stay with some friends at Cessnock, for the benefit of her health. The visit lasted some four or five weeks, and during that period the wife again, in my opinion, undoubtedly suffered a mental breakdown. At times she was rational, but at other times she was noisy, hysterical and somewhat irrational.

It was while upon this visit that she began to visit picture theatres at night in the company of the co-respondent, with whom she may have been acquainted, but whom she certainly did not know well. The petitioner was summoned to Cessnock, and, upon his arrival on 13th July 1922, he found his wife and the co-respondent, at about 7.30 o'clock in the morning, in a room at the back of a shop. Two beds, alongside each other, were in the room, and the wife was lying on one with her child, and the co-respondent on the other. The story of what took place, as related by the petitioner, proceeds as follows:—"I" (the petitioner) "fancy I said 'What is the meaning of this?' . . . My wife stood up in bed and said she had never been satisfied and she had found somebody else. 'It is no good,' she said; 'I cannot go on like that. I never was happy. . . . I found somebody else I like better, so I am going to stop with him.' I" (the petitioner) "said 'You had better let me have the baby now,' and she said 'All right, I will go and get him [? her] washed presently and you can take him [? her] home'." Soon afterwards the co-respondent and the wife signed a document acknowledging misconduct in the churchyard at Cessnock (of which, however, there is no evidence). The petitioner served his petition on 18th January 1922, but his wife was readmitted to Gladesville on 30th January 1922. She is now at times rational and at other times irrational.

The disease of her mind manifests itself in the following symptoms: She has periods of great excitement, and during those periods is restless, noisy, often abusive, rambling and incoherent, laughs without cause, and is resistive to anything done for her. The medical officer says that practically her condition amounts to acute mania, and in that condition—or in the prodromal stages thereof—the sexual activities are rather exaggerated. Now, this evidence, taken as a whole, shows beyond all question that the mental functions of the wife were not operating in an ordinary manner; but it does not show that she was incapable of knowing or feeling or willing, though doubtless her power of resisting any act must have been much reduced. She recognized her friends at Cessnock, and was able to discuss in rational terms the question of going to the picture theatres with the co-respondent. Again, she knew her husband on his arrival at Cessnock, and was able to discuss with him also, in rational terms,

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Starke J.

the nature of her conduct with the co-respondent. But her moral attitude on the matter, and her conduct as to her young child, are surprising and disconcerting. Further, after her husband's visit to Cessnock, she wired to her brother that she "was stranded," and he on going to Cessnock found her strange, but on "coming down" from Newcastle (a city near Cessnock) she became practically normal for a while, and read a magazine. Indeed, all observers of the wife's conduct speak of her as appearing, except on intermittent occasions, to know what she was doing and to be no different from other women.

On the whole, the mental condition of the wife was such, in my opinion, that she knew—(a) the nature of an act of sexual intercourse; (b) the identity of the person with whom she was engaging in that act, whether it was her husband or another man; (c) that to engage in such an act with another man than her husband was opposed to her duty as a wife. And, in addition, I am satisfied that, though her mental powers were considerably reduced, still she had sufficient will power to control her sexual acts and desires.

If these be proper conclusions upon the evidence, then the mental elements of responsibility for an act in the law undoubtedly exist, despite the disease of her mind. It is therefore quite unnecessary for me to consider the important and undecided question whether insanity relieves a person from responsibility for an act which otherwise would be a matrimonial offence. I do not wish to be taken as expressing any doubt on the subject, but I certainly reserve for further consideration the question whether the test of responsibility for criminal acts stated in *M'Naghten's Case* (1) can or ought to be applied to acts involving breaches of matrimonial duties. One cannot overlook the fact that *M'Naghten's Case* has been the subject of much criticism, both by legal and medical authors, and even Judges have not been able to apply the test in the same sense in every case.

The facts in the present case satisfy me that sexual intercourse took place between the wife and the co-respondent, and that the mental disease from which the wife suffered was not such as to relieve her in point of law from responsibility for her act. The case is a

(1) (1843) 10 Cl. & Fin., 200.

painful one, and much, in my opinion, ought to be forgiven the unfortunate woman. But a decree nisi for the dissolution of the marriage must nevertheless be granted.

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Appeal allowed. Decree nisi for dissolution of marriage. Petitioner to pay costs of respondent (including costs of her guardian ad litem) in Supreme Court and in High Court. Co-respondent to pay costs of suit and of appeal including costs paid by petitioner to respondent.

Solicitor for the appellant, *R. W. Fraser.*

Solicitors for the respondent, *A. H. Holdship & Son.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE SYDNEY HARBOUR TRUST COMMISSIONERS . . . . . PLAINTIFFS, } APPELLANTS;

AND

HARRIOTT . . . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1923.

SYDNEY, *April* 19, 20; *May* 3.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Wharves—Charges for berthing—Wharves "vested" in Sydney Harbour Trust Commissioners—Wharf leased to tenant—Sydney Harbour Rates Act 1904 (*N.S.W.*) (*No.* 26 *of* 1904), *secs.* 1, 6—*Sydney Harbour Trust Act* 1900 (*N.S.W.*) (*No.* 1 *of* 1901), *secs.* 27, 29, 39, 59.

Sec. 6 of the *Sydney Harbour Rates Act* 1904 (N.S.W.) provides that "(1) Tonnage rates shall be levied by and paid to the" Sydney Harbour Trust "Commissioners upon every vessel (except vessels under two hundred and forty tons of register tonnage and lighters) while berthed at any wharf . . . vested in the Commissioners. (2) On vessels in respect of which