[HIGH COURT OF AUSTRALIA.]

HENDERSON . . . . . APPELLANT;
DEFENDANT,

AND

HENDERSON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 20, 21, 22.

MELBOURNE, *Aug.* 30.

Latham C.J., Rich and Dixon JJ.

Husband and Wife—Divorce—Wife's petition—Adultery—Petitioner's adultery—Discretionary bar—Principles of exercise of discretion—Review of trial judge by appellate tribunal—The Matrimonial Causes Acts, 1864 *to* 1945 (Q.) (28 *Vict. No.* 29—9 *Geo. VI. No.* 8), *s.* 26.

Section 26 of *The Matrimonial Causes Acts*, 1864 to 1945 (Q.) provides that:—"In case the court shall be satisfied on the evidence that the case of the petitioner has been proved . . . then the court shall pronounce a decree declaring such marriage to be dissolved. Provided always that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery."

On the hearing of two petitions for divorce presented by a wife on the grounds of her husband's adultery, the trial judge found, on the first petition, that the husband committed adultery in August 1946, and on the second that the husband committed adultery on 7th September 1947. The wife had filed a discretion statement admitting her own adultery with a man between July 1943 and August 1945, which she alleged her husband had condoned. This man was willing to marry her and she wished to marry him. There were two children of the marriage, both boys, aged twelve and nine, who were in the care of the petitioner.

The trial judge, in the exercise of his discretion under s. 26 of *The Matrimonial Causes Acts*, 1864 to 1945 (Q.), dismissed both petitions on the ground mainly that in view of the flagrant and deliberate adultery committed by the petitioner, the exercise of the discretion would probably encourage other persons to immorality because of the realization that flagrant adultery would

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not prevent their success as petitioners in actions for dissolution of marriage. On appeal the Full Court pronounced a decree nisi in the wife's favour on the second petition.

Held that, having regard to (*a*) the wife's chastity since 1945, (*b*) the impossibility of any reconciliation, (*c*) the position and interest of the children of the marriage, (*d*) the interest of the petitioner and the man with whom she committed adultery and whom she desired to marry, (*e*) the futility of insisting upon the maintenance of a union which had utterly broken down and (*f*) the interest of the community at large, the Full Court was right in interfering with the exercise of the trial judge's discretion and pronouncing a decree nisi in favour of the wife.

Blunt v. *Blunt*, (1943) A.C. 517, applied.

Decision of the Supreme Court of Queensland (Full Court): *Henderson* v. *Henderson*, (1948) Q.S.R. 36, affirmed.

APPEAL from the Supreme Court of Queensland.

By petition filed on 19th September 1946, Irene Eila Henderson sought of the Supreme Court of Queensland a decree that her marriage with Trevor Macateer Henderson be dissolved on the ground of his adultery with Vera Carten, an unmarried woman, on divers occasions in and between the months of March 1944 and August 1946 at Brisbane and at various other places in or near Brisbane, and particularly on 30th and 31st August 1946 at Buranda, Brisbane. A second petition was filed on 17th September 1947 by which it was alleged that the husband had committed adultery with Vera Carten at Hasely Court, New Farm, Brisbane on 7th September 1947. With each petition the wife filed a discretion statement asking that the court exercise its discretion in her favour. In these she admitted having committed adultery with one Douglas Blaikie Duncan on divers occasions in and from July 1943 to February 1944 at Cash's Crossing near Brisbane; in February 1944 at Sydney and Melbourne; in March 1944 at the Canberra Hotel, Brisbane; from September 1944 until January 1945 at New Farm, Brisbane; and from May 1945 until August 1945 at Cash's Crossing. It was stated that the husband, with full knowledge of all adultery committed by her, had intercourse with her in the matrimonial home. She further stated that she was driven to adultery by her husband's continual illicit associations with other women and his adultery with other women and his sodomy and cruelty. Further she set out in the statement that she believed that, from the year 1936 to December 1944, her husband was committing adultery with a woman other than the one named in the petition.

By his defences the husband denied adultery with Vera Carten and alleged that the wife had committed adultery with Duncan on divers occasions between April 1943 and the date of the defence, at Brisbane; on divers occasions in or about the month of February 1944 at Glen Innes, Sydney and Melbourne; on divers occasions in March 1944 at the Hotel Canberra, Brisbane; on divers occasions between August 1944 and February 1945 at New Farm, Brisbane; and on 9th February 1945 at New Farm. There were two children of the marriage, both boys, aged twelve and nine, who were in the care of the petitioner.

On the first petition the trial judge found that the husband committed adultery with Vera Carten in August 1946 and on the second petition also found adultery with Vera Carten on 7th September 1947. The trial judge further found that the petitioner's allegation that her husband was committing adultery with another woman from 1936 to 1944 was without foundation, that the defendant was not guilty of sodomy and cruelty; that the defendant did not encourage her to commit adultery with Duncan; that the petitioner had not been driven to adultery by the defendant; that adultery with Duncan had not occurred since August 1945; that reconciliation of the parties was impossible; and that the petitioner and Duncan were desirous of marrying. After stating that he could find no real redeeming feature in the circumstances surrounding the conduct of the plaintiff in commencing and continuing her adultery with Duncan, the trial judge set out the following matters as weighing against the exercise of his discretion: 1. In view of the flagrant and deliberate adultery committed by the plaintiff, the exercise of the discretion would probably encourage other persons to immorality because of the realization that flagrant adultery would not prevent their success as petitioners in actions for dissolution of marriage. 2. The conduct of the defendant had not conduced to the plaintiff's adultery. 3. The later acts of adultery were not condoned by the defendant.

The conclusion arrived at by the trial judge was that the public interest would be best served by a refusal to exercise his discretion in favour of the petitioner and he therefore dismissed the petition.

On appeal, the Full Court by a majority held that a decree nisi dissolving the marriage should be pronounced on the second petition: *Henderson* v. *Henderson* (1).

From this decision the defendant appealed to the High Court.

(1) (1948) Q.S.R. 36.

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McGill K.C. (with him *Lynam*), for the appellant. The trial judge in refusing to exercise his discretion in the wife's favour did not do so by reason of any irrelevant matter in fact or in law. He considered all relevant matters and proceeded according to the principles laid down in *Blunt* v. *Blunt* (1). There were no redeeming features in her association with Duncan and she confessed to frequent flagrant acts of adultery with him. A strong affirmative case is necessary before the discretion is exercised in favour of a petitioner (*Apted* v. *Apted and Bliss* (2)). Under s. 26 of *The Matrimonial Causes Acts*, 1864 to 1945 (Q.) the court is not bound to pronounce a decree. That section contemplates an attitude by the court and not an attitude by the parties. Under the proviso the petitioner must seek the indulgence of the court and she must show that she is entitled to a favour or indulgence. The discretion is not to be exercised readily but stringently (*Wilson* v. *Wilson* (3)). Although the discretion is uncontrolled it is exercised only in special circumstances (*Hines* v. *Hines and Burdett* (4)). Even though the courts showed a tendency towards leniency there still must be special circumstances (*Holland* v. *Holland* (5) ; *Redman* v. *Redman* (6)). In *Blunt* v. *Blunt* (1) the House of Lords did not express any disapproval of the judgment of Lord *Merrivale* in *Apted* v. *Apted and Bliss* (2). As the trial judge did not base his decision in error of law or fact the exercise of his discretion is not a matter for appeal. All matters to be considered, whether they weighed for or against the petitioner, were set out by the judge. He proceeded according to the principles enunciated in *Blunt* v. *Blunt* (1). Where the wife's adultery is of her own choice, persisted in for the purpose of getting a divorce, those circumstances weigh against her, when the court applies the considerations of sanctity of marriage and public policy. *Holland* v. *Holland* (5) was decided after the change in the attitude of the courts had taken place and leniency prevailed (*Joske's Laws of Marriage and Divorce in Australia*, 2nd ed. (1936), pp. 251 et seq.). The discretion has to be exercised on the facts at the time of the decree and therefore the Full Court was wrong in granting a decree on one petition. Both petitions should have been dismissed. The wife's conduct is the most important thing for consideration in determining whether the sanctity of marriage and public policy should prevail. Here the wife persisted in an adulterous association in spite of her husband's efforts and condonation. She committed adultery so

(1) (1943) A.C. 517.
(2) (1930) P. 246.
(3) (1920) P. 20.
(4) (1918) P. 364.
(5) (1918) P. 273.
(6) (1948) 1 All E.R. 333.

that her husband would divorce her. There was no redeeming feature in her conduct.

Bennett K.C. (with him *Garland*), for the respondent. The conduct of the wife is not the point to start the inquiry in this case. On the law the trial judge harked back to restricted principles, which, since the liberal view taken in *Blunt* v. *Blunt* (1), are obsolete and have been superseded. By his own conduct the husband had set at nought the sanctity of marriage. As for the children the refusal of a decree would be the worst possible background they could have. As far as the community was concerned the marriage had become a social farce leading to immorality. No recognition of the wife's continued chastity had been given by the trial judge. His discretion had not been exercised according to law (*Redman* v. *Redman* (2)). The Full Court was right in exercising the discretion and pronouncing a decree (*Charles Osenton and Company* v. *Johnston* (3) ; *House* v. *The King* (4)). The trial judge adhered to the principle laid down in *Apted* v. *Apted and Bliss* (5) that a strong affirmative case was necessary. His opinion as to the likelihood of a decree encouraging immorality was unreal and the reasons for such opinion were fallacious. The trial judge failed to consider or give due weight to the extent and significance of the husband's adultery, the future of the parties and the position of the children of the marriage. He failed to apply his mind to the distinction between the two petitions, the later one showing the husband's persistence in his adultery with Vera Carten. Under s. 26 of *The Matrimonial Causes Acts*, 1864 to 1945 (Q.) there is a presumption in favour of a decree. The trial judge starts untramelled and unfettered (*Blunt* v. *Blunt* (1)). It is the antithesis of *Apted* v. *Apted and Bliss* (5). The divergence between the two cases arose by the difference in the treatment of *Morgan* v. *Morgan and Porter* (6). The case of *Wickins* v. *Wickins* (7) shows that *Apted* v. *Apted and Bliss* (5) was a retrograde step. Further *Wilson* v. *Wilson* (8) showed an advance towards leniency. It is clear from *Adams* v. *Adams* (9) that *Hines* v. *Hines and Burdett* (10) and *Constantinidi* v. *Constantinidi and Lance* (11) have been superseded. In *Cotton* v. *Cotton* (12) there was criticism of *Apted* v. *Apted and Bliss* (5). The discretion of the Full Court should be

(1) (1943) A.C. 517.
(2) (1948) 1 All E.R. 333, at p. 335.
(3) (1942) A.C. 130.
(4) (1936) 55 C.L.R. 499.
(5) (1930) P. 246.
(6) (1869) L.R. 1 P. & D. 644.
(7) (1918) P. 265.
(8) (1920) P. 20.
(9) (1928) V.L.R. 90.
(10) (1918) P. 364.
(11) (1905) P. 253.
(12) (1936) S.A.S.R. 190.

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substituted for that of the trial judge (*Redman* v. *Redman* (1); *McEachern* v. *McEachern* (2)). Sanctity of marriage does not mean that the court has to insist on the maintenance of a union which has completely broken down. Any moral lesson necessary could be taught by the dismissal of the first petition and the wife rewarded for her chastity by a decree being pronounced on the second petition (*Weeding* v. *Weeding* (3); *Maher* v. *Maher* (4); *Joske's Laws of Marriage and Divorce in Australia*, 2nd ed. (1936), p. 270).

McGill K.C. in reply.

Cur. adv. vult.

Aug. 30. The following written judgments were delivered:

LATHAM C.J. Upon the trial of two actions for divorce by a wife *Mansfield* J. found that the husband had committed adultery; but the wife had filed a discretion statement admitting adultery, and the learned judge declined to exercise his discretion in her favour and refused to pronounce a decree. Upon appeal to the Full Court *Macrossan* C.J. agreed with the learned trial judge. *Philp* J. was of opinion that the plaintiff was entitled to a decree upon both petitions, while *Stanley* J. was of opinion that the first petition was rightly dismissed, but that a decree should be granted upon the second petition. The result was that a decree of divorce was granted upon the second petition. The husband now appeals to this court.

The Matrimonial Causes Acts, 1864 to 1945 (Q.) s. 26, provides that if the court is satisfied that the case of the petitioner is proved and it was not found that the petitioner had been accessory to the adultery of the other party or had connived at or condoned the adultery or is acting in collusion " then the Court shall pronounce a decree declaring such marriage to be dissolved, provided always that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery."

The first petition was filed and a writ thereon issued on 19th September 1946. It alleged adultery of the defendant on divers occasions between March 1944 and August 1946. The learned trial judge found that the defendant had committed adultery in August 1946. The second petition was filed and a writ issued on 17th September 1947. In this action the plaintiff relied upon

(1) (1948) 1 All E.R. 333.
(2) (1941) Q.S.R. 103.
(3) (1890) 16 V.L.R. 596.
(4) (1901) 27 V.L.R. 147.

adultery of the defendant on 7th September 1947. It was found that such adultery did take place. In a discretion statement in each case the wife admitted adultery with one D., then a married man, on various occasions between April 1943 and February 1945. In evidence she admitted adultery with the same man in August 1945 when she was in Sydney for the purpose of buying furniture for a house costing over £4,000, which her husband had given to her. This adultery had not been disclosed in the discretion statement.

The learned trial judge made a full and careful analysis of the evidence and his findings of fact were not challenged. His Honour found that the adultery of the wife preceded that of the husband, that he had not encouraged her adultery, that his conduct had not conduced to it, that he had condoned some of the earlier acts of adultery, but not the later acts, that there was no prospect of reconciliation between the parties, that the wife and D. wished to marry, and that the wife had been chaste since August 1945. There are two children of the marriage aged about eleven and eight. His Honour was of opinion that there was " no real redeeming feature in the circumstances surrounding the conduct of the plaintiff in commencing and continuing her adultery with D." The plaintiff made charges of sodomy and cruelty against her husband which the learned judge found were not sustained.

His Honour in his reasons for judgment referred particularly to the cases of *Apted* v. *Apted and Bliss* (1) and *Blunt* v. *Blunt* (2). His Honour cited from the judgment of Lord *Merrivale* in the former case the statement that a strong affirmative case was necessary to justify the court in departing from the discretionary prohibition of relief to a guilty petitioner. I agree in substance with the observations of *Philp* J. in the Full Court with respect to this statement. Section 26 (which is in the same terms as the English section which Lord *Merrivale* considered) does not impose a prohibition, and the frame of the section does not in my opinion lend support to the argument that there must be what is called a strong affirmative case before the discretion conferred by the section can be exercised in favour of a guilty petitioner. The terms of the section show that the general rule is that if the petitioner proves a case of adultery a decree shall be pronounced. The proviso to the section gives a discretion to the court, but a provision that the court " shall not be bound " to pronounce a decree does not mean that a decree shall not be pronounced unless some especially strong reason can be shown in favour of granting a decree.

(1) (1930) P. 246. (2) (1943) A.C. 517.

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The learned trial judge took into account the matters which are referred to in *Blunt* v. *Blunt* (1) as considerations relevant to the exercise of discretion in the case of a petitioner's adultery. In *Blunt* v. *Blunt* (1) emphasis was placed upon the proposition that the discretion conferred upon the court was unfettered and that it should not be bound down by rules and regulations. In *Blunt* v. *Blunt* (1) the House of Lords set out certain headings of matters which were relevant to the exercise of the discretion. These matters were (2) :—

1. The position and interest of any children of the marriage ;
2. The interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage ;
3. The question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife ;
4. The interest of the petitioner, and in particular, the interest that the petitioner should be able to remarry and live respectably ;
5. The interest of the community at large is of primary importance and is to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

His Honour expressed his final conclusion in the following statement (3) :—" In view of the flagrant and deliberate adultery committed by the plaintiff, the exercise of the discretion would, in my opinion, probably encourage other persons to immorality because of the realisation that flagrant adultery will not prevent their success as petitioners in actions for dissolution of marriage." Accordingly, a decree was refused in both actions.

In the Full Court *Macrossan* C.J. agreed with *Mansfield* J. and, in particular, emphasised the original deliberate planning by the wife (4) " to rid herself of the obligations of one marriage in order to enter into another with a paramour who had been equally faithless to his own spouse." The plaintiff had said in evidence that on one occasion in 1943 she went away purporting to be the wife of D. because she thought her husband would therefore probably divorce her. *Philp* J. exercised his own discretion upon the appeal because, first, he was of opinion that *Mansfield* J. had

(1) (1943) A.C. 517.
(2) (1943) A.C. 517, at p. 525.
(3) (1948) Q.S.R. 36, at p. 49.
(4) (1948) Q.S.R. 36, at p. 57.

not paid sufficient attention to the facts with respect to a flat rented in the name of the woman with whom the learned judge found that the husband had committed adultery. His Honour was of opinion that the defendant had set this woman up in a flat as his mistress. There is no finding by the learned trial judge on this particular matter, and, although it is highly probable that the defendant paid some or all of the rent of the flat, the woman swore the contrary, and the learned trial judge made no comment upon it. In my opinion it would be unsafe to ground a decision so important to the parties as the decision in this case upon an opinion as to the probability of the defendant having established the woman as his mistress in the flat. Secondly, *Philp* J. made the comment upon *Apted* v. *Apted and Bliss* (1) to which I have already referred. He agreed that the conduct of the wife amounted to flagrant and guilty adultery without any redeeming feature, but his Honour was of opinion that though, to use the word used in *Blunt's Case* (2) the conduct of the petitioner had been " shocking," there were other considerations which justified and, indeed, required, the exercise of discretion in the plaintiff's favour. They were the interest of the plaintiff and D. that they should be allowed to marry and live respectably and the interest of the children who would, if a decree were granted, not be forced to grow up in an atmosphere of embarrassment and humiliation—which would be their lot if their parents were not divorced and one or both lived in adultery. On the second petition, in his Honour's opinion, the wife had a still stronger case.

Stanley J. was of opinion that the reason given by *Mansfield* J. for his final decision really amounted to saying that it was undesirable in the public interest that the public should become aware that a divorce could be granted even where a petitioner had been guilty of flagrant adultery. The Act expressly provides that a decree may be pronounced notwithstanding adultery of a petitioner and, further, *Blunt* v. *Blunt* (2) shows that a decree may be pronounced even though the conduct of the petitioner has been shocking and outrageous. In my opinion it cannot be said to be contrary to the public interest that the public should be aware that this is the law. *Stanley* J. considered that the conduct of the wife in her adultery and in making false charges against her husband disentitled her to an exercise of discretion in her favour upon the first petition. He held that the adultery of the husband upon which the second petition was based radically distinguished that petition from the first petition. For that reason and because the wife had lived a

(1) (1930) P. 246. (2) (1943) A.C. 517.

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chaste life since August 1945 and in the interests of the children he agreed with *Philp* J. in pronouncing a decree of divorce upon the second petition.

This is an appeal from the granting of a decree upon the second petition. The adultery of the husband on 7th September 1947 has been proved as alleged. Prima facie the wife is entitled to a decree of divorce. But, by reason of her admitted adultery, the court is not bound to pronounce a decree. The circumstances of that adultery, which produce the result that the pronouncement of a decree becomes a matter for the discretion of the court, must be most material in determining whether that discretion should be exercised against the wife and in favour of the husband. As far as the husband is concerned, what may be called his matrimonial conduct has not been such as to induce any tribunal to regard him with favour. As to the wife, I agree with the opinion of all the Justices of the Supreme Court that, as *Mansfield* J. said (1), " I can find no real redeeming feature in the circumstances surrounding the conduct of the plaintiff in commencing and continuing her adultery with D.". This opinion relates to the commencement and continuance of the wife's adultery. It is, in my opinion, a most material fact that, though the wife and D. are in love and wish to marry each other, no adultery has taken place between them since August 1945. The wife has been living apart from her husband since September 1946. The cessation of the adultery is, in the circumstances, a fact which should incline a court favourably towards her. I add to this fact the following circumstances: (1) reconciliation of the parties is impossible; (2) the wife and D. wish to marry; (3) if a decree is not pronounced the position of the children will probably be very miserable: whatever order may be made for their custody, they could never have a real home; (4) if a decree is pronounced, there will at least be a possibility of their having a real home; (5) in such circumstances, to keep a husband and wife tied together in hated matrimony will neither increase nor maintain respect for the institution of marriage. This marriage has failed and is irrevocably broken, and, in view of all the circumstances which I have mentioned, the Court will, in my opinion, serve both the private interests of the persons concerned and the public interests of the community by declining to keep in formal legal existence a union from which all love, affection and respect have long since disappeared. Accordingly, in my opinion, the Supreme Court rightly pronounced a decree in the second action and the appeal should be dismissed.

(1) (1948) Q.S.R. 36, at p. 47.

RICH J. The discretion of the judge in cases of this kind is not trammelled by rules: it is unlimited. It is said, however, that in the exercise of this discretion there are certain matters which should be taken into consideration. These matters are set out in the speech of Viscount *Simon* L.C. in *Blunt* v. *Blunt* (1). I need not enumerate them. Those which apply most strongly to this case are (1) the position and interest of the children. They have hitherto been in the care of their mother or their maternal grandmother and the defendant has not taken any interest in them. As at present advised it will be, I think, in their interest that they should remain in the charge of their grandmother; (2) the impossibility of reconciliation; (3) the interest of the plaintiff who wishes to remarry and live respectably; (4) the interest of the party with whom the plaintiff has misconducted herself, who proposes to marry her; (5) the futility of insisting on the maintenance of a marriage which has hopelessly broken down; (6) that the plaintiff has admittedly for two years lived a chaste life.

This conduct on the part of the plaintiff, the fact that the respondent went his own way and neglected his wife and children, and that she frankly disclosed her misconduct to her husband were circumstances to which his Honour did not attach sufficient weight. On the contrary, in his summing up of the matters which prevented him from exercising his discretion he referred to the plaintiff's flagrant adultery and to the probable encouragement to others to commit the offence in the hope of an exercise of discretion in their favour when their time came. The result of these proceedings will not impair or prejudice public morality or infringe public policy which "is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail" (*Richardson* v. *Mellish* (2)).

In the circumstances I consider that a decree nisi should be granted to the plaintiff.

DIXON J. The only question which is raised by this appeal is whether notwithstanding that the wife has committed adultery a decree for dissolution should be pronounced upon her petition on the ground of the adultery of the husband. The wife admitted her adultery and filed a "discretion statement" giving her narrative of her infidelity. The husband denied adultery on his part but,

(1) (1943) A.C. 517, at p. 525.

(2) (1824) 2 Bing. 229, at p. 252 [130 E.R. 294, at p. 303].

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upon ample evidence, findings of adultery were made against him, findings which were not and could not be challenged.

The statute law of Queensland, like that of many other jurisdictions, lays down no rule according to which a divorce is or is not to be granted to a petitioner who has himself or herself committed adultery. All it does is to say that in such a case "the Court shall not be bound to pronounce" a decree of dissolution. (*The Matrimonial Causes Acts*, 1864 to 1945). It follows in this respect the English *Matrimonial Causes Act* 1857, s. 31. From the beginning the provision has been interpreted as conferring upon the court hearing the suit a discretion to refuse a decree of dissolution or in a proper case to grant a decree of dissolution if the petitioner has been guilty of adultery or of any of the other conduct placed in the same category as adultery as a "discretionary bar." The so-called "discretionary bars" which are enumerated with adultery are unreasonable delay, cruelty, desertion and conduct conducing to adultery by the other party to the marriage. These are all governed by the same provision. There is nothing in the manner in which it is expressed or in its form to indicate upon what principles the court should act in granting or withholding a decree when the petitioner has through his or her own adultery or other conduct lost the absolute right to a divorce which otherwise the matrimonial offence of the other party would confer upon the petitioner. But while the provision contained nothing to show how the court should exercise its power, the Ecclesiastical Courts had always insisted that a party seeking relief should come with pure hands and had never considered that a husband or wife guilty of uncondoned adultery was entitled to a divorce *a mensa et thoro*. The court may have been moved by this reason or by the assumption then generally made that the purpose of the legislation was to relieve a husband or wife against a marriage that had broken down through the misconduct of the other party to the marriage and without any contributing matrimonial wrongdoing on the former's part. But whichever may be the reason, the courts instinctively treated the discretion conferred by the section as authorizing the granting of a decree only in exceptional cases. The presumption was heavily against exercising the discretion in favour of a guilty petitioner. To set up such a presumption appeared not only to vindicate morality; it also provided a rule or principle that would avoid all the uncertainties and inconsistency of decision which must arise from the existence of an unregulated judicial discretion. Lord *Penzance* remarked that a loose and unfettered discretion of this sort upon matters of such grave import is a dangerous weapon

to entrust to any court, still more so to a single judge: *Morgan* v. *Morgan and Porter* (1). Even in the England of 1869, where and when there was likely to be less divergence of outlook and opinion among judges upon such matters than has been witnessed in later times and in other places, the wisdom of the observation was undeniable. Doubtless the objectionable course of leaving the question to the discretion of the judge was adopted because the legislature found itself unable to formulate any principle for the guidance of the courts. But sound as an objection to such a course is, on the other hand it is not sound to lay down, in default of principle, a closed category of precise and particular situations as alone justifying a departure from a rule that relief must be refused to a guilty petitioner. Unfortunately however this was done, and for long the rule was that a decree must be refused unless the adultery of the petitioner was due to a mistaken belief on his or her part, as for instance that the marriage had been dissolved by death or divorce, or to the persuasion or instigation of the respondent or to his or her conduct conducing thereto or unless the adultery had long been condoned. The history of the decided cases shows first a progressive escape from the rigidity of this restrictive rule, which has no foundation in the provision and none in principle. But the change in opinion in England concerning the deeper principles upon which the jurisdiction in divorce is founded has also had its effect upon the doctrine first adopted by the court making it the rule to refuse a decree to a guilty petitioner and the exception to grant one. It is no longer true that the presumption of the law is against dissolving a marriage when a ground of divorce is proved, if it appears that the petitioner has himself or herself been guilty of adultery. There is no burden upon such a petitioner to establish special reasons inducing the court to relax a rule that prima facie a decree should be refused in such a case. Instead, the courts have enumerated a set of considerations which the judge is to take into account and weigh. The list is not regarded as exhaustive. It is a statement however of factors which, when they exist, the judge must consider. He is bound not to neglect them. Lord *Merrivale* P., in the elaborate review of the question which he undertook in *Apted* v. *Apted and Bliss* (2), considered the case law chronologically and in detail. His Lordship then said (3):—"Reviewing the cases in question as a whole these principles appear: in every exercise of discretion the interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration;

(1) (1869) L.R. 1 P. & D. 644, at p. 647.
(2) (1930) P. 246.
(3) (1930) P. 246, at p. 259.

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a strong affirmative case is necessary before a judge is justified under the statutes in negativing their conditional prohibition; it is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised where that course will probably encourage immorality; if it is not unlikely to do so that is an argument against leniency. Every person familiar with legal procedure who reads the modern cases to which I have referred will find that the matters I have mentioned were actively present in the minds of the judges concerned."

The course of practice here and in England warrants the statement that it is now no longer correct that a strong affirmative case is necessary negativing the conditional prohibition of the statutory provision. The statute is now regarded as investing the courts with authority to form a discretionary judgment whether the marriage should be dissolved, forming that judgment upon the circumstances of each given case, not neglecting but weighing the considerations which, according to the case law, are always material. Indeed it is so far from correct to demand a strong affirmative case that current English text books state the rule of practice to be almost the opposite. Thus in *Rayden* on *Divorce*, 4th ed. (1942), at page 149) it is said: " . . . from about 1917 the exercise of that discretion became increasingly less stringent, the general view adopted being that where a marriage has completely broken down it is prima facie in the interest of the community that the marriage should be dissolved, and now it is scarcely inaccurate to say that the discretion is usually exercised in favour of a petitioner who has committed adultery, regardless of its duration or character or promiscuous nature, unless there are grounds for holding that the grant of a decree would be contrary to the interests of the community, or there has been culpable delay, or there has been perjury and deception by the petitioner, or conduct by him or her conducing to the adultery of the other spouse." Mr. *Tolstoy's* recent book on the *Law and Practice of Divorce and Matrimonial Causes* at p. 59 goes even further:—" Generally speaking, the Court will exercise its discretion in favour of the petitioner who is himself guilty of adultery unless there are circumstances justifying its refusal, which happens comparatively rarely." The list of considerations which a court must take into account has now been settled by the House of Lords. In *Blunt* v. *Blunt* (1), Lord *Simon*, in whose opinion the other Lords concurred, speaks of four considerations or circumstances which Lord *Merrivale* had mentioned in *Wilson* v. *Wilson* (2)

(1) (1943) A.C. 517, at p. 525. (2) (1920) P. 20.

as warranting the exercise of the judicial discretion in the petitioner's favour. Lord *Simon* proceeds :—" These four points are : (*a*) the position and interest of any children of the marriage ; (*b*) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage ; (*c*) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife ; and (*d*) the interest of the petitioner, and, in particular, the interest that the petitioner should be able to remarry and live respectably. To these four considerations I would add a fifth of a more general character, which must, indeed, be regarded as of primary importance, namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused."

The actual decision of the House in *Blunt* v. *Blunt* (1) perhaps gives point to his Lordship's reference to the effect of the now prevailing view that a marriage that has finally broken down should be dissolved even though the petitioner has committed adultery. For the facts of the case were such as to cause *MacKinnon* L.J. to say that if it were not a case in which there should be a refusal of the prayer of the petitioner he could not conceive of any case in which there need be one and to add a reference to a passage in *Boswell's Johnson* (*Blunt* v. *Blunt* (2)). It is a passage which will be found to contain, as it happens, the decision of Dr. Johnson, expressed with vigour in the plain language of the times, upon a plea for leniency on behalf of a lady divorced by Act of Parliament, a plea advanced by Boswell in much the same way as that advanced here. (May 7th, 1773 Oxford ed., p. 509). However *tempora mutantur et nos mutamur in illis*. Notwithstanding the view of *MacKinnon* L.J. and his reliance upon Dr. Johnson, the House of Lords restored the decision of *Hodson* J. who had pronounced a decree of dissolution in spite of the conduct of the petitioner. It is true that the House of Lords placed the decision of the appeal upon the ground that the exercise by *Hodson* J. of his discretion should have been allowed to stand not only because of the considerations which should govern the exercise of a judge's discretion in the divorce court but also because of the principles which limit

(1) (1943) A.C. 517. (2) (1942) 168 L.T. 10, at p. 12.

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any review of that discretion in an appellate tribunal. But there can be little doubt that the view which prevailed, whether directly or as one considered as open to *Hodson* J. to adopt, consisted in "the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down." Indeed it is the weight now generally attached to that consideration which accounts for the very different manner in which the provision is administered in practice at the present time. It is of course a consideration of principle or policy. Some of the other considerations mentioned must depend only on the special situation of the parties or of other persons. Thus the position and interest of the children of the marriage must be governed by circumstances capable of infinite variation and must be more often than not a matter of speculation incapable of satisfactory decision. In a dilemma between setting a mother free to marry her paramour and keeping embittered parents bound by a marriage that has nothing but a formal and legal significance, it requires much boldness of prophecy to say by which solution the children would gain most or lose least. It would require also an anxious and detailed enquiry into matters affecting the welfare of the children, for which at that stage of a suit there is no procedure.

The interest of the party who has committed adultery is likewise a matter for speculation. Sentiment and optimism might in some cases lead to the conclusion that the door for a matrimonial union between the adulterers should be opened. On the other hand there must be cases in which cynicism might suggest that, if solicitude for the interest of the third party is to govern the matter, the safer course is to deny him or her the opportunity of stepping into the uncomfortable shoes of the former spouse. In prophesying that there will be no reconciliation, a judge will often be on firmer ground; and a petitioner who presses for a divorce is not unlikely to be right about his or her own interest in obtaining it. But the further task appears to be laid upon the court of maintaining respect for the sanctity of marriage and at the same time reconciling it with the social considerations that tell against maintaining a union that has broken down.

The description of this judicial duty may sound somewhat unreal and very perplexing. Plainly enough, in the decision of a single case, little can be done to promote or support respect for the sanctity of marriage. If it is to be done by the courts, it must be by the principle upon which the law is administered, illustrated by repeated and consistent application to the cases before the courts. But what I understand is meant is that on the one hand the judge is

not to leave out of account the respect that should be held for the sanctity of marriage, and on the other hand when a marriage has completely broken down he is to remember that less harm may be done to the sanctity of marriage by pronouncing a decree than in holding the parties to a status which they will disregard and the obligations of which they will set at nought.

In the present case, the learned trial judge gave very careful attention to the facts and to their bearing upon the considerations which the decisions say he should take into account. He had the advantage of seeing and hearing the parties of whom he formed a low estimate, but no lower than upon a reading of the whole of the evidence I myself have reached. I imagine that his Honour was impressed with the view that it would be a bad example if the petitioner obtained a decree, because she had secured the affections of another woman's husband, committed adultery with him, become the cause or at least the occasion of the dissolution of that marriage and had set out to obtain her own freedom by her husband's divorcing her or her divorcing her husband. At all events he refused the decree. I do not propose to enter into a discussion of the circumstances of the case and of the competing demerits of the parties. But while such a view of the petitioner's conduct is open, to state it thus leaves out many material circumstances and omits the whole case against her husband. His Honour expressed his conclusion that the decree should be refused after stating the considerations for and against an exercise of his discretion in favour of the petitioner. Of the factors set out, three only operate against the petitioner and two of them are merely negative, namely that her husband's conduct did not conduce to her adultery and that her later acts of adultery had not been condoned. The third and positive factor was that, in view of the flagrant and deliberate adultery she committed, the exercise of his Honour's discretion in her favour would probably encourage other persons to immorality because of the realization that flagrant adultery will not prevent their success as petitioners in suits for dissolution.

For myself, I cannot think that any decision the court gives between these parties will produce any effect by way of warning or example upon any stranger to the suit. The husband has committed adultery and behaved in a loose and unseemly manner. The wife committed adultery with one man only and has formed an adulterous connection with him which some time ago she severed in the hope of qualifying as a suitor for divorce. She desires a divorce so that she may marry the man. Her husband opposes it in order to prevent her doing so. The merits of either party are

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not very conspicuous and whichever succeeds no one will regard her or his success as the reward of virtue or an incitement to vice.

As to the factors favouring a decree, his Honour found the following: there was no prospect of a reconciliation between the parties to the marriage, the wife and Duncan, the man with whom she committed adultery, wish to marry and she will be in a position to marry and live respectably, her adultery did not conduce to her husband's adultery, her husband condoned some of the acts of adultery and she has not committed adultery since August 1945; finally, the children of the marriage are in her custody. These factors tell strongly in favour of granting her a decree. But the real question in the case is whether the learned judge's exercise of discretion ought not to prevail.

In my opinion, it ought not. It is based upon a consideration of a general character, namely the tendency of a decision in favour of the wife to encourage vice. I think that, in its application to the facts and circumstances of the case, this consideration has little or no foundation and is unreal. Moreover it is outweighed by the other factors in the case. It has produced a result out of accord with prevailing practice in administering the provision and represents perhaps an individual view, perhaps a view reflecting in some degree conceptions upon which courts no longer act. It may be, as *Philp* J. thought, that his Honour was influenced by the doctrine mentioned by Lord *Merrivale* and cited by his Honour that a strong affirmative case is necessary, a doctrine now obsolete. However that may be, on the whole I am prepared to accept the view, adopted by the majority of the Full Court, that it is a case in which the appellate tribunal is warranted in interfering. It is at least satisfactory to find that by doing so a decision of the case may be reached which accords more with the manner in which the discretion is now more commonly exercised both here and in England.

I therefore agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Leonard Power & Power.*
Solicitor for the respondent: *H. Leon Trout.*

B. J. J.