H. C. OF A. 1950.

PRENTICE v. NUGAN PACKING CO. PTY. LTD.

Williams J.

gives the employee is a right to sue for any balance due in any district court or court of petty sessions in lieu of applying for an order under s. 92 (2). The application under sub-s. (2) is an application for an order to an industrial magistrate. Sub-section (2), par. 2, provides that an application under this sub-section made after the termination of the employment (the case with which we are concerned) shall be made not later than six months after the date of such termination. The action in the district court was commenced after this period, so that it was then too late to apply to an industrial magistrate for an order. Accordingly the employee no longer had the choice of alternatives, and the words " in lieu of " in sub-s. (3) indicate to my mind an intention that the right to sue in any district court or court of petty sessions is to be an alternative right, and therefore a right which can exist only so long as the employee has this choice.

As *Street* C.J. said in the Supreme Court (1) : " His right to make an application to an industrial magistrate had to be exercised within six months and after that period had expired it can no longer be properly said that he was entitled to take some other proceedings instead of making an application to an industrial magistrate. He had lost his right to make such application, and it seems to me that with that loss he also lost the right to bring an action in a District Court or Court of Petty Sessions."

The words " in lieu of " were given this meaning in *Stubbs* v. *Director of Public Prosecutions* (2) and *In re a Debtor* (3). In the last-mentioned case *Darling* J. said (4) : " in my opinion he (the learned County Court Judge) could not make a receiving order ' in lieu of ' an order that he could not make and which, in fact, could not exist ".

In my opinion the appeal should be dismissed.

WEBB J. I would dismiss this appeal for the reasons given by the Chief Justice and *Dixon* J.

FULLAGAR J. I agree that this appeal should be dismissed. I have had the advantage of reading the judgments of the Chief Justice and *Dixon* J., and there is nothing that I wish to add to what they have said.

KITTO J. I agree, and I wish to refer to one additional matter only. It was contended that the time limit of six months after the date of the termination of the employment, which the second

(1) (1950) 50 S.R. (N.S.W.), at p. 226; 67 W.N., at p. 139.
(2) (1890) 24 Q.B.D. 577.
(3) (1905) 1 K.B. 374.
(4) (1905) 1 K.B., at p. 377.

paragraph of s. 92 (2) imposes in respect of proceedings under that sub-section, should be taken to be imposed for a reason which is relevant to such proceedings but irrelevant to proceedings under s. 92 (3). The fourth paragraph of sub-s. (2), which has no counterpart in sub-s. (3), enables a penalty to be imposed which might have been imposed in separate proceedings under s. 93 or s. 96. It was submitted that, having regard to the provisions of s. 56 of the *Justices Act*, 1902-1947, proceedings for a penalty under s. 93 or s. 96 must be instituted within six months after the relevant breach, and that the second paragraph of s. 92 (2) was intended to preclude the anomaly which would exist if a penalty could be imposed under that sub-section after the time for proceedings for a similar penalty under s. 93 or s. 96 had expired.

But even on the basis that s. 56 of the *Justices Act* applies to proceedings under s. 93 or s. 96, it cannot be inferred that the second paragraph of s. 92 (2) was enacted for the reason suggested. The period prescribed by that paragraph is, not six months after the commission of the breach, but six months after the termination of the employment; and that is a period by reference to which neither s. 56 of the *Justices Act* nor any other statutory provision limits the power to impose a penalty under s. 93 or s. 96. Some other reason therefore must account for the enactment of the second paragraph of s. 92 (2). The reason which suggests itself is that which has been recognized as explaining the time limit of six months which, until the amendment of s. 92 by the Act of 1943, applied to proceedings for the recovery of award wages, whether before an industrial magistrate and in a district court or court of petty sessions, namely that, while employees should have a reasonable time in which to obtain arrears, employers should be protected against an undue accumulation of stale claims as to which there might be great difficulty in preserving evidence (cf. *Josephson* v. *Walker* (1)). The presence of the fourth paragraph in s. 92 (2) therefore affords no ground for denying the applicability of the time limit prescribed by the second paragraph to proceedings which an employee elects to take under s. 92 (3) in lieu of taking proceedings under s. 92 (2).

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Oakes & Oakes*, Lismore, by *F. W. Hall & Edgington*.

Solicitors for the respondent, *Nicholl & Hicks*.

J. B.

(1) (1914) 18 C.L.R., at p. 703.

[HIGH COURT OF AUSTRALIA.]

ZARNKE . . . . . APPELLANT;
PLAINTIFF,

AND

ZARNKE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1950.

ADELAIDE, *Oct.* 6.

MELBOURNE, *Oct.* 31.

Latham C.J., Fullagar and Kitto JJ.

Matrimonial Causes—Dissolution of marriage—Desertion—Wife's action—Wife's adultery—Continuing at trial—Delay—Exercise of discretion—Review by appellate tribunal—Matrimonial Causes Acts 1864 *to* 1949 (*Q.*) (28 *Vict. No.* 29 —13 *Geo. VI. No.* 34), *s.* 26.

Section 26 of the *Matrimonial Causes Acts* 1864 *to* 1949 (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 or if the petitioner shall in the opinion of the court have been guilty of unreasonable delay in presenting or prosecuting such petition. . . ."

W., a wife, brought an action in the Supreme Court of South Australia for divorce from her husband, H., on the ground of desertion. She was domiciled in Queensland, and brought her action in South Australia by virtue of s. 11 of the *Matrimonial Causes Act* 1945 (Cth.), which rendered s. 26 of the *Matrimonial Causes Acts*, 1864 *to* 1949 (Q.) applicable.

H. deserted W. four months after they were married in 1927, leaving W. pregnant. She was then seventeen years of age. She had heard nothing of the defendant since the desertion. She had no means then or since, having lived largely by public relief and charity. She had another child by another man in 1929. Both children were now adult. Since 1944, W. and D. had been living together as man and wife, and both stated at the trial that their association continued up to that time and that they intended to continue it afterwards. They further stated that they wished to marry, if W.'s existing marriage were dissolved.

The trial judge found that desertion had been proved, but in the exercise of his discretion under s. 26 of the *Matrimonial Causes Acts* 1864 *to* 1949 (Q.), dismissed W.'s action, holding that the fact that W. proposed to live with D. in any event was almost conclusive against her application for matrimonial relief notwithstanding her adultery. His Honour also held that there had been unreasonable delay.

Held, that, having regard to all the circumstances of the case, the trial judge acted upon a wrong basis in refusing to exercise his discretion in favour of the plaintiff and that an order nisi for divorce in her favour should be granted.

Held, further, that the plaintiff's delay was not unreasonable in the circumstances.

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

Henderson v. *Henderson*, (1948) 76 C.L.R. 529, explained and applied.

Decision of the Supreme Court of South Australia (*Abbott* J.), (1949) S.A.S.R. 235, reversed.

APPEAL from the Supreme Court of South Australia.

Vera Dossie Zarnke commenced an action in the Supreme Court of South Australia against her husband Frederick William Zarnke for divorce on the ground of desertion. The parties were domiciled in the State of Queensland, but the plaintiff brought her action in the Supreme Court of South Australia by virtue of s. 11 of the *Matrimonial Causes Act* 1945 (Cth.), which rendered s. 26 of the *Matrimonial Causes Act* 1864 *to* 1949 (Q.) applicable. The action was not defended.

The plaintiff and the defendant were married in June 1927. Four months after the marriage, the plaintiff being then pregnant to her husband and only seventeen years of age, was deserted by the defendant. She had not seen or heard of him since the desertion, and had no means then or since. She had a child by another man in 1929. She lived largely by public relief and charity. At the time of the action, the two children were adults. Since 1944 she had been living with one Joseph Henry Daniels as his wife, and both stated frankly in evidence that they proposed to continue their association. The plaintiff and Daniels wished to marry, he being in a position to do so since he had been divorced by his wife in 1946.

The trial judge found the desertion proved, but declined to exercise his discretion in favour of the plaintiff. He treated the fact that she proposed, in any event, to continue to live with Daniels as almost conclusive against her application for matrimonial

H. C. OF A. 1950. ZARNKE v. ZARNKE.

relief. His Honour referred to *Henderson* v. *Henderson* (1), in which *Latham* C.J. said that it was a most material fact that the plaintiff had broken off the adulterous association over a year before commencing proceedings. *Abbott* J. was of the opinion that it would not further the interest of the community at large if the plaintiff, while living in open adultery, could successfully obtain the exercise of the judicial discretion in her favour. Further, he was not satisfied that want of means was the real reason for the delay in instituting proceedings. He thought that the true explanation was that she had no real desire to obtain a divorce until she had been living for some time with Daniels, nor until after Daniels' wife had divorced him. He thus refused to exercise his discretion on the ground of unreasonable delay also.

From this decision, the plaintiff appealed to the High Court.

F. G. Hicks, for the appellant. The trial judge refused to exercise his discretion in favour of the appellant because he was of the opinion that, since *Henderson* v. *Henderson* (1), he was not at liberty to do so if the plaintiff was still living in adultery at the time of the trial. He based this opinion upon the remarks of *Latham* C.J. (2). His Honour was mistaken, however, in that the Chief Justice merely said that it was one factor to be taken into account. In refusing to exercise his discretion, the trial judge proceeded upon a wrong basis. If his decision were correct, it would add a further consideration to those laid laid down by *Latham* C.J. in *Henderson* v. *Henderson* (2). The appellant could not have made any move towards obtaining a divorce until September 1932, as the period for desertion at that time was five years in Queensland or South Australia. She had no means then, but had she consulted a solicitor, he would have been in doubt as to her domicile, as to whether (in view of her comparatively recent adultery in 1929) discretion would have been exercised in her favour (*Apted* v. *Apted and Bliss* (3)) and as to whether her adultery terminated the desertion. Having regard to her means and the nature of the advice she would have received, the appellant's delay is excusable until 1942, when it was decided in *Waghorn* v. *Waghorn* (4) that the adultery of the deserted party did not necessarily determine the desertion. Owing to her financial position, however, she could not have been expected to commence proceedings until the *Matrimonial Causes Act* 1945 (Cth.) came into operation, by which time adultery with Daniels

(1) (1948) 76 C.L.R. 529.
(2) (1948) 76 C.L.R., at p. 536.
(3) (1930) P. 246.
(4) (1942) 65 C.L.R. 289.

had commenced. This having taken place, the court would not have been likely to exercise its discretion in the appellant's favour until Mrs. Daniels had obtained her divorce and all hope of preserving the Daniels' marriage had gone. Mrs. Daniels obtained an order absolute in January 1947 and the writ in the present action was issued in May 1948.

Cur. adv. vult.

Oct. 31.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment dismissing, by reason of adultery of the plaintiff wife, an action for divorce on the ground of desertion. It was held that the wife had a Queensland domicile. She took proceedings for divorce in South Australia by virtue of the Commonwealth *Matrimonial Causes Act*, 1945. By reason of s. 11 of that Act, s. 26 of the *Matrimonial Causes Acts*, 1864 *to* 1949, of Queensland was applicable. By that section it is provided that the court shall not be bound to pronounce a decree of divorce if it shall find that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner shall in the opinion of the court have been guilty of unreasonable delay.

The plaintiff was, when pregnant to her husband, deserted by him in 1927 within four months after the marriage. She was then only seventeen years of age. She has not seen or heard from her husband since 1927. She had no means then or since. She had a child by another man in 1929. She has lived largely by means of public relief and charity. Her two children are adult. Since 1944 she has been living with another man named Daniels as his wife and both he and she have very frankly stated in evidence that they propose to continue their association, but that they wish to get married, the man being now in a position to marry the plaintiff, having been divorced by his wife on the ground of adultery with the plaintiff. His wife has now married his brother.

The learned trial judge declined to exercise his discretion under s. 26 of the *Matrimonial Causes Acts* 1864 *to* 1949 of Queensland. His Honour treated the fact that the wife proposed, in any event, to continue to live with Daniels, as almost conclusive against her application for matrimonial relief notwithstanding her adultery. His Honour referred to what I said in *Henderson* v. *Henderson* (1), where I regarded the cessation of adulterous intercourse as a most material fact which should incline a court favourably towards an applicant for the exercise of the discretion entrusted to the court. I repeat that the circumstance mentioned should materially

(1) (1948) 76 C.L.R. 529.

H. C. OF A. 1950. ZARNKE v. ZARNKE. Latham C.J.

assist such an applicant, but I do not regard it as an essential element in all cases. I refer to what Sir *Boyd Merriman* P. said in *Andrews* v. *Andrews* (1):—"I do not wish to say anything which would discourage petitioners from breaking an adulterous association and coming before the Court with clean hands; and in many cases that may be the right and proper thing to do. It may well be held to be a test whether the discretion should be exercised. But that cannot be a rule of universal application; and as I said in the course of the argument, I doubt the wisdom of advising, as it were, by rule of thumb, that an adulterous association must always be broken off before a petition can be presented. Over and over again I have had cases where discretion has been asked for, where there has been a long association, the birth of children, and where in every respect except the actual legal relationship a new home has been set up and is likely to continue indefinitely. In those circumstances, particularly when the people concerned are poor and there are no real means of setting up alternative accommodation, there may be something unreal in insisting on the association being completely broken off with a view, nevertheless, to its being resumed the moment the decree has been made absolute. In other words, it must depend upon the circumstances of the case whether in the first instance any advice of that sort should be given, and, of course, ultimately, whether the discretion of the Court should be exercised notwithstanding that there has been no nominal change in the situation". In my opinion this statement indicates the proper approach to the exercise of the relevant discretion.

In the present case the maintenance in law of a marriage which completely disappeared in fact when the husband disappeared twenty-three years ago will not further the interests, moral or otherwise, of the parties to the marriage or of the plaintiff's children, nor, from the public point of view, will it tend to preserve or to promote respect for the institution of marriage. It is very probable that it was the husband's desertion of his young wife which brought about her association with another man in order to support herself and her baby. Adultery is always reprehensible, but the law expressly permits a decree of divorce notwithstanding adultery on the part of a plaintiff. A plaintiff will have more difficulty in obtaining a decree when the adultery is present and continuing than when it is past and repented. But all the circumstances of a case should be taken into consideration. In this case the wife was a girl, deserted when pregnant, having no means, charged with

(1) (1940) P. 184, at p. 185.

the responsibility of her baby when it was born, and she has always been poor. In my opinion it would be acting upon a wrong principle to refuse to exercise the discretion in her favour because she now proposes to continue to live with the man who is desirous of marrying her and supporting her if she obtains a divorce.

The delay of the plaintiff in proceeding is explained by her poverty, her ignorance of her rights, and the complexities of the relevant law which continued until the decision in *Waghorn* v. *Waghorn* (1) and the enactment of the Commonwealth *Matrimonial Causes Act* 1945.

The appeal should be allowed and judgment given for divorce.

FULLAGAR J. In this case the learned primary Judge found that the plaintiff wife had proved that she was deserted without cause by her husband in the year 1927, only a few months after her marriage. He considered that the domicile of the husband was in Queensland. The plaintiff, however, having been resident in South Australia for more than one year before commencing proceedings for divorce, was entitled to invoke the jurisdiction given to the Supreme Court of South Australia by the Commonwealth *Matrimonial Causes Act* 1945. Since the husband was found to be domiciled in Queensland, the law applicable was the law of Queensland. Under that law the wife, by proving the desertion, established a prima-facie right to a decree of dissolution of marriage, but s. 26 of the Queensland *Matrimonial Causes Acts* provides that the Court shall not be bound to pronounce a decree "if it shall find that the petitioner has during the marriage been guilty of adultery or if the petitioner shall in the opinion of the Court have been guilty of unreasonable delay" in proceeding for a divorce. In this case both of the two "discretionary bars" mentioned in s. 26 existed. The wife admitted that she had during the marriage been guilty of adultery with two men. And, whereas desertion took place in the year 1927, she did not commence proceedings until 7th May 1948.

The learned primary Judge obviously considered with anxious care the question whether he should exercise his discretion in favour of pronouncing a decree of dissolution, and he decided that he should refuse the decree. With the greatest respect for his Honour's view, I am of opinion that his exercise of discretion proceeded upon a wrong basis and cannot be supported consistently with the essential principles established by modern authority.

(1) (1942) 65 C.L.R. 289.

H. C. OF A. 1950. ZARNKE v. ZARNKE. Fullagar J.

The Court is, I think, indebted to Mr. *Hicks* for his analysis of the case and for his references to authority, but I do not find it necessary to mention any of the cases except *Blunt* v. *Blunt* (1) and *Henderson* v. *Henderson* (2). So far as the wife's adultery is concerned, the present case seems to me to be a stronger case than *Henderson* v. *Henderson* (2) for the exercise of discretion in favour of granting a decree. In *Henderson* v. *Henderson* (2) there appears to have been no circumstance which could incline a court to take a lenient view of the adultery of the petitioning wife. She endeavoured, indeed, to obtain sympathy by allegations of prior adultery on the part of her husband, allegations which the learned trial Judge found to be entirely without foundation. Nothing which could really excuse her conduct was, so far as I can see, ever put forward on her behalf. It may well be that adultery is never really excusable, but in the present case there are circumstances which certainly incline one to "gently scan" the wife's misconduct, and they are circumstances which have often been regarded as "mitigating" when a wife asks that discretion be exercised in her favour. The wife here was aged seventeen years when she was married. Three or four months after her marriage she was deserted. She was then three months pregnant. She was without means, and her parents were in poor circumstances. Some six months after the birth of the child (a daughter) she committed adultery with a man named Anderson, to whom she bore a child (a son) in October 1929. She had nothing to do with Anderson after she became aware that she was pregnant to him. She kept and brought up her two children partly by working and partly with the assistance of Government relief and private aid. Her daughter is now married. In 1944 she met a man named Daniels, and in 1945 commenced an adulterous association with him which has continued up to the present time. Daniels was a married man. He told the plaintiff that his marriage had been "a marriage in name only" for some five years, and that he suspected his wife of improper relations with his brother. Mrs. Daniels obtained a divorce from her husband on the ground of his adultery with the plaintiff, the decree being made absolute on 3rd January 1947. On or about the same day Mrs. Daniels married her husband's brother. Since the divorce, and probably for a short time before it, the plaintiff and Daniels have been living together as husband and wife. The plaintiff's son lives with them. Daniels has been paying alimony to his former wife and has also been supporting the

(1) (1943) A.C. 517. (2) (1948) 76 C.L.R. 529.

plaintiff. The plaintiff wishes to marry Daniels, and Daniels wishes to marry the plaintiff.

The position outlined above was frankly disclosed by the plaintiff to the Court. Since both of the plaintiff's children are grown up, and the daughter is married, the interests of children cannot be said to be seriously involved, but all the other elements to which importance was attached in *Blunt* v. *Blunt* (1) are present and strongly suggest an exercise of discretion in favour of dissolving the marriage. The plaintiff's married life was a matter of a few months and was broken up without fault on her part when she was little more than a child: there is no possibility of its being resumed. The Daniels' marriage has been dissolved. The interest of Daniels and the interest of the plaintiff lie in their being able to marry and "live respectably". There is no real interest of the community which can be served by compelling them to the choice between an unhappy separation and an adulterous association. I think, indeed, that it is fairly clear that *Abbott* J. would, if it had not been for one element in the case, have taken the view which was taken in *Blunt* v. *Blunt* (1) and *Henderson* v. *Henderson* (2) and granted a decree. That element consisted in the fact that Daniels and the plaintiff were living together at the time of the presentation and hearing of the petition, and Daniels, upon being asked by the learned Judge what they proposed to do in the event of a decree being refused, said that he "supposed that" they would continue to live together. With regard to that question and answer, one cannot help observing that, if a similar question had been put in *Blunt* v. *Blunt* (1) or *Henderson* v. *Henderson* (2), it is difficult to believe that it could have been honestly answered otherwise than as Daniels answered it.

With regard to the fact that Daniels and the plaintiff were living together at the time of the hearing, that must be conceded to be a material consideration. *Latham* C.J., in *Henderson* v. *Henderson* (3), said:—"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 petition in that case was presented in September 1946. The passage quoted was specifically referred to by *Abbott* J. But what may in one case be practically a decisive factor may in another case carry comparatively little weight. In *Henderson* v. *Henderson* (2) there were no mitigating circumstances whatever: *Dixon* J. spoke of the "competing demerits" of the

(1) (1943) A.C. 517.
(2) (1948) 76 C.L.R. 529.
(3) (1948) 76 C.L.R. 529, at p. 538.

H. C. OF A. 1950. ZARNKE v. ZARNKE. Fullagar J.

parties to the suit. Here no adultery was committed until the marriage had ceased to be a practical reality. The husband had simply vanished and the police were never able to find him. The first was committed when she was a young girl left destitute, and the second sixteen years later, after she had brought up her two children doubtless under great difficulties. The very fact that she and Daniels wish to marry and have incurred the expense of these proceedings suggests that they have respect for the institution of matrimony, and I cannot think, any more than could *Dixon* J. in *Henderson* v. *Henderson* (1), 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 ".

So far as delay is concerned, I do not think that that factor can with propriety be regarded as fatal in this case. For many years after she was deserted the plaintiff was in very poor circumstances with two young children. She lived in South Australia, but it would seem that she would have had to sue for a divorce in Queensland, and she would have been faced in any case with a probably fatal difficulty until this Court in 1942 decided *Waghorn* v. *Waghorn* (2). Such technical difficulties do not perhaps go to the root of the matter, but the other circumstances, coupled with the fact that Daniels could not marry her until his wife's decree was made absolute in January 1947, seem to me to justify regarding the delay up to that time as fairly excusable. She commenced proceedings in May 1948. The only delay to which any real importance can be attached seems to me to lie in the period of sixteen months between January 1947 and May 1948. The lapse of such a period (except possibly in some cases of a husband proceeding on the ground of his wife's adultery) is, I think, generally and rightly regarded, in such cases as the present, as not justifying an exercise of discretion against the petitioner.

In my opinion, this appeal should be allowed with costs. There should be a decree nisi for dissolution of marriage in accordance with the law of Queensland on the ground of desertion, and the defendant should be ordered to pay the plaintiff's costs of the action.

KITTO J. Section 26 of the Queensland *Matrimonial Causes Acts* 1864 *to* 1949, so far as it applies to this case, 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

(1) (1948) 76 C.L.R., at p. 545. (2) (1942) 65 C.L.R. 289.

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 or if the petitioner shall in the opinion of the court have been guilty of unreasonable delay in presenting or prosecuting such petition . . . ".

The section does not give a petitioner, whose case is proved, but whose adultery or unreasonable delay is also found, a prima-facie right to a divorce. The effect of the proviso is that the granting of a divorce in such a case is not *ex debito justitiae*; the court which hears the case has an unfettered discretion to grant or refuse the divorce.

The discretion is committed primarily to the judge who hears the case, but its exercise is subject to appeal and may be reversed either because of error in law or because the appellate court for other reasons can see clearly that injustice has been done. Thus if attention has been paid to irrelevant or unproved matters, or if no weight or insufficient weight has been given to relevant considerations, it is the duty of a court of appeal which is clearly satisfied that injustice has resulted to set the injustice right: *Charles Osenton & Co.* v. *Johnston* (1); *Blunt* v. *Blunt* (2); *Storie* v. *Storie* (3). The decisions of the House of Lords in *Blunt* v. *Blunt* (2), and of this Court in *Henderson* v. *Henderson* (4), have emphasized that the discretion, within the limits which its judicial character implies, is unfettered by any rules, but that certain matters, enumerated in the latter case by *Latham* C.J. (5), are relevant to be considered and therefore must be accorded proper weight.

The appellant proved her case before the learned trial judge; but she admitted adultery during the marriage, and a long delay had occurred between the date when she became entitled to a divorce by reason of her husband's desertion and the commencement of proceedings. The learned Judge on both these grounds thought it right to refuse a divorce.

With all respect to his Honour, it seems to me that, in exercising his discretion against the appellant by reason of her adultery, he fell into error in two respects. First, "I am convinced", he said, "that it would come as a surprise to the majority of the public to find that a litigant, however greatly injured, could, while living in open adultery, successfully invoke the exercise of the judicial discretion in her favour". To act upon this view was to hold

(1) (1942) A.C. 130.
(2) (1943) A.C. 517.
(3) (1945) 80 C.L.R. 597.
(4) (1948) 76 C.L.R. 529.
(5) (1948) 76 C.L.R., at p. 536.

H. C. OF A. 1950.

ZARNKE v. ZARNKE.

Kitto J.

himself bound by a rule which neither statute nor case law prescribes. The fact that a petitioner is living in adultery is of course a very material circumstance; to overlook it or to fail to regard it seriously would be plainly wrong; but to regard it as conclusive, whatever the circumstances of the case, is also wrong. The discretion is not so fettered. The learned Judge seems to have allowed himself to be influenced by the fact that in *Henderson* v. *Henderson* (1) much weight was given to the cessation, before the proceedings commenced, of the adulterous association there being considered. In particular he quoted some of the words which *Latham* C.J. (2) used in reference to the cessation of the wife's adultery. The words he quoted were "a most material fact . . . which should incline a court favourably towards her". The use of this quotation illustrates the danger of treating words used in relation to the facts of one case as affording a guide to the consideration of the facts of another case. The passage from which the words quoted were taken did not purport to state any general rule or principle. Indeed, if the passage is read as a whole, it is quite clear that the cessation of the adultery before the proceedings commenced was regarded as important, not as an isolated fact, but in its relation to all the circumstances of the case. In particular, the passage shows that the adultery in question had occurred and been discontinued before the husband and wife separated. In any case, it by no means follows from the fact that the termination of an illicit relationship before the commencement of divorce proceedings should incline a court to a favourable exercise of discretion in one case, that its continuance should be treated as decisive against a petitioner in another case.

Then his Honour said: "Flagrant disregard of the matrimonial law and of the conventions of morality should not be regarded as an inducement to dissolve a marriage, however hopelessly and utterly it has broken down". What his Honour had to consider, however, was whether the appellant's conduct, however severely it might deserve to be criticised, should be held to preclude her from obtaining a divorce, in view of all the circumstances, including her desire and that of the man with whom she was living to pay due regard to the matrimonial law and the conventions of morality by marrying one another; and the fact, for it was a fact beyond any doubt, that the appellant's marriage had hopelessly and utterly broken down more than twenty years before was a matter not to be put aside, but to be regarded as weighing heavily in the scales. Apart from the position and interest of the children

(1) (1948) 76 C.L.R. 529.

(2) (1948) 76 C.L.R., at p. 538.