App. at 219, 220, 224 – 78 W.N. 1039.
Ref to 79 W.N. 111; 62 S.R. 377
App. at 222 – 79 W.N. 163; 62 S.R. 340

App. 1966. V.R. 297
Ref to at pp. 218/24. (1972) 1 N.S.W. L.R. 362

(at 222) ref. 97 C.L.R. 433.
refrd. to. 98 C.L.R. 212.
C. 115 C.L.R. 296

[HIGH COURT OF AUSTRALIA.]

App. 5. A.L.R. 1. PATERSON AND ANOTHER . . . APPELLANTS;
App. 5. A.C.T.R. 96. RESPONDENT AND CO-RESPONDENT,

AND

App. by GIBBS J. at pp. 218/24 – 49 A.L.J.R. – 74. PATERSON . . . . . RESPONDENT.
PETITIONER,

Ref to 1976. V.R. 44.
Ref to. 50 A.L.J.R. 59.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 2, 5;

SYDNEY, *Nov.* 18.

Dixon C.J., Webb and Kitto JJ.

Matrimonial Causes—Dissolution of marriage—Adultery—Appeal—Interference by appellate court with finding of fact made by trial judge—Conflict of evidence—Marriage Act 1928 (*Vict.*) (*No.* 3726), *s.* 76

Evidence—Admissibility—Cross-examination of party on contents of letters addressed to her, but never received by her.

In a husband's suit for dissolution of marriage on the ground of the wife's adultery the judge who heard the suit inferred adultery from circumstances he found upon oral evidence notwithstanding evidence in dissent by the respondent and co-respondent whom he disbelieved.

Refd 92. C.L.R. 378.

Held, that while the appellate power of the Court extended to the re-examination of the facts, the judge's estimate of the respondent and co-respondent was of the first importance and his estimate not only of the general credibility of the witnesses for the petitioner but of the reliability of their detailed observation was decisive and these were matters on which his opinion could not be revised by a court of appeal. The circumstances found were enough to support an inference of guilt and the learned judge's interpretation of them was made in the light of his estimate of the parties and what appeared in the course of the trial. His finding could not be reversed.

Ref to. 51. A.L.J.R. 135.

Foll. 7 A.L.R. 421.

Aff 31. F.L.R. 146.
App. 142 C.L.R. 532

Review, by *Dixon* C.J. and *Kitto* J., of the authorities dealing with the position of a court of appeal in relation to the reviewing of findings of fact by a primary judge.

C + foll (1985) 3 N.S.W.L.R. 700
Foll 9 N.S.W.L.R. 263.

In the course of the trial the wife was cross-examined, despite objection, on the contents of a letter which had been addressed to her by a male not otherwise connected with the case but which she had never seen. Passages were read to her concerning various circumstances and relating to the writer's sentiments and attitude to her.

Held, by *Dixon* C.J. and *Kitto* J. (*Webb* J. *contra*), that the letter was not admissible in evidence against the wife, and cross-examination on it should not have been permitted, but, by the whole Court, that in the circumstances, a new trial was not warranted.

Decision of the Supreme Court of Victoria (*Barry* J.) affirmed.

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APPEAL from the Supreme Court of Victoria.

Ian Bell Paterson presented a petition, dated 7th October 1952 to the Supreme Court of Victoria, praying that his marriage with Pamela Edith Paterson might be dissolved on the ground that she had been guilty of adultery with Thomas O'Halloran.

The suit, which was defended, was heard before *Barry* J. when evidence was given by each of the parties.

On 17th July 1953 *Barry* J. granted a decree nisi for dissolution of marriage on the ground set out in the petition. His Honour found that adultery had been committed on 27th August 1952.

The respondent and co-respondent appealed from this decision to the High Court.

Further material facts appear in the judgments hereunder.

In the course of argument in the court below, the trial judge made certain observations which did not appear in the notes of evidence but were taken down by a newspaper reporter who was in court. The High Court refused to allow Mr. *Reynolds*, of Queen's Counsel, leave to file an affidavit setting out these observations, but allowed him to give the Court the following account of them :— " In the course of my final address, in discussing the standard of proof applicable to the case, his Honour said : ' So far as Australia is concerned I think it is the standard of probabilities. I can understand there are no more than two standards of proof, civil and criminal. There is so much authority I have to accept that they are different, although I must say judicially if you are satisfied it must be beyond reasonable doubt. I cannot imagine anything between civil and criminal standards '. I replied : ' They set standards between probabilities and proof beyond reasonable doubt '. His Honour then said : ' The more serious the charge, the more cogent the evidence must be '. I replied : ' And the evidence required to establish a charge of such gravity as adultery is of more cogent a character than that required to establish a less important state of relationship. The evidence put forward to establish a conclusion which may have such a highly detrimental effect on a person is much more closely scrutinized '. His Honour replied : ' I have always thought courts were much more concerned with theory than with reality. Adultery has been going on since

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Adam and I don't know the reason why courts should pull wool over their eyes and think adultery is an unusual thing for a person to commit. Murder and robbery are in a different category. Most males are adulterously inclined. Few people are burglariously inclined'. I then said: 'The fact of finding adultery against a person is of very great social, domestic and family consequence'. His Honour replied: 'I don't know about social consequence. It may have domestic consequence'. I said: 'Depending on the type of person involved it may have very serious consequences'. His Honour replied: 'It may have some effect on a woman if she wants to marry again. I take it when you say social consequence you mean acceptance into society'. After further discussion his Honour said: 'It all boils down to the proper position that you don't find adultery in this country unless you are satisfied there was adultery' ".

E. R Reynolds Q.C. (with him *H. Woolf*), for the appellants. It is submitted that the trial judge did not apply the standard of proof applicable to a case of adultery. A preponderance of probabilities is not by itself sufficient to prove adultery. While the criminal standard of proof is not applicable, yet regard must be had to the seriousness of the offence. That is borne out by the cases. [He referred to *Loveden* v. *Loveden* (1); *Briginshaw* v. *Briginshaw*, per *Rich* J. (2), per *Dixon* J. (3); *Watts* v. *Watts*, per *Fullagar* J. (4), per *Kitto* and *Taylor* JJ. (5).] As shown by the above quotation the trial judge did not place sufficient stress on the fact that adultery is a serious matter. Where, as here, the evidence relied on is merely circumstantial the principle stated by Lord *Buckmaster* in *Ross* v. *Ross* (6) is apt. On the facts of this case it was not possible for the trial judge to have the requisite degree of certainty that adultery had been committed. There was no evidence of a passionate association from which it might be inferred that, if there had been an opportunity for the commission of adultery, it would have been taken advantage of. Nor was there evidence that adultery had taken place. The cross-examination of the wife on the contents of a letter which she had not seen before should not have been permitted. The letter was not admissible evidence against the wife, nor were the replies which she gave in cross-examination on it. This matter

(1) (1810) 2 Hag. Con. 1, at p. 3 [161 E.R. 648, at pp. 648-649].
(2) (1938) 60 C.L.R. 338, at p. 350.
(3) (1938) 60 C.L.R., at pp. 360 et seq., and in particular at p. 368.
(4) (1953) 89 C.L.R. 200, at p. 203.
(5) (1953) 89 C.L.R., at pp. 206-210.
(6) (1930) A.C. 1, at p. 7.

is covered by the decision in *Gabriel* v. *Eliatamby* (1). If the cross-examination had not been permitted it is impossible to say that the trial judge would have come to the conclusion which he did.

E. H. E. Barber, for the respondent. Whether right or wrong, the decision below was based in large measure on the trial judge's opinion of the parties and witnesses. This Court should not disturb it: see *Burman* v. *Woolf* (2), particularly per *Martin* J. (3). The trial judge did not take a light view of adultery. He said that he could not find adultery unless he was satisfied that adultery had been committed. The finding was justified by the evidence. There was ample opportunity for committing adultery, and a close association, going beyond mere friendship, was proved between the wife and co-respondent. In particular the kissing proved is significant as evidence of affection and mutual attraction.

E. R. Reynolds Q.C., in reply.

Cur. adv. vult.

Nov. 18.

The following written judgments were delivered :—

DIXON C.J. AND KITTO J. This is an appeal from a decree nisi for dissolution of marriage pronounced by *Barry* J. The petition was the husband's and the ground was adultery. The respondent wife and co-respondent appeal. The finding that she and he committed adultery is attacked on the ground that the evidence is circumstantial and the inference is not sufficiently sure, particularly having regard to the evidence in denial of the now appellants. It is said also that the learned judge set too indefinite or loose a standard of proof or persuasion. Then an objection to evidence is relied upon by the appellants. The evidence objected to consists in some cross-examination of the wife, which was allowed, upon the contents of a letter addressed to her which she had not received and which she had not before read.

The general circumstances of the case may be briefly stated. At the time of their marriage, which took place on April 2nd 1947, the husband and wife were respectively aged twenty-three and twenty years. He was an estate agent, an occupation he still follows, and she a factory worker. Two children were born of the marriage. The birth of the second was in February 1950. Difficulties arose between them some six months later. He seems to have complained that she went out and manifested too much interest in other men.

(1) (1926) A.C. 133.
(2) (1939) V.L.R. 402.
(3) (1939) V.L.R., at p. 406.

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She was not satisfied with his conduct. A young man wrote her a long letter dated 14th March 1951. Her husband seized it in the post before it reached her and retained it in spite of an ineffectual struggle on her part to wrest it from him. It was upon the contents of this letter that she was cross-examined. Some time in April after an evening out she returned late during his temporary absence from the house and went to bed. On his return he roused her, questioned her and slapped her face. On 3rd May 1951 she left him. Her husband's mother looked after the two children who have been in his custody since that time. All this took place at Geelong, where they lived. Not long after leaving her husband she went to live in Melbourne. In June 1951 he had her watched by a private inquiry agent for a short time. Nothing was discovered to implicate her. In January 1952 the wife came to live with her mother in Melbourne. She says that it was about this time that she first met the co-respondent, a man of forty-seven years of age, who, she says, had known her father many years ago and also knew her mother and sister. In July 1952, she went to live by herself in a flat in Chapel Street, St. Kilda. The flat was on the first floor of the building and included two bedrooms and a sitting room. The windows of the bedrooms gave on the street but those of the sitting room did not. In August 1952 the husband engaged another inquiry agent. His surveillance of the wife began on 24th August. On that day the inquiry agent followed her from Geelong, where she had visited the children, back to Melbourne. She travelled by bus and at the terminal in Melbourne the co-respondent met her. He drove her to St. Kilda where, after sitting for about three-quarters of an hour drinking and kissing, so the agent deposed, they went to a cafe. After spending half to three-quarters of an hour in the cafe they drove to the flat in Chapel Street. The inquiry agent watched the flat from about a quarter to ten that night, the time they entered, until about 11 p.m. At that hour the co-respondent was still there. Next, on 27th August the flat was watched from 9.30 p.m. until 11 p.m., when the respondent wife and the co-respondent emerged together. They drove to the same cafe and returned to the flat three-quarters of an hour later. They both appeared before the windows of a front room, a room which was described as a spare bedroom. According to the inquiry agent and his wife, who appears to have been his coadjutrix in the investigation, the flat went into darkness. They walked up the path at the side of the building but could see no lights. At twenty minutes past midnight the co-respondent came out of the flats, the respondent wife waved to him from a window and he drove

away. On the evening of 31st August the co-respondent was seen at about a quarter to nine to enter the flat carrying what was described as a Gladstone bag. At about 10 p.m. he came out and drove away. Of the interval there was half an hour or so during which the flat was not under direct observation. It was because the respondent wife came across from the door of the building towards the inquiry agents' car and the agents thought it better to drive away. But the co-respondent's truck was parked there all the time and when he departed the respondent wife came to the window. The agents returned half an hour before the co-respondent's departure and during that half hour the lights were out. On 2nd September the inquiry agent and one of his assistants again watched the flat. They saw the forms of a man and a woman walking about the rooms and identified the co-respondent's car parked in a side street about 100 yards away where it remained. They watched from 8.30 p.m. to 10.30 p.m. and then left. For the last hour of that period the flat was in darkness. On the following night (3rd September) they watched again. The co-respondent's car drove up to the flat at about five minutes to eleven. He and the respondent wife alighted from the car and went inside. The lights of the flat went on and remained on until twenty minutes past eleven, when the co-respondent left by himself. On 7th September he and she and two others were seen to dine at the cafe about 8 p.m. Eventually about 10 p.m. his car drove up to the flats and stopped in front of them. The respondent wife was seated in the front seat beside the co-respondent. They sat there for twenty-five minutes, kissing each other on a number of occasions, if the evidence of the inquiry agents is correct. Then he drove away and she entered the flat. On 10th September it was decided to surprise the pair. After dining at the cafe the respondent and co-respondent returned about 8 p.m. to the flat, which they both entered. At about 9 p.m. the petitioner with three agents ascended the stairs and knocked at the flat door. It was opened by the respondent. They found the co-respondent standing by the fire. A conversation or altercation ensued which it is unnecessary to recount because, though it is relied upon by the petitioner, it really throws no further light on the question of guilt.

The co-respondent is a married man with children. His wife did not know of his visits to the respondent and, indeed, even at the time when he gave evidence in the suit he had not acquainted her with the fact that he was implicated in the proceedings. Both he and the respondent gave evidence denying adultery and explaining their relationship as the outcome of the family friendship of

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an older man ready to give his help, counsel and interest to a young woman member of the family who was left in a situation of difficulty by her husband and in whose society it was possible to find an occasional evening's quiet distraction from the concerns of a middle-aged master butcher who was not the object of much domestic solicitude in his own home. The lights in the flat were never out, so the pair said, even if the bedrooms were in darkness. The light of the sitting room could not be seen from the street. There were no kisses except "pecks" of greeting or farewell or perhaps of pacification in moments of emotional distress.

Barry J. took an entirely different view of the association between them. His Honour thought that the true explanation of their conduct was that the co-respondent was in love with the respondent or at least infatuated with her and that she, whether or not she was in love with him, was prepared to accept his advances and in fact did so. They were in an adulterous relationship. *Barry* J. disbelieved their evidence. His Honour approached the evidence of the inquiry agent or agents with proper caution but accepted it as true and accurate. The complaint that the learned judge did not exact a high enough standard of proof or persuasion can mean nothing but that objectively considered the circumstantial evidence was not sufficiently cogent to warrant the finding of adultery. Subjectively his Honour was as fully convinced as could be required even by the criminal standard of persuasion which this court has rejected in *Watts* v. *Watts* (1), and *Briginshaw* v. *Briginshaw* (2). If the learned judge's estimate of the witnesses and of the parties stands, it is difficult to see how it can be said that the circumstantial case which can be constructed from that material is insufficient to support a finding of adultery. Indeed it may be said that a relationship of actual or impending guilt was proved to a certainty and the only question that could arise, once the evidence of the inquiry agents is fully accepted, is whether by chance they may have struck too soon.

We think that on the footing stated there is ample support for the conclusion that adultery had already occurred. The advantages which the learned judge at the hearing of the suit possesses over a court of appeal extend to such a question and do not stop short at an estimate of the personal credibility of the witnesses. Indeed, as to the whole attack on the learned judge's findings it may be said that it is enough to apply the settled rules governing the manner in which a court of appeal should deal with appeals on questions of fact. A long line of cases extends from the time when

(1) (1953) 89 C.L.R. 200.

(2) (1938) 60 C.L.R. 336.

under the *Judicature Act* a general appeal was first given from judges sitting in witness actions without a jury. In the course of our work we are constantly reminded by counsel of the particular aspect of such a matter emphasized by one or other of the cases which have more recently dealt with the duty of a court of appeal when reviewing findings of fact. Some of the earlier judicial statements seem to have fallen from the honoured place they once held in the armoury of respondents in this court. The decision of the present case is controlled at so many points by the various cautions, not to say restrictions, provided by the rules laid down that some recapitulation of the case law may not be inappropriate. It should be remembered that before the *Judicature Act* the jurisdiction in which the rules were practically of most importance was admiralty, particularly in collision cases. At common law there was no room for appeals in questions of fact. Indeed, facts were treated with open disdain by ultimate tribunals. The curious may find an example of this in the observation which Lord *Holt* L.C.J. made in *R.* v. *Earl of Banbury* (1) in speaking of the jurisdiction of the House of Lords exercised by writ of error : " all causes generally consist more of matters of fact, than of law, and it is beneath the dignity of their Lordships, to be troubled with matters of fact " (2).

Soon after the *Judicature Act* came into operation a full exposition of the duty of a court of appeal in rehearing questions of fact was made by *Baggallay* J.A. The case was *The Glannibanta* (3), and the Court consisted of *James* L.J., *Baggallay* J.A., and *Lush* J. After referring to the language of the Privy Council in admiralty cases to the effect that, if there was conflicting evidence and the judge, having had the opportunity of seeing the witnesses and observing their demeanour, had come on the balance of testimony to a clear and decisive conclusion, the Privy Council would not be disposed to reverse such a decision except in cases of extreme and overwhelming pressure, his Lordship said that they felt just as strongly the great weight that is due to the decision of a judge of first instance whenever in a conflict of testimony the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements ; but—(1) the parties are entitled to demand the decision of the court of appeal on questions of fact as well as of law ; (2) the court cannot excuse itself from weighing conflicting evidence and drawing its own inferences and conclusions, though it should bear in mind

(1) (1695) Skinner 517 [90 E.R. 231].
(2) (1695) Skinner, at p. 523 [90 E.R., at p. 235].
(3) (1876) 1 P.D. 283, at pp. 287-288.

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that it has neither seen nor heard the witnesses and should make due allowance in that respect; (3) in the case in hand there was no reason to suppose that the judge at all proceeded upon the manner or demeanour of the witnesses. The decision below was reversed. In the same year in *Bigsby* v. *Dickinson* (1), *James* L.J., *Baggallay* and *Bramwell* JJ.A. followed *The Glannibanta* (2) and reversed a Vice-Chancellor's decision on facts in a case of nuisance. Their Lordships emphasized that an appeal on questions of fact existed. Then came the often cited case of *Coghlan* v. *Cumberland* (3). *Lindley* M.R. sitting with *Rigby* and *Collins* L.JJ. said in substance that the court of appeal must (1) rehear and reconsider the materials, (2) make up its own mind taking the judgment of the primary judge into account, (3) be guided by his impression when the question which witness is to be believed turns on demeanour, (4) be warranted in differing even on credibility when other circumstances show whether the evidence is credible or not. It will be seen that so far the tendency of the decisions was to formulate and concede the restrictive considerations or rules but, at the same time, to emphasize and act on the power to review findings of fact. This tendency may be seen in *Montgomerie & Co. Ltd.* v. *Wallace-James* (4). The House of Lords reversed concurrent findings of fact that there had been a user of a way by the public of forty years duration. Lord *Halsbury* L.C. proceeded on the ground that there was no question of truthfulness of testimony but the question was what were the proper inferences (5). Lord *Shand* conceded the importance to be attached to the primary judge's opportunity of seeing the witnesses and to the fact of the finding being unanimously sustained, but said that the case was a special one (6). Lord *Davey* dealt with both topics extensively in reasons which should be read though this is not the place to set them out (7). Lord *Lindley* said that there was no rule preventing the reversal of concurrent findings (8). The earliest occasion on which this Court dealt with the matter was probably in *Dearman* v. *Dearman* (9). The Court restored the decision of a primary judge who refused to act on the evidence of persons who said they were eyewitnesses of adultery. The position of a court of appeal was examined at length by *Isaacs* J. (10). Four years later in *Khoo Sit Hoh* v. *Lim Thean Tong* (11) Lord *Robson* for the Judicial Committee restated the

(1) (1876) 4 Ch. D. 24, at pp. 28-29.
(2) (1876) 1 P.D. 283.
(3) (1898) 1 Ch. 704, at p. 705.
(4) (1904) A.C. 73.
(5) (1934) A.C., at p. 75.
(6) (1904) A.C., at p. 79.
(7) (1904) A.C., at p. 83.
(8) (1904) A.C., at p. 92.
(9) (1908) 7 C.L.R. 549.
(10) (1908) 7 C.L.R., at p. 561.
(11) (1912) A.C. 323, at p. 325.

considerations. The substance of what his Lordship said was that (1) the court of appeal should be influenced by the opinion of the primary judge because he can estimate the intelligence position and character of the witnesses; (2) it should remember that many points are elucidated at the trial which may be represented ambiguously or imperfectly by the notes and the elucidation may be through counsel; (3) but it may turn out (a) that the judge has failed to take something into account, or (b) that he has given credence to evidence afterwards shown to be self-inconsistent or contrary to indisputable fact; (4) except in rare cases such as those which are capable of being dealt with wholly by argument a court of appeal will hesitate to interfere. In the same year in this Court in *Craine* v. *Australian Deposit & Mortgage Bank Ltd.* (1), *Griffith* C.J. and *Isaacs* J. reversed a finding by *Madden* C.J. as to the date when a fence was erected, basing themselves on the authority of Lord *Robson* (2). *Barton* J. dissented, placing his dissent on the authority of *Isaacs* J. in *Dearman* v. *Dearman* (3). An interesting contribution to the topic was made in *MacBean* v. *Trustees Executors & Agency Co. Ltd.* (4) by *Cussen* J., who (a) commented on the judicial tendency to distinguish between the findings of judges and those of juries (b) pointed out that in order LVIII, r. 1, of the then Rules of the Supreme Court of Victoria the words "by way of rehearing" were not reproduced and that the two classes of findings were assimilated, and (c) deprecated the court of appeal acting upon its own opinion upon a question of *quantum*. Next an example occurred of the connection which may exist between logical inference from observed facts and the impression created by witnesses. In *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Wright* (5), this Court refused to disturb a finding that a document of an unusual nature was genuine because, although made on a comparison of handwriting, the demeanour and credibility of a witness who said that he had found the document must have entered into the question. The principles in question and the differences that exist between primary and appellate courts were discussed again by *Barton* A.C.J. (6), by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (7). Shortly afterwards in *Scott* v. *Pauly* (8), where a decision of the Supreme Court upsetting the finding of the primary judge (*Northmore* J.) was affirmed, *Isaacs* J. took occasion to discuss the authorities and their effect (9).

(1) (1912) 15 C.L.R. 389.
(2) (1912) A.C., at p. 325.
(3) (1908) 7 C.L.R., at p. 561.
(4) (1916) V.L.R. 425, at pp. 441-443.
(5) (1917) 23 C.L.R. 185.
(6) (1917) 23 C.L.R., at pp. 190-191.
(7) (1917) 23 C.L.R., at p. 195.
(8) (1917) 24 C.L.R. 274.
(9) (1917) 24 C.L.R., at pp. 278-281.

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Then once more the distinction was emphasised by the Judicial Committee between cases where the result depends upon a view taken of conflicting testimony and cases where it depends upon inferences from uncontroverted facts: *Dominion Trust Co.* v. *New York Life Insurance Co.* (1). In *Mersey Docks & Harbour Board* v. *Procter* (2), Viscount *Cave* referred again to the subject and said that it was the duty of a court of appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes in question but with full liberty to draw its own inferences from the facts proved or admitted. The distinction between inferences from fixed facts and findings based on testimony frequently recurs. In *Cooper* v. *General Accident, Fire, & Life Assurance Corporation Ltd.* (3) Lord *Cave* said: "The question is, not what are the facts, but what is the proper inference to be drawn from the facts proved, and upon that point, as has been often said, the appellate tribunal is not less competent to judge than the judge who actually hears the case" (4). In *S.S. Hontestroom* v. *S.S. Sagaporack* (5) Lord *Sumner* gave an important summary of the competing considerations. His Lordship said: "Of course, there is jurisdiction to retry the case on the shorthand note . . . None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone" (6). These cautions did not prevent this Court reversing *Mann* J. on a pure question of fact depending on testimony in *Federal Commissioner of Taxation* v. *Clarke* (7). Discussions of the principles will be found per *Isaacs* A.C.J. (8) and by *Rich* J.

(1) (1919) A.C. 254.
(2) (1923) A.C. 253, at pp. 258-259.
(3) (1922) 128 L.T. 481.
(4) (1922) 128 L.T., at p. 483.
(5) (1927) A.C. 37.
(6) (1927) A.C., at p. 47.
(7) (1927) 40 C.L.R. 246.
(8) (1927) 40 C.L.R., at pp. 262-266.

dissenting (1). In the same way in *Webb* v. *Bloch* (2), *Knox* C.J. (3) and *Isaacs* J. (4) reversed a finding of *Starke* J. that there was an absence of malice in the publication of a libel by various persons called as witnesses before him. They did so on the ground that his finding was not based on credibility. *Isaacs* J. referred to the existence of " a constitutional and statutory duty upon this appellate Court to form its own independent opinion as to the proper construction of documents and the proper inferences from the evidentiary facts " (5). Some of these actual decisions may seem to impair the value in practice of the rules which govern the duty of the court of appeal in dealing with questions of fact, but from the very nature of such questions it is impossible for a report to reproduce the evidence which influenced the court except in outline and in many of the cases the strength of the considerations against the findings of the primary judges was very great. Any tendency to relax the rules was checked by the House of Lords in *Powell* v. *Streatham Manor Nursing Home* (6). Lord *Wright* made the following points: 1. An appellant's counsel opens as he chooses. (It is to be hoped that in making this point his Lordship did more than justice to counsel and less than justice to appellate courts.) 2. There is an antinomy in a duty to rehear and a restriction to recorded material. 3. Before a court of appeal upsets a finding into which credibility enters it should be convinced that the primary judge is wrong. 4. The court of appeal is not entitled to ignore findings based on credibility and to consider probabilities on the written material. 5. His Lordship repeats the questions put by Lord *Sumner* in *S.S. Hontestroom* v. *S.S. Sagaporack* (7). Finally Lord *Wright* discusses the modes of assessing the value of oral testimony. Another kind of finding was brought more decisively under the protection of the rules in *Owen* v. *Sykes* (8), where the court of appeal refused to review an award by *Greaves-Lord* J. of £10,000 for personal injuries and discussed the grounds on which an appellate court should interfere with an estimate of damages by a trial judge. In *Yuill* v. *Yuill* (9), Lord *Greene* M.R. restates the standards and refers to *Hvalfangerselskapet Polaris A/S.* v. *Unilever Ltd.* (10) as an illustration of the jurisdiction of the court of appeal to set aside a finding based in part on credibility because on carefully checking the whole evidence by a critical examination the primary judge's impression on the subject of demeanour was

(1) (1927) 40 C.L.R., at pp. 292-293.
(2) (1928) 41 C.L.R. 331.
(3) (1928) 41 C.L.R., at p. 356.
(4) (1928) 41 C.L.R., at pp. 359-360.
(5) (1928) 41 C.L.R., at p. 360.
(6) (1935) A.C. 243, at pp. 263-268.
(7) (1927) A.C., at p. 50.
(8) (1936) 1 K.B. 192.
(9) (1945) P. 15, at pp. 20-22.
(10) (1933) 46 Ll.L.Rep., 29.

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found to be mistaken. In *Watt or Thomas* v. *Thomas* (1), Lord *Thankerton* described the principle as a simple one and stated it thus: "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves" (2). Lord *Simonds* said: "I suppose that if ever there was a class of case, in which an overwhelming advantage lies with the judge who has the witnesses before him, it is in the arena of connubial infelicity and discord" (3).

When the rules, which are formulated in the foregoing cases with such variety of detailed expression but with such identity of substance, are applied to the present case they lead almost inevitably to the conclusion that this Court must abide by the finding of *Barry* J., that is unless it is vitiated by the erroneous admission of the evidence to which the respondent and co-respondent objected. The learned judge's estimate of the respondent and co-respondent was of first importance. His assessment not only of the general credibility of the witnesses for the petitioner but of the reliability of their detailed observation could hardly but be decisive. These are matters in which his opinion could not be reversed by a court of appeal notwithstanding its undoubted jurisdiction to re-examine the whole case.

When all the circumstances are arrayed against the respondent and co-respondent which the testimony accepted so fully by

(1) (1947) A.C. 484.
(2) (1947) A.C., at pp. 487-488.
(3) (1947) A.C., at p. 492.

Barry J. prove, a sufficient case is made to warrant a conclusion of adultery. Certainly a jury's verdict against the wife and the co-respondent based on such circumstances could not possibly be set aside as unreasonable. The judge was not called upon to interpret the circumstances *in vacuo*. All the smaller facts and incidents brought before him in the course of the trial and his estimate in relation thereto of the conduct and attitude of the parties whom he had the advantage of seeing and hearing, all these contributed to the context in which he was required to interpret the actual circumstances suggesting guilt.

It follows that the fate of this appeal is reduced to the simple question of the correctness of the course taken by *Barry* J. in allowing the cross-examination of the respondent upon the contents of the letter she had not seen and the consequences upon his Honour's finding, if that cross-examination ought to have been disallowed.

Counsel for the petitioner was permitted, over the objection of his adversary, to read to the respondent in his cross-examination, passages from the letter containing references to various circumstances and relating to the sentiments and attitude towards her of the writer and to ask her to admit deny or explain as the case might be what appeared in the letter. This method of getting the letter before the judge and using its contents was not admissible, nor were any of the questions expressly based upon what the letter said. Her credit could not be affected by what the writer said or the fact that he had said it nor was the fact that he had said it relevant to the issue. It is hardly necessary to add that the letter was not an admissible medium of proof of any fact that it stated or that could be inferred from the statements or expressions it contained. It follows that this part of the cross-examination ought not to have been allowed. What is the effect of the conclusion that the questions were inadmissible upon the validity of the findings made by the learned judge ? This question has caused us more difficulty than the primary attack upon the findings as insufficiently justified by the evidence. But in the end we have come to the conclusion that the learned judge's findings would have been exactly the same, had he disallowed the cross-examination. We are not here dealing with the verdict of a jury, the reasons for which are not known. The learned judge has stated his reasons in full, and while it certainly cannot be said that nothing deduced from that part of the cross-examination enters into the reasons his Honour gives, it can safely be concluded not only that what he so deduced did not form an indispensable part of his opinion or of

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the process by which it was formed, but that all the other elements in the case, had this one been excluded, would have led him exactly upon the same path to the same result. In these circumstances it would not be right to order a new trial on the ground that the cross-examination in question was wrongly admitted.

For these reasons the appeal should be dismissed with costs against the co-respondent.

WEBB J. I am not prepared to hold that *Barry* J. could not properly have allowed Mrs. Paterson to be cross-examined on the contents of Yeoman's letter to her with a view to showing that her letter to him, to which his was a reply, was the explanation of the terms of endearment that he used in his letter. However I agree with the Chief Justice and *Kitto* J. that there is no reason for thinking that the cross-examination of Mrs. Paterson on Yeoman's letter had an influence on the result; and so I think there was no miscarriage of justice calling for a new trial

But, to employ expressions used by the Chief Justice and *Kitto* J. while *a relationship of impending guilt* of Mrs. Paterson and the co-respondent O'Halloran was proved, was there proof of *actual guilt* of adultery? To find actual guilt it was necessary to rely on the evidence of the inquiry agent and his assistants as to what occurred in Mrs. Paterson's flat at No. 22 Chapel Street, St. Kilda, more particularly on the night of 27th August 1952. It is important to keep in mind that this flat was under observation by the inquiry agent and other witnesses for the petitioner on the nights of 24th, 27th and 31st August and of 2nd, 3rd, 7th and 10th September 1952, and that only as to the last occasion, when the raid was made, was no evidence given about the presence or absence of lights in the flat at material times, so far as could be observed from outside the flat. On 24th August the inquiry agent was first engaged and did not know what particular flat Mrs. Paterson occupied and so he said he took no notice of lights on that occasion. But the absence of such evidence about lights on the night of the raid was not explained, and, although there may be a reasonable explanation of this omission, none should be assumed to make it easier to accept the evidence of a private inquiry agent. To make any such assumption would be to depart from the usual attitude of courts towards the evidence of witnesses of that class. On the other hand, however, it is proper to assume that the raid would not have been made unless it was thought at the time that there was a likelihood of finding Mrs. Paterson and O'Halloran in compromising circumstances that would convince a court that they

had committed adultery on that occasion. But if lights were seen in the flat just before the raid, the prospects of getting such evidence were not encouraging. In self-contradictory evidence under cross-examination the inquiry agent admitted that he carried an iron bar as part of his raiding equipment to force the door open if necessary. From this it appears that the raid was made in the belief that the conditions were such that it might be expected that Mrs. Paterson and O'Halloran would be found behind barred doors in a guilty association. Thus, having regard to the importance the inquiry agent had before the night of the raid rightly attached to the absence of lights in the flat while Mrs. Paterson and O'Halloran were together there, it is reasonable to assume that he believed there was no light in the flat when he decided to make the raid, but that he was mistaken in that belief. Actually the lights were on when the raiders entered the flat, and there was nothing to suggest that adultery had occurred, or was about to occur. As already stated, on five of the six earlier occasions when he saw Mrs. Paterson and O'Halloran in the flat, the inquiry agent was careful to notice the presence or absence of lights in the flat, and it was evident from his Honour's reference to the evidence of the inquiry agent as to what happened in the flat on the night of 27th August (1) that he found adultery was committed on that night because the evidence was to the effect that Mrs. Paterson and O'Halloran were then seen together in the unlighted spare bedroom in the flat; and (2) that his Honour did not find adultery on any other particular occasion. But for this evidence of happenings on 27th August I venture to say that *Barry* J. would not have found adultery, and in my opinion could not properly have found adultery, and would have dismissed the petition.

The inquiry agent was not asked whether or not he saw lights in the flat before the raid, and it would be speculation to say how he would have answered that question. But it is not easy to avoid the conclusion that he had the mistaken belief that there was then no light in the flat. However if he made that mistake on 10th September he could have made it on 27th August. Evidence was given by one Scott, another inquiry agent, which, if accepted, would suggest that such a mistake could have been made. Scott said that from one position in front of the flat an upstairs room appeared to be in darkness, but that from another position in front some fifteen to twenty feet away from the first position light was showing into this room from another part of the flat. Nothing in the cross-examination of Scott indicates that he was not a credible witness. His Honour does not mention Scott's evidence.

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If he had accepted it then it would be too much to say that he would still have found adultery on the night of 27th August 1952.

On the other hand it is too much to say that he would not have found adultery.

Having regard to the standard of proof of adultery as stated in *Watts* v. *Watts* (1), and *Briginshaw* v. *Briginshaw* (2), to the advantage that the trial judge had in seeing the witnesses, and to the nature of the evidence as a whole, I have reached the conclusion, somewhat reluctantly, that this Court should not disturb the finding of adultery.

I would dismiss the appeal.

Appeal dismissed. The appellant Thomas O'Halloran to pay to the respondent Ian Bell Paterson his costs of the appeal.

Solicitors for the appellants, *Newman, Wingrove & Boughton.*
Solicitor for the respondent, *Lloyd P. Goode.*

R. D. B.

(1) (1953) 89 C.L.R. 200.

(2) (1938) 60 C.L.R. 336.