have been given is not likely to arise in many cases, since it is not often that it is possible to appeal against acquittal.

E.M.E.

EVIDENCE — ONUS OF PROOF IN DIVORCE CASES

IN THE 1953 A.L.R. are two decisions on the onus of proof in divorce cases which clarify the law in Australia. Prior to this, because of the situation in England, the law here was a little confused.

The easiest way to see the cause of the confusion in England which had its effects here is to trace through the cases in recent years.

Briginshaw v. Briginshaw (1938) 60 C.L.R. 336 was a petition for a divorce on the grounds of adultery. The High Court held that the jurisdiction in divorce matters was a civil jurisdiction, and that the question of onus of proof was simply one of statutory interpretation. The statute in question was the Marriage Act 1928 (Vic.) s. 80 ". . . upon any petition for dissolution of marriage it shall be the duty of the Court to satisfy itself so far as it reasonably can as to the facts" s. 86 " . . . if the Court is satisfied . . . it shall pronounce a decree . . .". The Court held that in a civil jurisdiction the word "satisfied" did not mean proof "beyond reasonable doubt" but something lower.

The next case of any importance on this topic is *Ginesi v. Ginesi* [1948] 1 A.E.R. 373. This is a decision of the Court of Appeal in England. As in *Briginshaw v. Briginshaw* the case was a petition for divorce on the ground of adultery. Tucker L.J. with the agreement of the rest of the Court held that adultery in such a case must be proved with the same degree of strictness as is required for the proof of a criminal offence, that is, that it must be proved beyond all reasonable doubt.

This statement of the law is not entitled to as much weight as at first glance it might appear. For, in the first place, counsel for both parties conceded that the standard of proof necessary to establish adultery was the same as in a criminal case. In the second place the main basis for the decision was that adultery was a criminal or quasi-criminal offence and a decision of the House of Lords—*Mordaunt v. Moncreiffe* (1874) L.R. 2 Se. and Div. 374 – emphatically stating that it is not, was not cited. In the third place no reference was made to the Matrimonial Causes Act 1937 s. 4, which states that the Court must merely be "satisfied".

The next case is an Australian one—*Wright v. Wright* (1948-49) 77 C.L.R. 191. This again was a petition for divorce on the ground of adultery. The High Court was then in the position of having to choose between an authority of its own and one of the Court of

Appeal which were in direct conflict. The High Court chose to follow *Briginshaw v. Briginshaw* in preference to *Ginesi v. Ginesi* on the ground that the former was a well reasoned decision whereas in the latter some of the relevant cases had not been cited and as a result there had been, in its view, a misapplication of the law.

At this stage although the authorities in England and Australia are in direct conflict, there is little doubt I feel as to the state of authorities in each country. However in 1950 a series of three cases came before the High Court in England.[1]

In the first of these—*Davis v. Davis*—Bucknill and Somervell L.JJ drew a distinction between a petition for divorce on the ground of adultery, and a petition on other grounds such as cruelty. In the latter case they said the burden is a "strict" one, but it is unnecessary to bring in the standard of proof required for a criminal charge. It would seem that the basis of the decision was that adultery was a quasi-criminal offence and therefore required stricter proof. Denning L.J. in the same case started a line of reasoning which he was to develop more fully in later cases to the effect that the statute said "satisfied" and that the same standard was not required for this as was required in criminal cases.

This argument he elaborated in *Gower v. Gower,* an action for the reduction of maintenance on the ground of the wife's adultery. Here he explored the weaknesses in *Ginesi v. Ginesi* and maintained that the Court was not irrevocably committed to the view that proof beyond all reasonable doubt was needed for adultery.

In *Bater v. Bater,* the action was one for divorce on the grounds of cruelty. Here in effect Bucknill and Somervell L.JJ. overruled *Gower v. Gower.* They maintained that "strict" there must mean beyond all reasonable doubt, and since the basis of the decision could no longer be that adultery was a criminal offence, the basis was changed to public policy. It was maintained that divorce was a very serious matter with very serious consequences and therefore the Court must be "satisfied beyond all reasonable doubt" from the point of view of public policy. Denning L.J. also changed his ground a little. He maintained in this case that the standard was proof "beyond all reasonable doubt", but that there were degrees of this proof, so that it would not necessarily be as high as the proof in a criminal case.

It was at this point that the question came up for discusion before the House of Lords for the first time. The case was that of *Preston-Jones v. Preston-Jones* [1951] A.C. 391. Unfortunately from the point

[1] *Davis v. Davis* [1950] 1 A.E.R. 40; *Gower v. Gower* [1950] 1 A.E.R. 804; *Bater v. Bater* [1950] 2 A.E.R. 458.

of view of certainty as to what the law is, this case was not a straight out petition for divorce on the grounds of adultery for there was the additional complication that if adultery was proved the effect would be to bastardize the child. The House of Lords held (Lord Oaksey dissenting) that adultery must be established "beyond reasonable doubt", and said that this was based not on the fact that adultery was a criminal offence, but on public policy. It would seem at first sight that the decision should put an end to the argument as to the standard of proof required. However all the judges with the exception of Lord MacDermott dealt with the question from the point of view of bastardizing the child. For this reason, it is clear authority that if adultery is proved and will bastardize a child, then it must be proved beyond reasonable doubt. But it is not clear authority by any means that adultery in any case must be proved beyond reasonable doubt.

The situation in England is therefore far from clear. On the authorities it would seem that if a decree on the grounds of adultery will bastardize a child, the adultery must be proved beyond all reasonable doubt; if it is simply a petition on the grounds of adultery it seems likely that the proof must be beyond reasonable doubt on the grounds of public policy. If it is a petition on any other grounds the standard of proof is very doubtful on the authorities. However there seems no reason to distinguish between adultery and other grounds and it is submitted that if adultery is to have the higher standard the same should apply to the other grounds.

It was with the authorities in this state that the question arose before the Victorian Supreme Court in the case of *Hobson v. Hobson* [1953] A.L.R. 494. This was a case of a petition for divorce on the ground of adultery. It was argued for the respondent that the Court would have to follow the House of Lords' decision in *Preston-Jones v. Preston-Jones* in preference to the High Court's own decisions in *Briginshaw v. Briginshaw* and *Wright v. Wright,* the authority for this being *Piro v. Foster* [1943] A.L.R. 405. Coppel A.J. dealt with the argument on two grounds. First of all he said *Piro v. Foster* did not order the lower Courts to follow the House of Lords, but it gave the lower Courts a discretion to follow the House of Lords if, and only if, they thought that the High Court itself would overrule its own decision and follow the House of Lords. He did not think that the High Court would do this in this case in view of its previous decisions, and therefore he intended to follow the High Court. Secondly he said that he did not in any case believe that *Preston-Jones v. Preston-Jones* decided that in a divorce suit upon the ground of adultery the standard of proof required is that necessary in a

criminal trial. This belief he based on parts of the judgments, not on the ground that *Preston-Jones v. Preston-Jones* only refers to cases which may bastardize a child.

Fortunately the question came before the High Court last year in the case of *Watts v. Watts* [1953] A.L.R. 485. The Court did not have to discuss the question whether it would refuse to follow a decision of the House of Lords for the judges distinguished *Preston-Jones v. Preston-Jones* on the ground that proof of adultery in that case would bastardize the child and therefore the standard would be higher. In the case before the Court however proof of adultery would not have that effect, and so there was no reason for construing "satisfied" to mean "satisfied beyond all reasonable doubt".

It is clear that the state of authorities in Australia is much less confusing than in England. It is obvious that in a petition on the ground of adultery the standard of proof is not as high as that required in a criminal case. From the dicta in *Watts v. Watts* it seems likely that the High Court would follow *Preston-Jones v. Preston-Jones* if a case of that type came before it.

JUDITH WYATT

PRIVATE INTERNATIONAL LAW — DOMICIL — JURISDICTION — MATRIMONIAL CAUSES ACT (1945)

THE RECENT case of *Leech v. Leech*[1] raises some important problems in the Conflict of Laws. The petitioner, Maria Leech, had petitioned for divorce from her husband, Harold Leech, on the ground of repeated acts of adultery. The petition had been filed on April 22, 1953, at which time the parties were domiciled in Tasmania. On April 26, after the institution of proceedings, the respondent moved to Victoria and, forming an intention of permanent residence, acquired a Victorian domicil. Section 75 of the Victorian Marriage Act (1928) could not be invoked here as the length of domicil necessary for the purpose of dissolution of marriage had not been satisfied. Consequently the petitioner had recourse to a Commonwealth statute, the Matrimonial Causes Act (1945) which invested the State Court with Federal jurisdiction under certain circumstances.

O'Bryan J., who heard the case, referred to the general principle of law that jurisdiction in such cases, apart from special statutory provisions, was exercisable only by the Courts where the parties were domiciled at the time of the institution of proceedings. But the real difficulty lay in deciding whether jurisdiction to dissolve the marriage continued if the parties were no longer domiciled in the

[1] [1953] V.L.R. 621.