IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 195 OF 2004

BETWEEN:

(1) KTH CAPITAL LTD
(2) KTH CAPITAL MANAGEMENT LTD

Plaintiffs

AND

CAYMAN ISLANDS MONETARY AUTHORITY

Defendant

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of applicant(s)	(1) KTH Capital Ltd 36C Bermuda House PO Box 513 GT Grand Cayman (a Regulated Mutual Fund) (2) KTH Capital Management Ltd 36C Bermuda House PO Box 513 GT Grand Cayman (a Restricted Mutual Fund Administration licensee)

Judgment, order, decision or other proceeding in respect of which relief is sought	(1) Decision of the Cayman Islands Monetary Authority on 9 February 2004 to appoint Mr James Cleaver of Ernst & Young as Advisor to KTH Capital Ltd pursuant to s. 30(3)(d) of the Mutual Funds Law (2003 Revision) (2) Decision of the Cayman Islands Monetary Authority on 9 February 2004 to appoint Mr James Cleaver of Ernst & Young as Advisor to KTH Capital Management Ltd pursuant to s. 31(3)(d) of the Mutual Funds Law (2003 Revision)
Relief sought An order of certiorari to remove into the Grand Court of the Cayman Islands and to quash the above decisions of the Cayman Islands Monetary Authority	
Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant	Appleby Spurling Hunter Clifton House 75 Fort Street P.O. Box 190 GT George Town Grand Cayman (Ref: JW/10093.002)
Signed Appleby Spurling Hunter	**Dated** 14/4/04

GROUNDS ON WHICH RELIEF IS SOUGHT

The Facts

1. Under the Mutual Funds Law (2003 Revision) ("the Law"), the Cayman Islands Monetary Authority ("CIMA") may:

   1.1 in respect of a regulated mutual fund, appoint a person to advise the fund on the proper conduct of its affairs: see s. 30(3)(d) of the Law.

   1.2 in respect of a licensed mutual fund administrator, appoint a person to advise the administrator on the proper conduct of its mutual fund administration: see s. 31(3)(d) of the Law.

2. CIMA may only take such action, if it is ***satisfied*** that one or more of a number of statutory criteria set out in ss. 30(1) and 31(1) respectively are fulfilled. These include satisfaction that:

2.1 a regulated mutual fund is carrying on or attempting to carry on business ... in a manner that is prejudicial to its investors or creditors: see s. 30(1)(b);

2.2 the direction and management of a regulated mutual fund has not been conducted in a fit and proper manner: see. s. 30(1)(d);

2.3 a licensed mutual fund administrator is carrying on or attempting to carry on business ... in a manner that is prejudicial to investors in any mutual fund it is administering or to its creditors or to the creditors of any such mutual fund: see s. 31(1)(b);

2.4 the direction and management of a licensed mutual fund administration business has not been conducted in a fit and proper manner: see s. 31(1)(d);

3. Sections 30 and 31 of the Law make it clear that CIMA must be satisfied that one of the criteria applies before it can take any of the relevant steps. CIMA was not, and did not express itself to be so satisfied. The preamble to the terms and conditions on which Mr James Cleaver was appointed stated that:

3.1 "Whereas the Cayman Islands Monetary Authority has ***concerns*** that KTH Capital Ltd is carrying on or attempting to carry on business in a manner that is prejudicial to its investors or creditors and that the direction and management of KTH Capital Ltd has not been conducted in a fit and proper manner" (emphasis added); and

3.2 "Whereas the Cayman Islands Monetary Authority has ***concerns*** that KTH Capital Management Ltd is carrying on or attempting to carry on business in a manner that is prejudicial to its investors or creditors and that the direction and management of KTH Capital Management Ltd has not been conducted in a fit and proper manner" (emphasis added).

4. The terms of reference of Mr Cleaver's appointment were stated to include:

4.1 Investigate the expenses incurred by KTH Capital Ltd and whether it [sic] had been properly disclosed and reported;

4.2 Investigate the alleged deception of Ironwood Capital Limited/Chinese Enterprise Investments Development Limited and/or their principal, Mr Xiang Ping Luo to take control of and dilute these persons' interest in the non-performing loan portfolio via the use of KTH Capital Ltd;

4.3 Investigate the circumstances and documentation surrounding the pledging of certain assets of Ironwood Capital Limited; and

4.4 Investigate the allegations of falsified and over-inflated invoices of Zhongjin Fengde Holdings Limited issued for payment.

5. In an email from CIMA's general counsel to the Plaintiffs' attorneys dated 13 February 2004, it was stated that:

5.1 "The Authority has considered carefully the circumstances of the Company and its operations including the specific matters listed in the terms of reference of the appointment of the of the Advisor (which I assume you have now seen) and take the view that it is ***necessary and appropriate to appoint some one to look into these matters*** and advise the licensee on them as well as to report to the Authority in accordance with section 31 (8) of the Law"; and

5.2 "In terms of the specific ***concerns*** in respect of which the Advisor has been appointed, they are set out in the terms of reference of the appointment of the Advisor which I understand have now been provided to you by the Advisor (if that is not the case please let me know). I should point out however that these do not outline all of the ***concerns*** that gave rise to the appointment but indicate the specific ***areas that the Advisor has been asked to look into and advise on at this time***" (emphasis added).

Grounds for review

6. The word '***satisfied***' as used in ss. 30(1) and 31(1) of the Law is clear. It requires that CIMA must have made up its mind, or must have concluded, that one or other of the statutory criteria have been fulfilled: see *Stroud's Judicial Dictionary*, 6th edition [Attachment A]; and *Blyth v. Blyth* [1966] AC 643, at 676 E-G [Attachment B]. It also requires that CIMA must have read and considered the relevant material before it can say that it was personally *satisfied*: see *Attorney-General v. I.B.A.* [1973] 1 QB 629, at 636 A-B [Attachment C].

7. It is clear from the language of the appointing document that CIMA was not *satisfied* within this meaning: CIMA has expressed itself merely as having *concerns*, which does not meet the necessary standard.

8. This is reinforced by:

8.1 the terms of reference themselves, which require Mr Cleaver to *investigate* a number of matters; and

8.2 the subsequent correspondence from CIMA, which describes Mr Cleaver's role as being to "look into" areas of concern identified by CIMA and to report back to CIMA with his findings.

9. CIMA has therefore acted ultra vires. It has misdirected itself, by appointing Mr Cleaver to carry out investigations where it had "concerns" but was not satisfied of the conditions required for a valid appointment. It is using the adviser in reality in order to satisfy CIMA one way or another whether or not subsections (b) and/or (d) of ss. 30(1) and 31(1) of the Law do in fact apply.

10. This is not a legitimate use of the power in ss. 30(3)(d) and 31(3)(d) of the Law to appoint a person to *advise* a fund or a fund administrator on the proper conduct of its affairs. An advisor is not properly appointed where his function is to *investigate* the affairs of a fund or a fund administrator.

11. It is not a legitimate use of the power in ss. 30(9)(b) and 31(8)(b) of the Law to require an advisor to report his results of his investigation back to CIMA, so that CIMA can be 'satisfied' for the purposes of ss. 30(1) and 31(1). The advisor's reporting requirement is limited to reporting to CIMA on the affairs of the entity that he is advising.

Conclusion

12. Since CIMA did not appoint on the basis that it was *satisfied* that any of the criteria set out in ss. 30(1) or 31(1) of the Law applied, it had no jurisdiction to make the appointment under ss. 30(3) and 31(3) of the Law.

13. The appointment of Mr Cleaver as an advisor to the Plaintiffs is therefore *ultra vires* and should be set aside.

14. Accordingly, the Plaintiffs seek an order of certiorari to remove for the purpose of being quashed CIMA's decisions dated 9 February 2004.

Ancillary matters

15. If leave be granted to apply for judicial review, the Plaintiffs invite this Honourable Court to direct that the grant shall operate as a stay of CIMA's decisions until the determination of the application, pursuant to GCR Order 53 rule 3(10)(a): see the matters set out in the affidavit sworn in support of this application.

16. The Plaintiffs request a hearing in chambers for the determination of this application for leave, pursuant to GCR Order 53 rule 3(3).

Dated the 14th day of April 2004

Appleby Spurling Hunter

APPLEBY SPURLING HUNTER

FILED by Appleby Spurling Hunter, Attorneys-at Law for the Plaintiffs, whose address for service is Clifton House, 75 Fort Street, P.O. Box 190 GT, Grand Cayman, Cayman Islands (Ref. JW/10093.002)

STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES

SIXTH EDITION

DANIEL GREENBERG
Barrister of Lincoln's Inn and of the Office of the Parliamentary Counsel

ALEXANDRA MILLBROOK
Barrister of Middle Temple and the Intervention Board Executive Agency

VOLUME 3: Q–Z

LONDON
SWEET & MAXWELL
2000

Sleeve : Judicial Dictionary

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e CERTIFICATE

SATISFY; SATISFIED. (Town and Country Planning Act 1944 (c. 47), s.1) The court could not examine the Minister's decision that he "is satisfied" that an order was requisite for dealing satisfactorily with extensive war damage on the ground that the phrase meant "satisfied on reasonable grounds" (*Robinson v. Minister of Town and Country Planning* [1947] K.B. 702). See also REASONABLE; REASONABLE CAUSE, REASONABLE GROUND.

"Is satisfied" (Matrimonial Causes Act 1950 (c. 25), s.4), meant satisfied beyond reasonable doubt (*Preston-Jones v. Preston-Jones* [1951] A.C. 391; *Galler v. Galler* [1954] P. 252). The words did not import a criminal standard of proof. They merely meant "makes up its mind" (*Blyth v. Blyth* [1966] A.C. 643).

"Satisfied" (Judgments Act 1838 (c. 110), s.17). Where money paid into court was ordered to be paid out to the plaintiff in satisfaction of the judgment debt the debt was not thereby "satisfied" within the meaning of this section. This did not occur until the money was actually paid (*Parsons v. Mather & Platt* [1977] 1 W.L.R. 855).

"Satisfy themselves" (Television Act 1964 (c. 21), s.3(1)). For a consideration of whether or not the Independent Broadcasting Authority had done enough to "satisfy themselves" for the purposes of this section, see *A.-G. ex rel. McWhirter v. I.B.A.* [1973] 1 Q.B. 629.

"If a magistrates' court is satisfied" (Magistrates' Courts Act 1980 (c. 43), s.129(1)). Justices could only be "satisfied" that a person who had been remanded was unable by reason of illness or accident to appear or be brought before the court at the expiration of the period for which he had been remanded if they had solid grounds on which they could reasonably found a reliable opinion (*R. v. Liverpool City Justices, ex p. Grogan* [1991] C.O.D. 148).

Execution "withdrawn, satisfied, or stopped": see WITHDRAWN.

SAVAGE ANIMAL. See ANIMAL.

SAVE. A bequest of a fund to trustees upon trust to pay the annual income testator's wife for life, with a direction that "all moneys which shall be ed" thereout by the trustees and wife shall go to A, has no application as ards income actually paid to the wife, but applies to income in the stees' hands at the wife's death which she has allowed to remain in their ds, *i.e. semble*, which she has not demanded (*Wood v. Menzies* 9 Macph.).

Save and except": see *Savill v. Bethell* [1902] 2 Ch. 538, cited EXCEPTION; ERVING.

Can save": see LEFT.

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INGS. "Savings" of income trust funds, may well bear the sense of thing in the hands of the trustees not paid over; and includes a

WORDS AND PHRASES
legally defined

THIRD EDITION

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English Dictionary, "same as" usually expresses identity of kind and "same that" absolute identity, except in contracted sentences where "same as" alone is found. The taxpayer accordingly submits that in s 80E(1)(c) [of the Income Tax Assessment Act 1936–1986 (Cth)] the phrase, in its natural and grammatical meaning, refers merely to identity of kind and that if it is not used in this sense it adds nothing to the words of the subsection, since if it had been intended to require absolute identity that could have been achieved by omitting the words "same" and "as", and by simply using the expression "the business it carried on". The meaning of the phrase "same as", like that of any other ambiguous expression, depends on the context in which it appears. In my opinion in the context of the section the words "same as" import identity and not merely similarity and this is so even though the legislature might have expressed the same meaning by a different form of words.' *Avondale Motors (Parts) Pty Ltd v Federal Taxation Comr* (1971) 124 CLR 97 at 105, per Gibbs J

Same offence

[The Criminal Evidence Act 1898, s 1(f)(iii) (amended by the Criminal Evidence Act 1979 by the substitution of the words 'in the same proceedings') permits a witness to be cross-examined as to character if he has given evidence against any other person charged with the 'same offence'.] 'If a house is burgled by a burglar and an hour later it is burgled by another burglar, it would be wrong in my opinion to hold that each burglar was charged with the same offence. In my view, for the offences charged to be regarded as the same for the purposes of s 1(f)(iii), they must be the same in all material respects including the time at which the offence is alleged to have been committed, and a distinct and separate offence similar in all material respects to an offence committed later, no matter how short the interval between the two, cannot properly be regarded as "the same offence".' *Comr of Police for the Metropolis v Hills* [1978] 2 All ER 1105 at 1109, HL, per Viscount Dilhorne

SAMPLE *See also* SALE OF GOODS

Australia 'I understand the word "sample", whether as a matter of law or as a matter of popular speech, to mean a part of a fluid or substance taken from some larger quantity because it is a fair representation of the whole.' *Lawry v West* (1947) 73 CLR 289 at 299, per Dixon J

SANCTION

[The Companies Act 1862, s 131 (repealed; cf now the Companies Act 1985, s 576) empowered a liquidator to 'sanction' share transfers after the commencement of a voluntary winding-up.] 'It was contended in argument that s 131 only contemplated the sanction of the liquidator in order to relieve him from difficulty in ascertaining who was to receive the surplus assets if any should be distributable. But notice to him would suffice for this purpose. Sanction by him means approval and implies a power of disapproval.' *Re National Bank of Wales* (1897) 66 LJ Ch 222 at 227, CA, per Lindley LJ

SANITARY CONVENIENCE

'Sanitary conveniences' includes urinals, water-closets, earth-closets, ash-pits, privies and any similar convenience. (Mines and Quarries Act 1954, s 182; cf Factories Act 1961, s 176)

'Sanitary convenience' means a closet, privy or urinal. (Food Act 1984, s 132(1))

SANITY

Australia 'It is I think undesirable to attempt to frame a definition of the word sanity or to give a complete account of when it may be said that the matter in dispute is the sanity of the patient. Assistance may be found in the definition of insanity and the discussion of that term in *Pope on Lunacy* [2nd ed, 1890, pp 1–3]. That definition of insanity is "a defect of reason consisting either in its total or partial absence or in its perturbation".' *Hare v Riley and AMP Society* [1974] VR 577 at 583, per Norris J

SATISFACTION *See also* ACCORD AND SATISFACTION

Satisfaction is the gift of a thing with the intention that it shall be taken either wholly or partly in extinguishment of some prior claim of the donee. Satisfaction may occur (1) when a covenant to settle property is followed by a gift by will or settlement in favour of the person

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See also ACCORD

ft of a thing with the e taken either wholly or nt of some prior claim of 1 may occur (1) when a erty is followed by a gift in favour of the person

entitled beneficially under the covenant; (2) when a testamentary disposition is followed during the testator's lifetime by a gift or settlement in favour of the devisee or legatee; and (3) when a legacy is given to a creditor.

Ademption is the term which correctly describes, among other matters, the second category of instances in which the doctrine of satisfaction applies; and where a testamentary gift is wholly or partly extinguished by a subsequent gift or disposition made by the testator in his lifetime the testamentary gift is said to be adeemed in whole or part. (16 Halsbury's Laws (4th edn) para 1407)

'The distinction between ademption and satisfaction lies in this: in ademption the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may, either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word *ademption*, because the bequest or devise contained in the will is thereby *adeemed*, that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he give benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenants the right to elect whether they will take under the covenant, or whether they will take under the will. Therefore this distinction is manifest. In cases of satisfaction the persons intended to be benefited by the covenant, who, for shortness, may be called the objects of the covenant, and the persons intended to be benefited by the bequest or devise, in other words, the objects of the bequest, must be the same. In cases of ademption they may be, and frequently are, different.' *Chichester (Lord) v Coventry* (1867) LR 2 HL 71 at 90, 91, per Lord Romilly

'When a testator gives a direction that a particular thing shall be taken by any one in or towards satisfaction of his share, and the thing spoken of exists and belongs to the testator, I cannot doubt that, according to the plain and obvious meaning of the words, he gives that thing to the legatee, and this plain meaning is not controlled or varied, but is rather corroborated, by the addition of such words as 'and shall be brought into hotchpot and accounted for accordingly'.' *Re Coster, Humphreys v Jadsden* [1897] 1 Ch 325 at 333, CA, per Rigby LJ; affd sub nom *Wheeler v Humphreys* [1898] AC 506

SATISFIED

'I hold . . . that in this statute [Matrimonial Causes Act 1950 (repealed; see now the Matrimonial Causes Act 1973, under which the sole ground of divorce is 'breakdown of marriage')] the word "satisfied" does not mean "satisfied beyond reasonable doubt". The legislature is quite capable of putting in the words "beyond reasonable doubt" if it meant it. It did not do so. It simply said *on whom* the burden of proof rested, leaving it to the court itself to decide what standard of proof was required in order to be "satisfied".' *Blyth v Blyth* [1966] 1 All ER 524 at 536, HL, per Lord Denning

'The phrase used in s 4(2) of the Act of 1950 is simply "is satisfied", with no adverbial qualification. The formula "satisfied beyond reasonable doubt" has been a very familiar one for a great many years, and if that meaning had been intended the formula could and should have been used. The phrase "is satisfied" means, in my view simply "makes up its mind"; the court on the evidence comes to a conclusion which, in conjunction with other conclusions, will lead to the judicial decision. There is no need or justification for adding any adverbial qualification to "is satisfied".' Ibid at 541, per Lord Pearson

New Zealand [The Marriage Act 1955, s 15(2) provides (in relation to applications for leave to marry within the degrees of affinity) that the court must be 'satisfied' of certain circumstances.] 'The best opinion I can form is that on such an application as this the evidence must enable the judge to feel what Dixon J [in *Briginshaw v Briginshaw* (1938) 60 CLR 336] defined as "an actual persuasion". That means a mind not troubled by doubt or, to adapt the language used by Smith J in *Angland v Payne* [1944] NZLR 610 at 626, CA], "a mind which has reached a clear conclusion". If a formula has to be phrased, I would adopt one analogous to that expressed in *Edwards v Edwards* [[1947] SASR 258 at 271], and would say that the judge must be "satisfied with the preponderance of probability arrived at by due caution in the light of the seriousness of the charge".' *Re Woodcock* [1957] NZLR 960 at 963, 964, CA, per Finlay ACJ

New Zealand [Under the Licensing Act 1908 (NZ), s 194(1) (repealed) every person found on licensed premises at any time when such premises were required by the Act to be closed was liable to a fine, unless he 'satisfied' the court that he was an inmate, servant, lodger, bona fide traveller, etc.] 'The mind of the court must be "satisfied"—that is to say, it must arrive at the required affirmative conclusion—but the decision may rest on the reasonable probabilities of the case, which may satisfy the court that the fact was as alleged, even though some reasonable doubt may remain. If the probabilities, when considered in the light of all such doubts as may arise with regard to them, do in fact persuade the court, that is, in my opinion, all that is necessary in order to entitle the court to say that it is "satisfied" of the fact. This is what the statute expressly requires on the natural interpretation of its words, and the court is not at liberty to uphold the defence unless the evidence produces in its mind the required acceptance of the truth of the allegation.' *Robertson v Police* [1957] NZLR 1193 at 1195, per F B Adams J

SAVINGS

[An ante-nuptial settlement provided that all 'savings' arising from the income of the wife should be held by the trustees subject to her appointment.] 'Savings may well bear the sense of being something which, at the time of her [the wife's] death, is to be in the hands of the trustees. Two senses may be given to the word: either it will mean money which has been paid to her, and from her not wanting to spend it, handed back to the trustees; or money which has never passed from the hands of the trustees and is a "saving" in this sense, that she has never wanted it and never applied to the trustees for it, as she might have done. With respect to the fund in question, not having applied to the trustees for it, she must be assumed not to have required it and in this sense it may well be said to be savings.' *Re Rosenthall's Settlement* (1857) 6 WR 139 at 140, per Page Wood V-C

SAVINGS BANK

See BANK—BANKING

SCAFFOLD

'By reg 3(2) [of the Building (Safety, Health and Welfare) Regulations 1948 (revoked; see now the Construction (Working Places) Regulations 1966)] a scaffold is defined as meaning a "temporary structure". I do not think, for my part, that the subsequent words, whereby a scaffold is made to include "any working platform, gangway, run, ladder or step-ladder", have the effect of extending the meaning of "scaffold" to anything other than temporary structures. It seems to me that their effect is merely to show that a temporary structure, in order to be a scaffold, may take one of several forms.' *Curran v William Neill & Son (St Helens) Ltd* [1961] 3 All ER 108 at 115, CA, per Willmer LJ

SCALES

In this section [penalty for using false scales, etc] 'scales' includes weights, measures and weighing or measuring machines or instruments. (Customs and Excise Management Act 1979, s 169(4))

SCHEME

Australia '"Scheme" is a vague and elastic word. Doubtless it connotes a plan or purpose which is coherent and has some unity of conception.' *Australian Consolidated Press, Ltd v Australian Newsprint Mills Holdings Ltd* (1960) 105 CLR 473 at 479, per Dixon CJ

Australia 'In *XCO Pty Ltd v FC of T* (1971) 124 CLR 343; 2 ATR 353, I expressed the effect of some of the authorities which have explained the meaning of the second limb of s 26(a) [Income Tax Assessment Act 1936 (now repealed) (Cth)] as follows (124 CLR at 349; 2 ATR at 357–359): "The word 'scheme' simply means plan, design or programme of action . . . It is not necessary, to constitute a scheme within s 26(a), that the action planned should involve a series of repetition of acts. The alternative 'carrying on or carrying out' appears to cover, on the one hand, the habitual pursuit of a course of conduct, and, on the other, the carrying into execution of a plan or venture which does not involve repetition or system." . . . The scheme must, however, be one which is carried out by the taxpayer himself or on his behalf; it is not enough that the taxpayer derives a receipt from somebody else who has obtained it by carrying out a scheme of profit-making . . . I do not understand the correctness of that statement to be disputed.' *Federal Comr of Taxation v Bidencope* (1978) 8 ATR 639 at 647, per Gibbs J

agents carries out any building work shall take all measures that appear necessary or advisable to minimise accident risk and to prevent injury to the health of persons engaged in such building work and for this purpose, without limiting the generality of the foregoing, he shall . . . (2) provide and maintain safe means of access to every place at which any person has to work at any time; . . . (5) keep all stairways, corridors and passageways free from loose materials and debris, building materials, supplies and obstructions of every kind. . . ."

In so far as the decision affects the validity of regulation 73 (5) their Lordships consider that the decision of the High Court is sound. Regulation 73 (5) prescribes that stairways, etc., are to be kept free from obstructions of all kinds. This is a definite measure or step to be taken by the contractor and may fairly be regarded to come within the powers of section 22 (2) (*g*) (v). So far as regulation 73 (2) is concerned the argument sustained by their Lordships in the present case does not appear to have been presented by Sir Garfield Barwick, appearing for the appellants. His argument, so far as appears in the report,[6] was that regulation 73 was invalid on the ground of uncertainty. It is true that in his judgment Williams J. pronounces generally upon the validity of regulation 73 (2) and (5), but Kitto J. refers expressly to the argument on uncertainty. Apart from these considerations, however, their Lordships observe that the opening words of regulation 73 are not to be found in regulation 98. The safety measures which are to be taken under regulation 73 are such as "appear necessary to minimise accident risk." If therefore the provision of a safe means of access to a place of work appears necessary to minimise accident risk in *Ryan's* case,[7] their Lordships would think that the result of the case was justified and the decision is distinguishable from the present case. Moreover, upon the facts of the case, breach of regulation 73 (5) would have been sufficient for the plaintiff to succeed. If, however, the opening words do not apply, then it would appear doubtful whether *Ryan's* case,[7] so far as regulation 73 (2) is concerned, can stand with the present decision.

Their Lordships' decision on the validity of regulation 98 makes it unnecessary to consider the remaining points argued for the appellants. If the regulation does impose an absolute liability, it is no objection that it is imposed in a regulation and not by statute. There are numerous examples of regulations imposing

[6] 97 C.L.R. 89.

[7] Ibid.

absolute liability. On the question whether regulation 98 gives a cause of action to a person engaged in excavation work who is injured by its breach and imposes civil liability upon the contractor in the event of breach, their Lordships have no hesitation in saying that the decision in *Ryan*[7] on this point was sound. This follows a long line of authority in England which it is unnecessary to restate.

Upon the whole matter their Lordships will humbly advise Her Majesty that the order of the Full Court of the Supreme Court of New South Wales dated March 17, 1965, should be set aside and the judgments of Asprey J. dated March 2, 1964, and June 24, 1964, restored. The respondent must pay the costs before the Full Court and, in accordance with the undertaking given by the appellants on the granting of leave to appeal to this board, the appellants will pay the costs of this appeal.

Solicitors: *Galbraith & Best*; *Rodgers, Horsley & Burton.*

[7] 97 C.L.R. 89.

[HOUSE OF LORDS]

H. L. (E.)* 1965 *Dec.* 20, 21 1966 *Feb.* 15

BLYTH . . . . . APPELLANT

AND

BLYTH . . . . . RESPONDENT

Husband and Wife—Condonation—Sexual intercourse as—Husband, by—Transitional effect of new Act—Wife's adultery—Terminated by wife without resumption of cohabitation—Isolated act of marital intercourse before July 31, 1964—*Whether husband's evidence admissible to negative presumption of condonation—Matrimonial Causes Act,* 1963 (*c.* 45), *s.* 1.

Husband and Wife—Condonation—Evidence—Burden of proof—Wife's adultery—Isolated act of marital intercourse without resumption of cohabitation—Evidence by husband that he did not intend to condone adultery—Divorce petition delayed because of reconciliation hope—Whether court "satisfied" that adultery not committed—Whether husband's evidence "sufficient to negative necessary intent"—"Satisfied"—Matrimonial Causes Act, 1950

* *Present*: LORD MORRIS OF BORTH-Y-GEST, LORD MORTON OF HENRYTON, LORD DENNING, LORD PEARCE and LORD PEARSON.

(14 *Geo.* 6, *c.* 25), *s.* 4 (2)—*Matrimonial Causes Act*, 1963 (*c.* 45), *s.* 1.

Husband and Wife—Adultery—Evidence—Burden of proof—Civil or criminal standard.

Burden of Proof—Matrimonial cause—Civil or criminal standard—Condonation—Adultery.

Statute—Retroactive effect—Divorce—Condonation of adultery by act of intercourse—New Act providing that presumption of condonation may be rebutted—Whether procedural matter—Matrimonial Causes Act, 1963 (*c.* 45), *s.* 1.

By section 4 (2) of the Matrimonial Causes Act, 1950:

"If the court is satisfied on the evidence that—(*a*) the case for the petition has been proved; and (*b*) where the ground of the petition is adultery, the petitioner has not in any manner . . . condoned, the adultery . . . the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: . . ."

By section 1 of the Matrimonial Causes Act, 1963:

"Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent."

In 1954 the wife left the husband and lived with the co-respondent until August, 1955, when she broke off the association. In 1958 the husband and wife met by chance and sexual intercourse took place. In his petition dated December 13, 1962, the husband sought a divorce on the ground of his wife's adultery. At the hearing in December, 1964, the commissioner found the adultery proved but held that, although section 1 of the Act of 1963, which came into force on July 31, 1963, altered the substantive law, it could not be construed to jeopardise the vested rights which the wife had acquired before that Act when her husband, by intercourse with her in 1958, reinstated her as his wife, and accordingly the husband's evidence was not admissible to negative the presumption that he intended to condone his wife's adultery, and the commissioner dismissed the petition. However, in case he was wrong, the commissioner heard the evidence of the husband, who said that he did not intend to forgive his wife in 1958 but delayed petitioning until 1962 because he hoped for a reconciliation. The commissioner found "on a rather slender balance of probabilities, that the husband did not intend to condone the adultery":—

Held, that the husband's evidence was admissible in that section 1 of the Act of 1963 only altered the law as to the admissibility of evidence and the effect which the courts are to give to evidence, so that the rule against giving retrospective effect to Acts of Parliament did not apply.

Held, further, (Lord Morris of Borth-y-Gest and Lord Morton of Henryton dissenting), that the evidence was sufficient to

negative condonation. There is no statutory requirement that the absence of condonation must be proved beyond reasonable doubt. In matrimonial cases, as in other civil cases, the proof must be by a preponderance of probability, the degree of probability depending on the subject-matter, so that in proportion as the offence is grave, so the proof should be clear.

Preston-Jones v. *Preston-Jones* [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124, H.L.(E.) considered.

Per Lord Denning (post, pp. 668D—669A), approved by Lord Pearce (post, p. 673A). The High Court of Australia, in *Wright* v. *Wright* (1948) 77 C.L.R. 191 refused to follow *Ginesi* v. *Ginesi* [1948] P. 179; 64 T.L.R. 167; [1948] 1 All E.R. 373 (C.A.) and held that adultery required proof of the standard required in a civil case: I prefer *Wright* v. *Wright* to *Ginesi* v. *Ginesi*.

Per Lord Pearson. I accept the argument that a lesser degree of proof is required to satisfy the court that the presumption of condonation has been rebutted than would be required to satisfy it that a matrimonial offence has been committed (post, p. 677A–B).

Decision of the Court of Appeal [1965] P. 411; [1965] 3 W.L.R. 365; [1965] 2 All E.R. 817, C.A. reversed.

APPEAL from the Court of Appeal (Willmer, Harman and Winn L.JJ.).

This was an appeal brought by leave of the Court of Appeal by Stanley Blyth (an assisted person), a petitioner husband in undefended divorce proceedings, from a judgment of that court, which dismissed an appeal by him against the dismissal of his petition for divorce. The judgment of the Court of Appeal was given on May 28, 1965, and dismissed his appeal from an order of the Probate, Divorce and Admiralty Division of the High Court (Mr. Commissioner Gallop Q.C. sitting as a Special Commissioner at Norwich and giving judgment in London) dated December 16, 1964, which had dismissed his petition dated December 13, 1962, in which he sought, in the exercise of the court's discretion, dissolution of his marriage on the ground of the adultery of his wife, Doreen Alice Blyth, the respondent, with Denis Pugh, the co-respondent.

The parties were married on March 23, 1940, and their one child, a son, was born on March 7, 1942. The wife had met the co-respondent in January, 1954, and in May, 1954, she left her husband and went to live with him. She gave birth to a daughter by him on May 28, 1955. She left him in August, 1955, and went to live at the house of her mother at Great Yarmouth. Between February 8, 1955, and 1958 there were many proceedings instituted by the wife against her husband in the magistrates' court in relation

to the care, custody and maintenance of the child of the marriage. While she was living with her mother and her two children, her husband had intercourse with her in 1958 in circumstances hereinafter set out.

On December 13, 1962, the husband filed a petition for a divorce on the ground of his wife's adultery, stating therein that he had not condoned it. It was proposed to prove the adultery by obtaining an admission from her, and a private inquiry agent visited her. She gave him a statement dated April 5, 1963, in which she said:

"I met Mr. Pugh in January, 1954, . . . After a time we . . . decided to live together as man and wife. This we did on May 1, 1954, when we obtained a flat . . . After we lived together adultery took place between us, with the result that I gave birth to a daughter on May 28, 1955, of whom Mr. Pugh is the father. In August, 1955, we parted and I returned to my mother's home, where I have lived ever since. . . . After I left my husband, and I parted from Mr. Pugh I saw my husband on a number of occasions, and went out with him, and sexual intercourse took place between us, and on one occasion he slept at my mother's house with me, and intercourse took place between us. This was about four years ago. Since that time I have not seen my husband."

The husband made a discretion statement dated August 12, 1964, in which he said:

"(1) My wife associated with the co-respondent for some time before, in May, 1954, leaving home and going to live with him. Partly due to this association by about January, 1954, I had become very unhappy. (2) In about December, 1952, I met again Janet Dade . . . whom I had known about two years earlier. . . . We became friendly and on two occasions . . . namely, in February and in August, 1954, we committed adultery. In the latter month our association ceased."

This hearing was on November 9, 1964. In the course of it the husband gave evidence as follows:

"Q. How did you come to go to the house in the first place? A. It was upon meeting my wife in the Great Yarmouth market place. We talked to each other and I was invited to the house. . . . Q. What did you do? Did you have something to eat? A. No, sir. It was Christmas-time. My wife was busy decorating. She asked me to help. . . . She was telling me about the serious operation she had . . . for a growth upon her womb. She asked me if I would like to see it. I was not interested. Within a short time she had undressed herself and placed herself on the rug in front of the fire. She invited me to have intercourse with her. As a man, torment got the better of me, and we did have intercourse. We had a cup of tea, and I left the house upon my son arriving home. Q. That is the only time that you had intercourse with her since she left you in 1954? A. Yes. Q. At the time of this intercourse was there any talk between the two of you as to your forgiving or remitting the offences she had committed? A. None whatsoever. Q. Did you, when you had intercourse with her that evening, intend to forgive her? A. No, sir. Q. Or to remit the offences she had committed? A. No, sir. We did not even trouble about it. . . . Q. This petition was not actually filed until December, 1962, which is, of course, some years after you and your wife ceased to live together, and some years, according to what you were saying, after this occasion when you visited her house and had intercourse. Why did you not start proceedings before? What was the delay? A. I always lived in hopes that there would be some way that we could get together. The commissioner (to counsel): That does not help you very much on the question of his state of mind when he had intercourse with his wife. Counsel: After that occasion when you had intercourse with her, did you sometimes see her? A. Yes. We often spoke to each other. On one occasion I talked it over with her mother, and I found that my wife was swayed more towards her mother than towards me. I found that, no matter what I said or tried to do, she would not come round to my way of thinking."

The commissioner in giving judgment in London on December 16, 1964, said that the husband had had intercourse with his wife with knowledge of her adultery and that his evidence to negative an intent to condone it was not admissible. He accordingly dismissed the petition on the ground of condonation. In view of the possibility of an appeal, he further said:

"First, if the evidence in question were to be taken into account, I would find, on a rather slender balance of probabilities, that the husband did not intend to condone the adultery; secondly, I would excuse the delay in the presentation of the petition."

The Court of Appeal having dismissed the husband's appeal, he appealed to the House of Lords.

James Comyn Q.C. and *Derek Hyamson* for the appellant petitioner. The law relating to condonation was amended by sections 1 to 4 of the Matrimonial Causes Act, 1963. *Henderson* v. *Henderson* [1] represents the law as it stood before that Act.

[1] [1944] A.C. 49, 53; 60 T.L.R. 113; [1944] 1 All E.R. 44; H.L.(E.).

As the law then stood, the facts of the present case would have established condonation.

The submissions for the appellant are: (1) Section 1 of the Act of 1963 must be fitted into the Matrimonial Causes Act, 1950. When it is so fitted in, it represents an entirely new concept and enables a husband to give evidence to negative an intent. One is thus going primarily to his state of mind. The evidence must be sufficient to negative an intent to condone. This is done if the evidence is accepted The court need only look at the wording of section 1 in interpreting it and need only consider whether it is "sufficient" to negative condonation.

(2) If that submission is not accepted, it is fallacious to say that the court has to determine a single question and must come to a single overall conclusion. In each case it may have to look at several questions. The word "satisfied" must be given its normal and natural meaning and the degree of satisfaction must vary with the subject-matter which the court is considering. Here the court is considering a very simple question in relation to which Parliament has used simple language. Thus, if section 1 of the Act of 1963 is to be interpreted in accordance with section 4 (2) of the Act of 1950, then, while the court must be "satisfied," the proper meaning is, not satisfaction beyond reasonable doubt, but satisfaction by evidence on which a judge can decide. *Preston-Jones* v. *Preston-Jones* [2] does not decide anything so sweeping as Willmer L.J. has held in the Court of Appeal in the present case.

(3) If the appellant must choose between two standards of proof in relation to the rebuttal of a presumption of condonation of adultery, the burden of proof imposed is proof on a balance of probabilities and not proof beyond reasonable doubt.

The degree of satisfaction demanded must vary with the particular matter which is being considered in proportion as the crime or matter in hand is grave. Thus in a case of condonation the attitude of the court will be more benevolent than in a case of connivance. In the present case the appellant's evidence sufficiently discharges the burden on him. His words "No, sir. We did not even trouble about it" bear the hall-mark of truth. In the atmosphere of a court of law there is the danger of imagining that people act with leading cases in their minds and the Statute Book in their hands, but one must give a common-sense meaning to the common-sense answer which the appellant gave to his counsel.

[2] [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124, H.L.(E.).

It must be remembered that in *Preston-Jones* v. *Preston-Jones* [3] the court was concerned with the question of bastardising a child and so the degree of proof required was of necessity high. Similarly adultery, being a grave matter, attracts a more anxious approach than, say, condonation. In the case of connivance there is first a presumption of innocence, and the person who asserts it must make out a prima facie case. In the present case the Court of Appeal were wrong in holding generally [4] that it is "well settled that in this context, so far as concerns proof of a matrimonial offence, 'satisfied' means satisfied beyond reasonable doubt." It is, in any event, an unnecessary elaboration to speak of "reasonable doubt."

There are three relevant decisions of the Court of Appeal, *Hornal* v. *Neuberger Products Ltd.*[5]; *Bater* v. *Bater* [6] and *Douglas* v. *Douglas*.[7] The expression "satisfied beyond reasonable doubt" is apt, but tends to be confusing because it is conditioned by the subject-matter which one is considering: see *Churchman* v. *Churchman*,[8] which indicates the presumption against connivance, so that the prime burden rests on the person who asserts it and who must prove it beyond reasonable doubt. Condonation is something altogether different.

The husband's evidence to rebut condonation was admissible and he has discharged the onus of proof. The margin by which he discharged it is irrelevant. There was a single, casual unpremeditated act of intercourse, resulting from a chance meeting with his wife and her unexpected allurement. Forgiveness was not mentioned and the question of resuming married life was not discussed: and he said in his evidence that he had not intended to forgive her or remit her offences. There was enough evidence for the commissioner to have held that the intent to condone was negatived and to have satisfied him that the wife's adultery was not condoned. In the face of the evidence, any doubt which the commissioner may have felt was not a "reasonable" doubt. If, however, the House of Lords has any doubt on the matter, it should order a new hearing.

R. J. A. Temple Q.C. and *Basil Garland* for the Queen's Proctor. The requirement that the court should be "satisfied"

[3] [1951] A.C. 391, 399, 407, 408.
[4] [1965] P. 411, 426, 431; [1965] 3 W.L.R. 365; [1965] 2 All E.R. 817, C.A.
[5] [1957] 1 Q.B. 247, 256, 258, 261, 264–265, 266; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970, C.A.
[6] [1951] P. 35, 36, 37; 66 T.L.R. (Pt. 2) 589; [1950] 2 All E.R. 458, C.A.
[7] [1951] P. 85, 99; 66 T.L.R. (Pt. 2) 531; [1950] 2 All E.R. 748, C.A.
[8] [1945] P. 44, 52; 61 T.L.R. 464; [1945] 2 All E.R. 190, C.A.

is not a novelty. From the Matrimonial Causes Act, 1857, in every statute governing the matrimonial code of England it has been a requirement that the court should profess itself "satisfied" on a variety of matters: see ss. 29, 30 and 31 of the Act of 1857, reproduced in s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, replaced by s. 4 of the Matrimonial Causes Act, 1937, and now replaced by s. 4 (2) of the Matrimonial Causes Act, 1950. To the Act of 1950 has been added section 1 of the Matrimonial Causes Act, 1963. The repetition of the word "satisfied" is a constant reminder of the weight which is attached to the serious matters to be proved.

As to section 1 of this last Act, it is submitted that it does not pretend to deal with the standard of proof required. It does no more than admit evidence which may be adduced by those who wish to rebut a presumption of condonation. For the effect and the measure of the evidence so presented one must look to section 4 of the Act of 1950 itself.

The relaxation of a rule of evidence by section 1 of the Act of 1960 is not a novelty. Thus section 32 of the Act of 1950, which replaced section 7 of the Law Reform (Miscellaneous Provisions) Act, 1949, got rid of this rule in *Russell* v. *Russell*,[9] The Queen's Proctor raises no point on the admissibility of the husband's evidence in this case.

As to the requirement that the court shall be "satisfied" and the nature of reasonable doubt, see *Lyons* v. *Lyons*[10] and *Bater* v. *Bater*.[11] *Preston-Jones* v. *Preston-Jones*[12] is based on the principle of public policy which requires more than a mere balance of probabilities in matrimonial cases. Otherwise a dissolution of marriage might be granted on a 51 per cent. probability of the petitioner's case being true. The hearing of a divorce case is a civil matter of a special sort and the meaning to be attached to "satisfied" makes a difference to the ease with which the burden of proof is shifted.

In *Hornal's* case[13] it is recognised that the standard of proof in divorce cases requires that decision on a balance of probabilities should be abandoned. In *Churchman* v. *Churchman*[14] the standard of proof in matrimonial cases was equated with that in criminal cases, though in *Davis* v. *Davis*[15] it was held that

[9] [1924] A.C. 687; 40 T.L.R. 713, H.L.(E.).
[10] [1950] N.I. 181.
[11] [1951] P. 35, 37.
[12] [1951] A.C. 391.
[13] [1957] 1 Q.B. 247, 264.
[14] [1945] P. 44, 51.
[15] [1950] P. 125; [1950] 1 All E.R. 40, C.A.

this standard was only applicable to cases of adultery. In *Bater* v. *Bater*[16] it was held that in cases of cruelty nothing less than proof beyond reasonable doubt was required. This is supported by *Gollins* v. *Gollins*.[17] Desertion also must be strictly proved: *Williams* v. *Williams*.[18] As to the discretionary bars to relief, the approach to the operation of the divorce code expressed by Lord MacDermott in *Preston-Jones* v. *Preston-Jones*[19] is correct; "satisfied" cannot connote something less than proof beyond reasonable doubt. Connivance must be strictly proved: *Douglas* v. *Douglas*[20] and Rayden on Divorce, 9th ed. (1964), p. 232, para. 4.

The standard is the same, both in proof and disproof. Take, for example, the case of an undefended suit in which the petitioner is alleging adultery against his spouse. Suppose that at some stage the court is put on inquiry as to the existence of connivance or condonation. Not every fancy doubt would be enough to displace the presumption of the petitioner's innocence; only a reasonable doubt or suspicion can do that, so as to give rise to the problem at all. Once there is a reasonable doubt in the mind of the tribunal, the next step is that the burden of disproof falls on the petitioner, and, if the tribunal has had a reasonable doubt, that can only be displaced by proof beyond reasonable doubt: see *Tilley* v. *Tilley*.[21] The difficulty stems from the wording of the Act which puts on the petitioner the burden of proving that there is no connivance of condonation. In the case of both the court must be satisfied of their absence beyond reasonable doubt. Thus, if connivance is not disproved beyond reasonable doubt a decree must be refused, even if the court believes, although with something less than reasonable certainty, that the petitioner is innocent of it.

In the end there is only one issue and the court must ask itself whether or not the petitioner has proved uncondoned adultery free from connivance. Accordingly, the need for proof beyond reasonable doubt applies to every aspect of this issue. In satisfying itself the court requires a high degree of proof and when cruelty comes in as a bar to granting a decree, the burden of proof must also be discharged beyond reasonable doubt. At the same time, the court must have regard to the

[16] [1951] P. 35.
[17] [1964] A.C. 644; [1963] 3 W.L.R. 176; [1963] 2 All E.R. 966, H.L.(E.).
[18] (1943) 113 L.J.P. 18, 24; [1943] 2 All E.R. 746, C.A.
[19] [1951] A.C. 391, 416–417.
[20] [1951] P. 85, 92–93.
[21] [1949] P. 240, 259–260; 65 T.L.R. 211; [1948] 2 All E.R. 1113, C.A.

different degrees of probability in dealing with different subject-matters—collusion, connivance and conduct conducing.

The question of degree of proof was considered in *Bater* v. *Bater*[22]; *Tilley* v. *Tilley*[23]; *Hornal's* case[24] and *Emanuel* v. *Emanuel*.[25] The true rule as regards condonation was stated in *Fearn* v. *Fearn*,[26] where it was held that a high degree of proof is required in cases of condonation.

The standard of disproof is no less high than that imposed on a party making an affirmative allegation. "Satisfied" in the Act means proof beyond reasonable doubt. Because the presumption of innocence is only displaced by doubt, or suspicion of a reasonable degree, which gives rise to a reasonable doubt, the only standard of proof adequate to discharge the burden of negativing collusion or condonation thus arising from reasonable doubt must be proof beyond the degree of doubt or suspicion which has imposed the burden, that is, proof beyond reasonable doubt.

No submissions are made as to the petitioner's case on the facts of the present case.

In *Baguley* v. *Baguley*[27] the principle of *Henderson* v. *Henderson*[28] was applied to a wife.

James Comyn Q.C. in reply. In all divorce cases the court must be "satisfied" of the prescribed matters and satisfaction must depend on the subject-matter and the circumstances. That is elementary. All depends on the particular problem in the particular case. In the present case, if the House of Lords is not satisfied on the point of condonation, the only just thing to do is to send the case back for retrial. The necessary elements for condonation are missing here—forgiveness and reinstatement. Taking the totality of the evidence, there was not condonation by any test. The object of the Act of 1963 was to amend the law and facilitate reconciliation and it must be read with the Act of 1950. In view of the provisions of section 2 of the Act of 1963, it would be hard to find a weaker case of condonation than that revealed by the facts of the present case.

On the wording of the statutes compare section 5 of the Act of 1950 as to the dismissal of a respondent or co-respondent from proceedings "if the court is satisfied that there is not sufficient evidence."

[22] [1951] P. 35, 36–37.
[23] [1949] P. 240, 268.
[24] [1957] 1 Q.B. 247, 263–264.
[25] [1946] P. 115, 118–119; 61 T.L.R. 538; [1945] 2 All E.R. 494.
[26] [1948] P. 241, 252–253; 64 T.L.R. 218; [1948] 1 All E.R. 459, C.A.
[27] [1962] P. 59n.; [1961] 3 W.L.R. 482n.; [1961] 2 All E.R. 635, C.A.
[28] [1944] A.C. 49.

There are many gradations in the condition of the court being "satisfied." Note the contents of the proviso to section 8 (1) of the Act of 1950.

Their Lordships took time for consideration.

February 15, 1966. LORD MORRIS OF BORTH-Y-GEST. My Lords, the appellant as petitioner sought the dissolution of his marriage on the ground of his wife's adultery. The court could not grant him a decree unless satisfied on the evidence that he had not in any manner condoned the adultery. On the hearing of the petition the question arose whether, having regard to the dates of the events in the matrimonial story, he could give certain evidence in support of his contention that there had been no condonation. If such evidence was admissible, it was for the court to consider its weight and effect and thereafter to reach a conclusion in regard to the issues which by statute call for determination. The petition was not defended. The learned commissioner held that certain evidence of the husband (which was received de bene esse) was inadmissible. The petition was dismissed on the ground of condonation. On appeal it was held in the Court of Appeal that the husband's evidence was admissible but that it fell short of what was required to satisfy the court that he had not condoned his wife's adultery. The appeal was therefore dismissed.

The facts which gave rise to the issues thus outlined must now be stated. The parties were married on March 23, 1940. Their one child was born on March 7, 1942. The wife left the husband in May, 1954. In a discretion statement the husband asserted that before then she had associated with the co-respondent. Partly owing to that association, the husband stated that he had become very unhappy. He committed adultery in February, 1954, and again in August, 1954, with someone he had earlier known: his association with her ceased in August, 1954. Between February 8, 1955, and 1958 there were many proceedings instituted by the wife against the husband in the magistrates' court in relation to the care, custody and maintenance of the one child of the marriage. The wife had met the co-respondent in January, 1954. She went to live with him in May, 1954, and continued to do so until August, 1955. She gave birth to a daughter on May 28, 1955. In August, 1955, the wife went to her mother's home and continued to live there after that date.

In 1958 the husband and wife had intercourse. As the learned commissioner found, the husband then had knowledge of his wife's

adultery. He gave evidence that they chanced to meet in the market place; they talked and she invited him to her mother's house. In the words of the learned commissioner in his judgment:

"They went to the house of her mother, where, after some allurement by her, the husband engaged in the act of intercourse in question. No fraud by the wife is suggested."

It is beyond dispute that as the law stood before the end of July, 1963, a court would have been obliged to hold, upon proof of the facts just recited, that there had been condonation. (See *Henderson* v. *Henderson*.[1])

Years went by before the husband petitioned for divorce. His petition was dated December 13, 1962. When eventually it came on for hearing (on November 9, 1964) the husband gave his reason for the delay. It was that he "always lived in hopes that there would be some way that we could get together." He amplified this by saying that after the occasion when they had intercourse they sometimes saw each other and often spoke to each other. He added:

"On one occasion I talked it over with her mother and I found that my wife was swayed more towards her mother than towards me. I found that, no matter what I said or tried to do, she would not come round to my way of thinking."

Though, as the law stood, the husband had no prospect, after the act of intercourse, of securing a divorce based on his allegation of his wife's adultery (which in fact had ended over seven years before his petition) it does not appear that the passing of time before he presented his petition was attributable to any recognition that there had been condonation. Rather was it attributable to his hopes of restoring the marriage. When the petition was presented (which was many months before the Matrimonial Causes Act, 1963, was passed) he swore that he had not condoned his wife's adultery. So far as his legal advisers knew, that was true, for it was apparently only when they were collecting the evidence to be given at the hearing that they learned some of the facts. It was proposed to prove the husband's case—that is that his wife had committed adultery—by obtaining an admission from her. A private inquiry agent saw her and she gave and signed a statement in writing. It was dated April 5, 1963. In it she stated that she had lived with the co-respondent and committed adultery with him between May 1, 1954, and August, 1955. In her statement she further said in reference to the time after she had parted from the co-respondent:

[1] [1944] A.C. 49; 60 T.L.R. 113; [1944] 1 All E.R. 44, H.L.(E.).

"I saw my husband on a number of occasions, and went out with him, and sexual intercourse took place between us, and on one occasion he slept at my mother's house with me, and intercourse took place between us. This was about four years ago. Since that time I have not seen my husband."

When the husband's legal advisers became aware of the contents of the wife's statement they deferred the setting down of the petition and waited until after the passing of the Matrimonial Causes Act, 1963. That Act was passed on July 31, 1963, and then came into force. Section 1 provides that:

"Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent."

In contrast to this section, section 2 (which does not call for present consideration) refers to "co-habitation."

The petition eventually came on for hearing on November 9, 1964. The husband wished to take advantage of the above-cited provision in section 1 of the Act and the question arose whether he could do so. The events which he sought to explain were all prior to the passing of the Act. The learned commissioner took the convenient course of hearing de bene esse the evidence which counsel for the husband desired to tender. Later, after hearing argument, the commissioner ruled as to its admissibility. Accordingly, the husband gave his account of his relationship with his wife since May, 1954. It differed from that set out in the statement made by his wife which he was putting in and using as evidence to prove his allegation of her adultery. He said that there had been only one act of intercourse. The following questions and answers were then recorded:

"Q. At the time of this intercourse was there any talk between the two of you as to your forgiving or remitting the offences that she had committed? A. None whatsoever. Q. Did you when you had intercourse with her that evening intend to forgive her? A. No, sir. Q. Or to remit the offences she had committed? A. No, sir, we did not even trouble about it."

The learned commissioner came to the conclusion that to admit the evidence which the husband sought to give to rebut a presumption of condonation would be to give section 1 of the Act of 1963 a retrospective effect which he considered was not permissible. Accordingly, he ruled that the evidence was inadmissible. On that view it followed that the petition had to be dismissed on

Act of 1963 provides by section 7 (2) that it shall be construed as one with the Matrimonial Causes Act, 1950. Section 4 of that Act laid down the duty on the court when a petition is presented to it. Section 1 of the Act of 1963 does not alter the standard of proof: it is merely permissive as to evidence which may be adduced.

It becomes important to have regard to the relevant statutory requirements. There is a duty on the court to inquire (inter alia) as to condonation. Section 178 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provided:

> "On a petition for divorce it shall be the duty of the court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not, and also to enquire into any countercharge which is made against the petitioner."

The wording was altered in section 4 of the Matrimonial Causes Act, 1937 (later section 4 (1) of the Act of 1950):

> "On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties."

The wording of subsections (2) and (3) of section 178 of the Act of 1925 was as follows:

> "(2) If on the evidence the court is not satisfied that the alleged adultery has been committed or find that the petitioner has during the marriage been accessory to or has connived at or condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall dismiss the petition. (3) If the court is satisfied on the evidence that the case for the petition has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall pronounce a decree of divorce: Provided that the court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the court he has been guilty—(*a*) of unreasonable delay in presenting or prosecuting the petition; or (*b*) of cruelty towards the other party to the marriage; or (*c*) of having without reasonable excuse deserted, or of having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery complained of; or (*d*) of such wilful neglect or misconduct as has conduced to the adultery."

As a result of section 4 of the Act of 1937 (see s. 4 (2) of the Act of 1950) the wording of subsections (2) and (3) was changed. The new wording was as follows:

> "If the court is satisfied on the evidence that—(*a*) the case for the petition has been proved; and (*b*) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and (*c*) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents; the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty—(i) of unreasonable delay in presenting or prosecuting the petition; or (ii) of cruelty towards the other party to the marriage; or (iii) where the ground of the petition is adultery or cruelty, or having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or (iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion."

The words in section 4 (2) (*c*) were repealed by the Act of 1963 and a change made in the wording of the proviso. It will be seen that, whereas in 1925 the word "satisfied" was used in regard to the substantive charge and the word "find" was used in regard to condonation, in 1937 and thereafter the word "satisfied" is used both in regard to a substantive charge of adultery and cruelty and in regard to condonation. Different wording is used in the proviso.

It follows that in the present case the court had first to be "satisfied" that the allegations of the wife's adultery were proved and then to be "satisfied" that the husband had not condoned: if the court was not "satisfied" with respect to either matter, the court was by statute bound to dismiss the petition. I think it must follow that the only evidence that could be "sufficient" to negative condonation would be evidence that "satisfied" the court that the husband had not "condoned."

My Lords, the word "satisfied" is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not

strengthen it: nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When Parliament has ordained that a court must be satisfied only Parliament can prescribe a lesser requirement. No one, whether he be judge or juror, would in fact be "satisfied" if he was in a state of reasonable doubt. It may be, however, that in some sets of circumstances and in regard to some issues the stage of being satisfied (and so eliminating reasonable doubt) is much more easily reached than in others. The measure of what is a "reasonable" doubt will also vary with the circumstances. But the standard of proof has been laid down by Parliament when it directs that a court must be "satisfied." In *Bater* v. *Bater* [4] (in which case all three Lords Justices agreed that where a court had to be satisfied in regard to an allegation of cruelty, it was no misdirection to state that the petitioner must prove her case beyond reasonable doubt) Bucknill L.J. said [5]:

> "I do not understand how a court can be satisfied that a charge has been proved (and the statute requires that the court shall be satisfied before pronouncing a decree) if, at the end of the case, it has a reasonable doubt in its mind whether the case has been proved. To be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind."

To the same effect were some words of the Lord Justice in *Davis* v. *Davis*.[6] In reference to the words "satisfied on the evidence that the case for the petition has been proved" he said [7]:

> "I understand that to mean that, if there is any reasonable doubt at the end of the case, then the burden of proof has not been discharged and the decree ought not to be granted."

Those views were endorsed in speeches in your Lordships' House in *Preston-Jones* v. *Preston-Jones*,[8] where the meaning of the word "satisfied" came directly in issue. In that case the husband's allegation that his wife had committed adultery was based solely on the circumstance that during the period between 186 and 360 days before the birth of a child to her he had been continuously absent abroad. It was argued on behalf of the wife that proof beyond reasonable doubt that she had committed adultery would not suffice and that the husband could only succeed if he proved scientifically that it was impossible for him to be the father. That

[4] [1951] P. 35; 66 T.L.R. (Pt. 2) 589; [1950] 2 All E.R. 458, C.A.
[5] [1951] P. 35, 36.
[6] [1950] P. 125; [1950] 1 All E.R. 40, C.A.
[7] [1950] P. 125, 127.
[8] [1951] A.C. 391; [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124, H.L.(E.).

contention was not accepted. Lord MacDermott referred to the duty of the court to be satisfied on the evidence, and having pointed out [9] that the evidence must be "clear and satisfactory, beyond a mere balance of probabilities" he added:

> "If a judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence relied upon by a petitioner as ground for divorce, he must surely be 'satisfied' within the meaning of the enactment, and no less so in cases of adultery where the circumstances are such as to involve the paternity of a child. On the other hand, I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word 'satisfied' is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry."

Lord Simonds was in agreement with Lord MacDermott. In his speech [10] he referred to the fact that in that case a finding of adultery would in effect bastardise the child and he made his view clear that, for a court to be satisfied, there had to be proof which established a matter beyond all reasonable doubt. Lord Morton of Henryton in his speech [11] said that the burden of proof of adultery was certainly no heavier than proof beyond reasonable doubt: he added that counsel for the appellant had not contended that it was any lighter. He said [12] that the test of being satisfied beyond a reasonable doubt was the correct one and [13] that, when expert evidence is given, it must be weighed with care "in order to ascertain whether the husband has proved his case beyond reasonable doubt."

My Lords, the jurisdiction in divorce is statutory and by statute certain duties are imposed upon the court. There is no occasion to seek to compare or to equate the jurisdiction in divorce with jurisdiction in either criminal or in other civil matters. Parliament has imposed a duty on the court to inquire as to condonation. Then if the court is "satisfied" as to certain separate questions (*a*) that the case for the petition has been proved, and (*b*) (where the ground of the petition is adultery) that the petitioner has not in any manner been accessory to or connived at or condoned the adultery, then the court "shall" pronounce a decree of divorce: if the court is not "satisfied" with respect to any of those matters then the court "shall" dismiss the petition.

[9] [1951] A.C. 391, 417.
[10] Ibid. 399, 401.
[11] Ibid. 412.
[12] Ibid. 413.
[13] Ibid. 415.

My Lords, having regard to the imperative words of the statute I find it impossible to accept the contention that the word "satisfied" means one thing at one moment and something different at another. As applied to the present case, it cannot mean that the court had to be satisfied that the wife committed adultery but need only be half satisfied or not quite satisfied that the husband had not condoned it. If it is thought that the requirements are strict, the remedy would lie in a change of, but not in the disregard of, the law.

What, then, should be the result in the present case of obeying the statutory directions? Without seeing and hearing the husband, no view can be satisfactory. He sought to prove that he had not condoned. He sought to "negative the necessary intent"—which I take to mean that he sought to show that he never meant to forgive his wife or to reinstate her. The nature of condonation was described by Viscount Simon L.C. in his speech in *Henderson* v. *Henderson*.[14] "It is," he said, "the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven."

On the one hand, it is said that (on an acceptance of what the husband stated in his evidence, rather than what the wife put in her statement) there was but the one casual act of intercourse, that it was unpremeditated, that it was the consequence of a chance meeting, that there was at the time no mention of forgiveness or discussion as to a resumption of married life, that it came about unexpectedly by reason of some allurement by the wife, and that the husband said many years later that he had not intended to forgive her or to remit her offences. The sum total of that, it is urged, is that the learned commissioner could have held that there was evidence sufficient to negative the necessary intent and accordingly that he could have proclaimed himself satisfied that the husband had not in any manner condoned his wife's adultery.

There is much to be said which could lead to a contrary conclusion. The act of intercourse was evidence of condonation. Until section 1 of the Act of 1963 was enacted it was conclusive evidence. After that section came into force, it was still weighty evidence of condonation. Weightier evidence to rebut the conclusion of condonation would seem to be demanded. It became necessary to consider what the husband said about it. I have set out his answers. He said that he did not intend to forgive or remit "the offences that she had committed." The quality of his attitude was revealed

[14] [1944] A.C. 49, 57.

when, in reference to what were described as her "offences," he said: "We did not even trouble about it." He appears to have regarded her "offences" as lightly as he did his own. No great effort or measure of forgiveness would be needed on his part to remit that which seemed to him to be of so little account. His real and doubtless genuine concern seems to have been to persuade his wife to return to him. He always lived in hopes that she would. The continuance of these hopes and the continuance of his efforts to persuade her to return to him might suggest that his protestation that all the time he had not forgiven her was somewhat hollow. It would do him little credit if it must be thought of him that during all the time when he was ardently pressing his wife to return to him he was secretly preserving an attitude that she was a guilty party whose "offences" (committed over seven years before the date of his petition) he had in no wise intended to "forgive." One view of the case might be that he had in fact forgiven her but that in spite of forgiveness and reinstatement amounting to condonation, his wife was unwilling to return to him. It may be that a dissolution of this marriage is now desirable, but the case must be decided on the basis of the allegations in fact made in the petition which was presented and on the basis of the law which prevails and which must be honoured.

As between the two possible views of the case which I have endeavoured to summarise, a decision one way or another fell to be made after hearing and assessing the husband's evidence. Without seeing and hearing the husband I would find it unsatisfactory to seek to reach decision. Had the learned commissioner ruled that all the husband's evidence was admissible he would have held on a rather slender balance of probabilities that the husband did not intend to condone. On that very limited finding, which Willmer L.J. described[15] as a "charitable" one based upon a balance which, he said,[16] must have been "slender indeed" and which finding rather surprised Harman L.J., it would seem that the learned commissioner had such an element of doubt that he was not "satisfied." He was unable to say, or at least he did not say, that he was satisfied. I have wondered whether in order to avoid any conceivable risk of injustice to the husband it would be appropriate to remit the case for elaboration of the finding. There are, however, difficulties in that course, for the learned commissioner, having heard the petition fully and having weighed the matter, expressed himself in a reserved judgment in language which seems to suggest

[15] [1965] P. 411, 427.

[16] Ibid. 425.

that he was not satisfied. As, however, I understand that the majority of your Lordships take a different view of the case, no question of sending the case back can arise. For my part, I find the judgments of Willmer and Harman L.JJ. entirely compelling and accordingly I would dismiss the appeal.

LORD MORTON OF HENRYTON. My Lords, three questions arose for decision in the Court of Appeal. The first question was, did section 1 of the Matrimonial Causes Act, 1963, enable the appellant husband to give evidence negativing the presumption of condonation which arose from his sexual intercourse with his wife in 1958?

My Lords, I feel no doubt that the Court of Appeal was right in deciding that the evidence given by the husband was admissible. The contrary was not argued in this House and I see no answer to the reasoning of Willmer and Harman L.JJ.

The second question was—what meaning should be given to the word "satisfied" in statutes dealing with matrimonial causes and, in particular, in section 4 (2) of the Matrimonial Causes Act, 1950? The relevant portion of that subsection is as follows:

> "If the court is satisfied on the evidence that—(*a*) the case for the petition has been proved; and (*b*) where the ground of the petition is adultery, the petitioner has not in any manner . . . condoned, the adultery . . . the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition."

My Lords, apart from authority I should have thought that no judge can be "satisfied," in the natural meaning of the word, if he feels a reasonable doubt on the matter in question. If a judge says to himself: "I feel a doubt on this matter and, in my opinion, the doubt is a reasonable one," can he possibly go on to say that he is satisfied? I think not. If, on the other hand, the statute uses the words "finds" or "holds" or "decides," it is clearly open to a judge to give a decision on the balance of probabilities. I do not seek to add the words "beyond reasonable doubt" to the word "satisfied" for I think that these words are implicit in the word which has been used in the statute.

In the case of *Preston-Jones* v. *Preston-Jones*[17] this House considered the meaning of the word "satisfied" in section 4 (2) (*a*) of the Act of 1950. Lord MacDermott expressed the view[18] that in respect of a ground for dissolution of marriage the word "satisfied" was not capable of connoting "something less than proof

[17] [1951] A.C. 391.

[18] Ibid. 417.

beyond reasonable doubt." Lord Simonds[19] expressed his agreement with this view and I think it is clear that Lord Oaksey and I took the same view.[20] Further, as Willmer L.J. pointed out in the present case,[21] "the word 'satisfied' governs both limbs of the subsection," and I find it impossible to give one meaning to the word when it is applied to limb (*a*) and another meaning when it is applied to limb (*b*). For these reasons, my Lords, I am of opinion that the word "satisfied" in section 4 (2) of the Act of 1950 means "satisfied beyond reasonable doubt."

The third question arises if my view on the second question is correct. The learned commissioner said in his judgment:

> "If the evidence in question" (that is, the evidence of the husband that he did not intend to condone his wife's adultery with the co-respondent) "were to be taken into account, I would find on a rather slender balance of probabilities that the husband did not intend to condone the adultery."

I think that the words just quoted make it clear that the learned commissioner was not satisfied "that the petitioner had not in any manner condoned the adultery." He obviously felt great doubt upon the matter. Counsel for the appellant husband suggested in this House that the doubt which the learned commissioner felt was not a "reasonable" doubt having regard to the evidence given by the appellant at the trial. My Lords, if the learned commissioner had accepted the earlier part of the evidence given by the appellant he could not have felt any doubt at all, but one significant comment which fell from him indicates that he had doubts about accepting it. At page 19 (C) of the transcript of proceedings Mr. Ives, counsel for the appellant, put the following questions to him:

> "Q. The petition was not actually filed until December, 1962, which is, of course, some years after you and your wife ceased to live together, and some years, according to what you are saying, after this occasion when you visited her house and had intercourse. Why did you not start proceedings before? What was the delay?
>
> A. I always lived in hopes that there would be some way we could get together.
>
> The commissioner (to counsel): That does not help you very much on the question of his state of mind when he had intercourse with his wife.
>
> Mr. Ives: After that occasion when you had had intercourse with her, did you sometimes see her?
>
> A. Yes. We often spoke to each other. On one occasion I talked it over with her mother, and I found that my wife was

[19] [1951] A.C. 391, 401.

[20] Ibid. 409, 413.

[21] [1965] P. 411, 426.

swayed more towards her mother than towards me. I found that no matter what I said or tried to do, she would not come round to my way of thinking."

My Lords, I find it impossible to say that the doubt so clearly expressed in the learned commissioner's judgment, after he had seen and heard the witness, was not a reasonable doubt.

I would dismiss the appeal.

LORD DENNING. My Lords, on March 23, 1940, the parties married. In 1954 and 1955 the wife committed adultery and left the husband. In 1958 the husband had sexual intercourse with his wife on one occasion. He had no intention of forgiving her for her past adultery, though he always hoped there would be some way in which they could get together. They never did so. On December 13, 1962, the husband brought a petition for adultery against his wife. In the state of the law at that time, his one act of sexual intercourse was conclusive evidence that he had condoned the adultery: see *Henderson* v. *Henderson*.[22] But on July 31, 1963, Parliament enacted section 1 of the Matrimonial Causes Act, 1963, which said that:

> "Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent."

The husband's petition came on for hearing on November 9, 1964, after that Act was passed. Mr. Commissioner Gallop Q.C. held that section 1 of that Act was not retrospective and that the evidence of the husband (to negative an intent to condone) was not admissible: but he added that, if the evidence were to be taken into account, he would find "on a rather slender balance of probabilities that the husband did not intend to condone the adultery."

I think that the commissioner was wrong in holding that the evidence was not admissible. The rule that an Act of Parliament is not to be given retrospective effect only applies to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure, or the admissibility of evidence, or the effect which the courts give to evidence.

Once the evidence is held admissible, the question arises whether it was sufficient to negative condonation. The Act of 1963 is not, I think, to be construed in isolation. It is to be construed as

[22] [1944] A.C. 49.

one with the Act of 1950. Accordingly, section 4 of the Act of 1950 applies to this case. Seeing that the ground of the petition is adultery, before pronouncing a decree of divorce, the court has to be "*satisfied* on the evidence that (*a*) the case for the petition has been proved; and (*b*) the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery."

What is the meaning of the word "satisfied" in section 4 of the 1950 Act? Willmer and Harman L.JJ. have held that it means "satisfied beyond reasonable doubt" and that, on the finding of the commissioner, the evidence in the present case did not come up to that standard. I can well understand how, sitting in the Court of Appeal, the Lords Justices took that view. Some years ago in 1950 in *Preston-Jones* v. *Preston-Jones*,[23] Lord MacDermott expressed the view that, in respect of a ground for dissolution, the word "satisfied" was not capable of connoting "something less than proof beyond reasonable doubt." Proof beyond reasonable doubt was required. Lord Simonds[24] expressed his concurrence. And in *Hornal* v. *Neuberger Products Ltd.*[25] Hodson L.J. said that the House of Lords has held that the words of the Act of 1959 "produce the same result as the rule in criminal cases." In the present case the Lords Justices took the next logical step. They said that the word "satisfied" must mean the same throughout section 4. If it meant that the petitioner must prove adultery beyond reasonable doubt, so also it meant that he must prove beyond reasonable doubt that he had not condoned the adultery.

The logic of the Lords Justices is impeccable. The error lies in what Lord MacDermott said in 1950. It was said obiter and without argument. I cannot think he would have said it if he had been taken, as your Lordships have been, through the other sections of the Act where the word "satisfied" is used. It then becomes plain that the word "satisfied" deals only with the incidence of proof, not with the standard of proof. It shows *on whom* the burden lies to satisfy the court, and not the degree of proof which he must attain. The best example of this is in regard to connivance. The court has to be "satisfied" that the petitioner has not in any manner connived at the adultery. That clearly puts the burden on him to prove a negative—to prove that he was not guilty of connivance —to prove that he was innocent of it. Can anyone seriously suggest that he has to prove his innocence beyond reasonable doubt? Surely it is sufficient if the scales tip the balance in his favour.

[23] [1951] A.C. 391, 417.
[24] Ibid. 401.
[25] [1957] 1 Q.B. 247, 264; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970, C.A.

There are occasions, even in the criminal courts, where the burden of proof lies on the accused man to prove his innocence, or to prove a negative. He is never bound to prove it beyond reasonable doubt. It is sufficient if the balance of probability is in his favour: see *Sodeman* v. *The King*,[26] a decision of the Privy Council, and *Rex* v. *Carr-Briant*.[27] So also with connivance. The petitioner discharges the burden on him by showing that on balance of probability he did not connive. He only fails to discharge this burden if the tribunal finds the evidence, pro and con, so evenly balanced that it can come to no definite conclusion: see *Churchman* v. *Churchman*[28] by du Parcq L.J.

I hold, therefore, that in this statute the word "satisfied" does not mean "satisfied beyond reasonable doubt." The legislature is quite capable of putting in the words "beyond reasonable doubt" if it meant it. It did not do so. It simply said *on whom* the burden of proof rested, leaving it to the court itself to decide what standard of proof was required in order to be "satisfied."

This brings me to the standard of proof required by the court itself. In 1948 it was held by the Court of Appeal that adultery "must be proved with the same strictness as is required in a criminal case. That means that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact": see *Ginesi* v. *Ginesi*.[29] But in the same year, 1948, the High Court of Australia refused to follow that case and held that adultery required proof of the standard required in a civil case: see *Wright* v. *Wright*.[30] Dixon J. (as he then was) said [31]:

> "While our decision is that the civil and not the criminal standard of persuasion applies to matrimonial causes including issues of adultery, the difference in the effect is not as great as is sometimes represented. This is because, as is pointed out in the judgments in *Briginshaw* v. *Briginshaw*,[32] the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue and because the presumption of innocence is to be taken into account."

After that decision, I ventured to suggest that the Court of Appeal should reconsider *Ginesi* v. *Ginesi*,[33]: see *Gower* v. *Gower*[34]; and

[26] [1936] 2 All E.R. 1138; [1936] W.N. 190, P.C.
[27] [1943] K.B. 607; 59 T.L.R. 300; [1943] 2 All E.R. 156, C.C.A.
[28] [1945] P. 44, 52; 61 T.L.R. 464; [1945] 2 All E.R. 190, C.A.
[29] [1948] P. 179, 181; 64 T.L.R. 167; [1948] 1 All E.R. 373, C.A.
[30] (1948) 77 C.L.R. 191.
[31] Ibid. 210.
[32] (1938) 60 C.L.R. 336.
[33] [1948] P. 179.
[34] (1950) 66 T.L.R. (Pt. 1) 717; [1950] 1 All E.R. 804, C.A.

in any case it should not be extended to cruelty: see *Davis* v. *Davis*.[35]

Sitting in this House, I feel at liberty to say that I prefer *Wright* v. *Wright*[36] to *Ginesi* v. *Ginesi*.[37] This House held in *Mordaunt* v. *Moncrieffe*[38] that the analogies and precedents of criminal law have no authority in the Divorce Court, a civil tribunal. It is wrong, therefore, to apply the analogy of criminal law. We should not say that adultery must be proved with the same strictness as is required in a criminal case. We should say simply that it must be proved to the satisfaction of the court.

So far as the standard of proof is concerned, I would follow the words of Dixon J. which I have quoted and which I elaborated in *Bater* v. *Bater*[39] with the approval of the Court of Appeal in *Hornal* v. *Neuberger Products Ltd.*[40] In short it comes to this: so far as the *grounds* for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear. So far as the *bars* to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability he did not connive or condone or as the case may be.

This means that the decision of the Court of Appeal was erroneous. It required the husband to prove beyond reasonable doubt that he had not condoned the adultery; whereas no such proof was required. It was sufficient that the commissioner found that the husband did not intend to condone the adultery, even though he did it "on a rather slender balance of probabilities." But I must say that, on the evidence, I should be satisfied myself beyond a doubt that he did not condone the adultery. Condonation involves forgiveness and reinstatement of the erring spouse. The evidence negatived both. The husband described the incident.

> "Within a short time she had undressed herself and placed herself upon the rug in front of the fire. She invited me to have intercourse with her. As a man, torment got the better of me, and we did have intercourse. We had a cup of tea, and I left the house."

As to forgiveness—"we did not even trouble about it." No forgiveness. No reinstatement. No condonation.

I would, therefore, allow the appeal and pronounce a decree nisi on the ground of the wife's adultery.

[35] [1950] P. 125.
[36] 77 C.L.R. 191.
[37] [1948] P. 179.
[38] (1874) L.R. 2 H.L.Sc. & Div. 374.
[39] [1951] P. 35.
[40] [1957] 1 Q.B. 247.

LORD PEARCE. My Lords, the Court of Appeal were plainly right in their conclusion that the husband was entitled by section 1 of the Matrimonial Causes Act, 1963, to give evidence at the trial to negative any implication of condonation from the sexual intercourse which, apart from the Act, would be conclusive. As Willmer and Harman L.JJ. pointed out in their clear exposition of the relevant arguments, the section looks forward to the conduct of all future trials regardless of whether the acts in question occurred before or after the passing of the Act.

On the second point, however (on which Winn L.J. expressed his doubts), I do not find myself in agreement with them either as to the standard of proof required to negative condonation or as to the effect of the evidence.

The story was simple and not wholly unfamiliar in this type of case. The commissioner apparently believed the husband's evidence and there seems no particular reason why he should not. The parties were living apart after acts of mutual infidelity and there were various applications about maintenance and custody in the magistrates' court. The husband did not take divorce proceedings because he "always lived in hopes that there would be some way that we could get together." But in the incident in question there is no trace of any talk of forgiveness or reinstatement or of living together again. They met in the street by chance and the wife invited him to the house where she was living with the child of the marriage and another child which she had by another man. She asked him to help her to put up the Christmas decorations. She told him she had had an operation on her womb and offered to show him the scar. When he showed no interest, she took off her clothes, lay down on the rug in front of the fire and asked him to have intercourse with her. Then, in the husband's own words, "As a man, torment got the better of me, and we did have intercourse. We had a cup of tea, and I left the house upon my son arriving home." There was no talk whatsoever about his forgiving her. The husband was emphatic on this. And he added, "No sir, we did not even trouble about it."

This would be a strange kind of forgiveness and reinstatement. Why, when the wife was tempting him, did she not say: "Come on, let's make it up"? Why, when it was over, did she not say: "Won't you stay on with me now?" Why did the husband not say something to the like effect? Yet nothing was said about forgiveness, or making it up or living together in the future.

Parliament has deliberately got rid of the irrebuttable presumption of condonation which was finally laid down by this House in

Henderson v. *Henderson*.[41] Though there was much to be said in favour of it, there was much against it. It allowed a guilty woman to make capital out of a deliberate seduction of a weak-willed husband. But its worst effect was that it hindered reconciliation since it prevented a cautious and well-advised husband from approaches to his wife which might lead to his having sexual intercourse with her (or to his being alleged by her to have had sexual intercourse) when she had no real intention of reconciliation. The object of the Act of 1963 is plainly to facilitate reconciliation. To that end it allows the court to weigh the sexual act in question in the light of truth and common sense without any irrebutable presumption.

Forgiveness and reinstatement involve matters of the mind. When men and women of self-control have intercourse in normal circumstances, there is a very strong inference that their bodies go with their minds and set the seal on reconciliation and forgiveness. But the divorce courts have to deal very often with persons who have little self-control, and whose minds and bodies are not always co-ordinated. In dealing with such persons one has to be careful not to cause injustice by drawing mental inferences more suitable to persons who are better co-ordinated and more self-controlled.

The husband (if the commissioner was right in accepting his evidence) was not interested in his wife's preliminary suggestion, but finally yielded to her naked invitation on the rug, being carried away by his passions and having not a single thought about forgiveness or reinstatement. From that sexual episode by itself in its particular circumstances I draw little, if any, inference. But from the absence of any talk at all about reconciliation or the future either in her earlier advances, or, later over the cup of tea, or finally when he was taking his departure, I draw a very strong inference that neither regarded this as effecting a reinstatement or, to use language which the parties would use, a reconciliation. If during or after their passionate interlude they did not even pay some sentimental lip-service to reconciliation, it must have been far from the minds of both. For that reason I would myself feel satisfied beyond reasonable doubt that there was no condonation.

The wider and more important question, however, is whether in all cases the court must be satisfied beyond reasonable doubt that there has been no condonation. If it must, the law on this subject is in an unsatisfactory state. The court, while believing (albeit

[41] [1944] A.C. 49.

without certainty) that a husband has *not* condoned, must hold that he *has* condoned in so far as it refuses him a relief to which it thinks him to be entitled on the real merits. As between parties the court must award the victory to the one who, it thinks, is not really entitled to it. Since the Act of 1963 has made condonation a complete end of the matter, beyond the possibility of a revival, the injustice of such behaviour by the court strikes all the harder. And since condonation is a matter frequently conducted in private, if not in a bedroom, the court may often be faced with the fact that though it probably knows the correct answer, it cannot feel sure.

Moreover, it is clear that if this be the position with regard to condonation, so, too, must it be with regard to connivance. It is admitted that there can be no ground for treating connivance differently in this respect from condonation. Connivance carries a stigma which many would consider far graver than adultery itself, and certainly graver than mere desertion. Yet the court must, so the argument runs, smear a man with the guilt of connivance by refusing him a decree on that ground, when it believes him (albeit without any certainty) to be guiltless. Both as between the parties and as between the petitioner and the court, this would be a grave injustice. I find myself quite unable to accept so regrettable a situation unless compelled by clear binding authority or by the express words of an Act of Parliament. So far as the statute is concerned there are no such words. The mischief is created by writing into a statute words which are not there and which could easily have been inserted had Parliament so intended—the words "beyond reasonable doubt."

I think Parliament did not intend the section to define the degree of proof which is necessary to satisfy the court. The section merely informs the court what must be proved and by whom to the satisfaction of the court.

I cannot accept the argument that the repetition of the word "satisfied" in the various sections is a constant reminder of the great weight of the proof to be attached to such serious matters as those with which the various reliefs contained in the Act are concerned. The word "satisfied" is a neutral word which leaves to the court the duty of assessing its own satisfaction. I would rather regard "satisfied" as expressing a minimum, such as is needed by any court in giving any relief in any interlocutory, procedural or final matter in civil or other proceedings. And it is, I think, to be found in many statutes or rules of court even in trivial matters.

It is to the common law and not to the statute that one must look for any authority which binds a judge to be satisfied in certain cases with nothing less than a proof beyond reasonable doubt. The courts have held that cogent evidence is required for proof of adultery. (Albeit, as I think, the proof demanded is not that demanded in criminal cases and I agree with the observations by my noble and learned friend, Lord Denning, as to the cases of *Ginesi*[42] and *Wright*.[43]) And on other matters with which your Lordships are not here concerned, the courts have expressed views as to the cogency of proof demanded. I find nothing which conflicts with this view in the decision itself in *Preston-Jones*.[44] That case was not concerned immediately with the question here in issue. The real question was whether, on the assumption that proof beyond reasonable doubt was needed to establish adultery, such proof had been forthcoming on the evidence under review. Lord Simonds there emphasised[45] how strictly the courts "from time out of mind" had regarded proof where the adultery issue involved the bastardisation of a child, and he appeared to think that this, rather than the statute, was the cogent factor. But he also agreed with the opinion of Lord MacDermott, who used words which were relied on as establishing that the need for proof beyond reasonable doubt was based on the construction of the word "satisfied" in the statute, as opposed to the particularity of the question to be decided. But he was there regarding the word "satisfied" in the context of proof of adultery. I do not regard his observation as necessarily inconsistent, or intended to be inconsistent, with the view that in other less serious matters to be investigated under the section a court could be satisfied with less cogent evidence. I do not believe that he would have so expressed himself had he anticipated that his words would be used to assert that proof of innocence of connivance, which is a wholly different matter, could not be established on a mere balance of probabilities.

I entirely agree with the judgment of Denning L.J. in *Bater*[46] approved in *Hornal* v. *Neuberger Products Ltd*.[47]:

> "The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable

[42] [1948] P. 179.
[43] 77 C.L.R. 191.
[44] [1951] A.C. 391.
[45] Ibid. 400.
[46] [1951] P. 35, 36–37.
[47] [1957] 1 Q.B. 247.

doubt, but there may be degrees of proof within that standard. As Best C.J., and many other great judges have said, 'in proportion as the crime is enormous, so ought the proof to be clear.' So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion."

Too close a judicial self-analysis is not helpful in deciding the issue. And when a judge begins to doubt whether or not he has reasonable doubts it obscures rather than clarifies his difficult task.

If, therefore, one approaches the section as it was enacted, without writing any words into it, it makes clear and sensible provision. The court must be "satisfied"; and in the case, for instance, of adultery it will, on ordinary legal principles and not for statutory reasons, need cogent proof. But since it cannot give decrees where there may be condonation or connivance, it must inquire into these and satisfy itself that they do not exist. But the court on ordinary legal principles would not insist on disproof beyond reasonable doubt on such a matter as connivance if, on a balance of probabilities, it believes a man innocent.

I cannot agree that there is only one issue, namely, has the husband proved uncondoned adultery free from connivance, and that therefore the need for proof beyond reasonable doubt must apply to every aspect of this one issue. There are separate issues to be proved and only successful proof of them all will result in relief being given. But that does not affect the question: what degree of proof will satisfy a court in respect of each issue? With regard to the non-existence of condonation and connivance the court is, in my opinion, entitled to be satisfied on a balance of probabilities.

I would therefore allow the appeal and pronounce a decree nisi on the ground of the wife's adultery.

LORD PEARSON. My Lords, the first question is whether section 1 of the Matrimonial Causes Act, 1963, applies at all to this case, in which both the event which might constitute condonation and also the filing of the petition took place before the coming into force of the Act, but the trial took place after it. The section provides:

> "Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent."

The crucial question is whether the section is dealing with a rule of evidence and therefore of procedure or with a rule of substantive law. Willmer L.J. has shown in his judgment [48] that the former rule was treated in the decided cases as a rule of evidence. The section itself treats the new rule which it introduces as a rule of evidence, because it provides for a presumption to be rebuttable by certain evidence. As Harman L.J. said [49]:

> ". . . where an Act is dealing with a matter of the admissibility of evidence, it points quite clearly to the date of the trial, and the date of the happening of the event of which evidence may or may not be given is in truth irrelevant. This is not in my judgment really retrospective legislation at all, but an instruction to the court to be observed at the hearing of suits before it."

I agree with the decision of the Court of Appeal that the section applies to this case. The contrary has not been argued in this appeal.

The second question arises out of the form of the learned commissioner's finding in relation to condonation. It was a hypothetical finding, because on his view of the law section 1 of the Act of 1963 did not apply to this case and the evidence as to intent could not be taken into account. He said:

> "If the evidence in question were to be taken into account, I would find on a rather slender balance of probabilities that the husband did not intend to condone the adultery."

The words "on a rather slender balance of probabilities" raise a question as to the standard of proof, or the degree of satisfaction in the mind of the court, required for establishing absence of condonation in a divorce suit. Although section 1 of the Act of 1963 has some bearing and will be referred to in this connection later, the provision primarily concerned is subsection (2) of section 4 of the Matrimonial Causes Act, 1950. The first part of that subsection provides as follows:

> "If the court is satisfied on the evidence that—(*a*) the case for the petition has been proved; and (*b*) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and (*c*) the

[48] [1965] P. 411, 424–425. [49] Ibid. 430.

petition is not presented or prosecuted in collusion with the respondent or either of the respondents; the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: . . ."

The Court of Appeal have decided the question on the basis that it involves and depends upon the construction of that subsection. They have taken *Preston-Jones* v. *Preston-Jones* [50] as showing that "satisfied" in relation to a charge of adultery means "satisfied beyond reasonable doubt." Then they have said that, as the word "satisfied" has that meaning in relation to a charge of adultery, it must as a matter of construction equally have that meaning in relation to proving absence of connivance, absence of condonation and absence of collusion. Also they have said that the court really has to decide a single question, namely, whether it is satisfied that adultery, uncondoned and not connived at, has been committed, and, in deciding that single question, the satisfaction required is satisfaction beyond reasonable doubt. Accordingly, on their view as to the standard of proof required, there was not a sufficient finding in this case.

For several reasons I am unable to agree with the reasoning of the Court of Appeal.

(1) The phrase used in section 4 (2) of the Act of 1950 is simply "is satisfied," with no adverbial qualification. The formula "satisfied beyond reasonable doubt" has been a very familiar one for a great many years, and, if that meaning had been intended, the formula could and should have been used. The phrase "is satisfied" means, in my view, simply "makes up its mind"; the court on the evidence comes to a conclusion which, in conjunction with other conclusions, will lead to the judicial decision. There is no need or justification for adding any adverbial qualification to "is satisfied." If the phrase is thus allowed to have its natural and ordinary meaning, there is no difficulty in giving the same meaning to that phrase in relation to each of the matters specified in subparagraphs (*a*), (*b*) and (*c*) of the subsection. The degree or quantum of proof required by the court before it comes to a conclusion may vary according to the gravity of the subject matter to which the conclusion relates, but in relation to each subject matter the specified conclusion is reached or not reached by the end of the trial: the court either is or is not satisfied on each point. Willmer L.J.[51] referred to the argument that the degree of proof required to satisfy the court must be commensurate with the gravity of the

[50] [1951] A.C. 391.

[51] [1965] P. 411, 426.

matter in issue. He referred to *Hornal* v. *Neuberger Products Ltd.*[52] and to the statement of principle by Denning L.J. in *Bater* v. *Bater*.[53] He then said [54]:

> "Applying this approach, it can be urged that, although in either case the court must be 'satisfied,' a lesser degree of proof is required to satisfy the court that the presumption of condonation has been rebutted than would be required to satisfy it that a matrimonial offence has been committed. This is an attractive line of argument, but on consideration I do not think that it is acceptable."

Respectfully I agree with Willmer L.J.'s statement of the argument, but disagree with his rejection of it. I accept the argument.

(2) The opinions expressed in *Preston-Jones* v. *Preston-Jones* [55] by Lord Simonds,[56] by Lord Oaksey [57] and by Lord MacDermott,[58] to the effect that proof beyond reasonable doubt is required for establishing a charge of adultery, were based upon the gravity of the subject matter rather than upon any point of wording or construction in section 4 of the Act of 1950. Lord MacDermott said [58]:

> "I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely that on its true construction the word 'satisfied' is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict enquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be 'satisfied,' in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt* v. *Moncrieffe* [59] that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."

Although Lord MacDermott was not considering any question as to the degree of satisfaction or the standard of proof required under

[52] [1957] 1 Q.B. 247.
[53] [1951] P. 35, 36–37.
[54] [1965] P. 411, 426–427.
[55] [1951] A.C. 391.
[56] Ibid. 400–401.
[57] Ibid. 409.
[58] Ibid. 417.
[59] L.R. 2 H.L.Sc. & Div. 374.

sub-paragraphs (*b*) and (*c*) of section 4 (2), I wish to call attention to his statement [60] that

> "it would be quite out of keeping . . . to hold that the court might be 'satisfied,' in respect of a ground of dissolution, with something less than proof beyond reasonable doubt."

This language is consistent with the view that the word "satisfied" does not, as a matter of interpretation, mean "satisfied beyond reasonable doubt," and that the requirement of proof beyond reasonable doubt may be limited to the grounds for dissolution and may not extend to the matters referred to in sub-paragraphs (*b*) and (*c*). A similar approach to the question can be seen in the judgment of du Parcq L.J. in *Williams* v. *Williams*,[61] where he said:

> "Desertion without cause is no technical offence. It is nothing less than a total repudiation of the obligations of marriage. The law can never regard it lightly. The court should always insist that it must be strictly proved."

(3) If absence of condonation has to be proved beyond reasonable doubt, so also must absence of connivance and absence of collusion. Connivance or collusion constitute serious misconduct. It would be remarkable, and perhaps unprecedented, if a party were required to give proof beyond reasonable doubt that he was not guilty of serious misconduct. I should be reluctant to give that effect to the statute.

(4) Section 4 (2) of the Act of 1950 follows section 4 of the Matrimonial Causes Act, 1939, which, by substituting a new section for section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, altered the incidence of the burden of proof with regard to connivance, condonation and collusion. Under sections 29–31 of the Matrimonial Causes Act, 1857, and section 178, as originally enacted by the Act of 1925, the petitioner would not be barred from relief unless the court found that there had been connivance, condonation or collusion. Under the Act of 1937 and under the Act of 1950 the petitioner fails unless the court is satisfied that there has been no connivance, condonation or collusion. The evident intention of the relevant provision (formerly contained in section 4 of the Act of 1937 and now section 4 (2) of the Act of 1950) is to regulate the incidence of the burden of

[60] [1951] A.C. 391, 417.

[61] (1943) 113 L.J.P. 18, 24; [1943] 2 All E.R. 746, C.A.

proof and not to prescribe the degree or quantum of proof required, which is not mentioned in the provision.

(5) The subject of condonation is specially dealt with in the Act of 1963, and that Act is by section 7 (2) to be read as one with the Act of 1950. Therefore, section 4 (2) of the Act of 1950 now has to be read in conjunction with section 1 of the Act of 1963 which provides that the presumption may be rebutted "by evidence sufficient to negative the necessary intent." That provision does not say how much is to be enough, but the language of it is difficult to reconcile with the supposition that absence of condonation has to be proved beyond reasonable doubt. Moreover, one of the objects of the Act of 1963, as appears both from its long title and from section 2, is to facilitate reconciliation in matrimonial causes. A husband's efforts at reconciliation, naturally involving attempts to regain the affection and love of his wife, would be seriously hampered if, in order to preserve his right to a divorce on failure to secure a reconciliation, he had to bear in mind that he must not do anything which would even raise doubts whether he may not have had an intention to condone his wife's misconduct.

(6) I do not see that anything is to be gained by treating the separate questions which have to be decided under section 4 (2) of the Act of 1950 as amalgamated into a single, composite, rolled-up question. The questions arise under separate heads of the subsection, and would often fall to be decided on different parts of the evidence, and would naturally be considered and decided separately.

As to the facts, the learned commissioner's finding, though introduced by the words "on a rather slender balance of probabilities," is a clear finding that the husband did not intend to condone the wife's adultery. He was therefore able to come to a definite conclusion on this question: he was "satisfied" within the meaning of section 4 (2) of the Act of 1950: there was "evidence sufficient to negative the necessary intent" within the meaning of section 1 of the Act of 1963. Moreover, as the learned commissioner accepted, partially at any rate, the evidence of the husband, I think that his conclusion must follow. There was only a casual act of intercourse prompted by the wife's allurement. There was no taking back of the wife into the husband's home, no resumption of cohabitation, nothing that could be regarded as a reinstatement of the wife, who was apparently not willing to be reinstated. It seems to me, in the circumstances, unnecessary to direct a further trial of the petition.

would allow the appeal and grant a decree nisi of dissolution of marriage.

Appeal allowed.

Solicitors: *Norton, Rose, Botterell & Roche for Chamberlain, Talbot & Bracey, Great Yarmouth; H.M. Procurator General and Treasury Solicitor.*

F. C.

END OF VOLUME AND OF APPEAL CASES FOR 1966.

SUBJECT-MATTER

AUSTRALIA

New South Wales

Regulations

Excavation work—Power under statute to make regulations "relating to the manner of carrying out building work, excavation work or compressed work," and "to safeguards and measures to be taken for securing the safety . . . of persons engaged in . . . excavation work"—Regulation prescribing "every drive and tunnel shall be securely protected and made safe for persons employed therein"—Whether extending scope or general operation of enactment—Validity—Scaffolding and Lifts Act, 1912–1960 (N.S.W.), ss. 22 (1), (2) (g) (iv) (v)—Scaffolding and Lifts Regulations, reg. 98.

Utah Construction & Engineering Pty. Ltd. v. Pataky, P.C. **629.**

Revenue

Income tax

Avoidance of tax—Whether agreements implemented to avoid tax—Whether capable of explanation by reference to ordinary sensible business arrangement—Income Tax and Social Services Contribution Assessment Act, 1936–1960 (Commonwealth), s. 260.

Mobil Oil Australia Ltd. v. Comr. of Taxation of the Commonwealth of Australia, P.C. **275.**

Capital or income expenditure—Payments by oil company to secure exclusive sales stations—Agreement (i)—Loan by oil company to retailer repayable with interest at fixed rate by retailer—Covenant not to dispose of interest in garage without first offering to oil company—Grant to oil company of sole and exclusive advertising rights—Oil company to pay to retailer each year sum of money equal to and to be credited against loan interest and repayments—Agreement (ii)—Annual sum payable to retailer in respect of each period of 12 months during which retailer remained in occupation and observed terms of agreement—Whether sum deductible by oil company—Income Tax and Social Services Contribution Assessment Act, 1936–1952 (Commonwealth), s. 51.

Mobil Oil Australia Ltd. v. Comr. of Taxation of the Commonwealth of Australia, P.C. **275.**

"Solo site service station system"—Lump sum paid to retailer in return for tie for a period of years—Retailer to sell only approved brands of motor spirit—Oil company's ultimate object—Character of the advantage sought—Lasting qualities—Recurrence—Manner in which the advantage to be used, relied upon or enjoyed—Means adopted to obtain the advantage—Enduring benefit—Capital structure—"Once and for all payments"—Whether allowable deductions for tax purposes—Income Tax and Social Services Contribution Assessment Act, 1936–1952 (Commonwealth), s. 51.

B.P. Australia Ltd. v. Comr. of Taxation of the Commonwealth of Australia, P.C. **224.**

BILL OF EXCHANGE

Cheque

Holder in due course

Unindorsed cheque paid by customer into company's account—Whether cheque delivered for collection—Permission to draw against uncleared effects—Whether bank gave value for cheque—Effect of paying-in slip—Cheque returned to customer to sue—Subsequent action by bank—Whether bank "holder"—Need for indorsement—"For collection"—Meaning—Cheques Act, 1957, s. 2.

Westminster Bank Ltd. v. Zang, Roskill J., C.A. and H.L.(E.) **182.**

BURDEN OF PROOF

Matrimonial cause

Civil or criminal standard

Condonation—Adultery.

Blyth v. Blyth, H.L.(E.) **643.**

sons, inclined in one part of his argument to say that that was not a sum that he could attack; I leave that out of account altogether. On the basis that the master and the judge both thought that that was a proper sum, I see no reason whatever to differ from them.

Then comes the question of what should be the effect in relation to that of the offer, the equivalent of payment into court. If the judge intended in his judgment to say that the whole amount of that offer might be taken in relation to the amount of security, I think it would be wrong. It is not altogether clear to me whether he did so mean; but the way I think it should be regarded is this: taking into account all the circumstances of the case, including the amount of the offer, is it likely that the claimants here would recover more than the sum of £1,500? Now obviously that is a question to which no certain answer could possibly be given at this stage of the proceedings, and it would be quite wrong that on an application for security for costs such details should be gone into as would enable the court to come to anything like a firm answer. What I think can be said is that on the information that the court has before it, the right conclusion is that the amount recovered would be likely to be more than that sum. For that reason I think that the proper view is that to that extent Parkinsons have in effect got security to the extent of not less than £1,500, and that therefore no order for security should be made.

I am not impressed by the argument that this would be likely to hinder parties from paying into court or making an offer such as was made by Parkinsons in this case. In any case where the plaintiff or claimant has a prospect of recovering some sum in proceedings, it is a matter of simple prudence on the part of defendants or respondents to make a payment in or an offer which will relieve them of having to pay in the long run what may be a heavy bill of costs resulting from a comparatively small award in favour of the plaintiff or claimant. For these reasons I think that the judge came to the right conclusion and I too would dismiss the appeal.

LAWTON L.J. There are now two judgments in favour of dismissing the appeal. In the ordinary way I would not have thought it appropriate to give further reasons for dismissal, but, having listened to the judgments already given, it seems to me the position is this: Lord Denning M.R. has said that in his judgment section 447 gives a general discretion to the court which is to be exercised having regard to all the circumstances of the case. Cairns L.J., however, has dealt with the problem before us on the basis of the Irish case of *Peppard and Co. Ltd.* v. *Bogoff* [1962] I.R. 180 in which Kingsmill Moore J. said, at p. 188:

> "I am of opinion that the section"—he was referring to the Companies Act 1908—"does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the court which may be exercised in special circumstances."

There being a difference of emphasis between the two judgments already given, doubt may continue as to the construction of section 447 unless something is said by me. I agree with Lord Denning M.R. that the effect of section 447 is that once it is established by credible evidence that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence, the court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straitjacket by considerations of burden of proof. It is a discretion which the court will exercise having regard to all the circumstances of the case. For those reasons I too would dismiss this appeal.

Appeal dismissed with costs in Court of Appeal and below.

Solicitors: *Church, Adams, Tatham & Co.; Pritchard, Englefield & Tobin for William H. Lill & Co., Altrincham.*

M. M. H.

[COURT OF APPEAL]

ATTORNEY-GENERAL *ex rel.* McWHIRTER *v.* INDEPENDENT BROADCASTING AUTHORITY

[1973 M. No. 255]

1973 Jan. 16; 19; 25, 26, 29; Feb. 5

Lord Denning M.R., Cairns and Lawton L.JJ.

Injunction—Relator action—Public interest—Scheduled television programme—Newspaper criticisms—Attorney-General's refusal to move ex officio for injunction—Action by private citizen to prevent showing of programme—Locus standi—Whether relator action essential

Statutory Duty—Statutory authority—Independent Broadcasting Authority—Duty to "satisfy themselves"—Scheduled television programme prima facie including indecent and offensive matter—Staff advice to authority—Newspaper criticisms—Whether authority obliged to view programme—Whether authority's decision that programme not offensive reasonable —Television Act 1964 (c. 21), ss. 3 (1) (a), 18, 24

On Monday January 15, 1973, the applicant, a member of the public, telephoned the Attorney-General's office to ask the Attorney-General to move ex officio to stop a documentary programme about an American artist and film-writer scheduled to be transmitted at 10.30 p.m. on the Independent Television network on Tuesday January 16, on the ground that its transmission would be a breach by the Independent Broadcasting Authority of its duty under section 3 (1) (*a*) of the Television

Act 1964.[1] He based his request on three newspaper criticisms of a preview of the film which described incidents included in it, and also on the advertised preamble to the film which warned that "some people" might find aspects of it "offensive." At 2 p.m. he was told that the Attorney would not move himself but that that decision was without prejudice to consideration of a request by the applicant in proper form for relator proceedings. The applicant decided, in view of the shortness of time and his understanding as to the complexity of the requirements for instituting relator proceedings, to proceed on his own. He served a writ on the authority on the morning of January 16 and applied ex parte to Forbes J. in chambers for an injunction to restrain the authority from transmitting the film that evening. The judge refused the application. The applicant appealed to the Court of Appeal, which heard him at 3.30 p.m., examined the newspaper cuttings and the relevant sections of the Act, and adjourned until 5 p.m., having directed that the authority should if possible be represented before a decision was made.

Counsel for the authority presented evidence that the programme had been subjected to careful scrutiny by the senior staff and revised with deletions but that the members of the authority had not themselves viewed it after the adverse newspaper reports.

The court were unanimously of opinion that there was prima facie evidence that the programme included matter which would contravene the requirements of section 3 (1) (*a*) of the Act, and by a majority, Cairns L.J. dissenting on the ground that the applicant had no locus standi in his own right, granted a temporary injunction; and the programme was not shown that night.

Before the order of the court had been drawn up, the authority applied for the appeal to be restored to the list for further argument. At the resumed hearing, the Attorney-General, appearing as amicus curiae on the question of the applicant's locus standi, said that he would give his consent to relator proceedings properly instituted. The authority presented evidence that its members had themselves since the interim injunction viewed the programme, as had also the General Advisory Council, and that with one dissentient had decided that the programme was suitable to be shown at the suggested time and that the authority was satisfied that it complied with the requirements of section 3 (1) (*a*) in respect of good taste, decency and offence to public feeling:—

Held, (1) that where there was a breach or threat of breach of the law affecting the public generally, a private citizen with no interest greater than that of others could only apply for an injunction if he had first obtained the fiat of the Attorney-General, who in constitutional law had an absolute discretion to decide whether or not to institute proceedings. As on the evidence the applicant had had both time and opportunity to apply for relator proceedings in the name of the Attorney-General and had elected not to do so he had no locus standi.

Sed per Lord Denning M.R. (Lawton L.J. concurring). In the last resort, if the Attorney-General refused leave in a proper case or unreasonably delayed giving leave, or if his machinery worked too slowly, a member of the public having an interest could himself apply to the court, at least for a declaration, and in a proper case for an injunction, joining the Attorney-General, if need be, as defendant (post, pp. 649F–G, 657D).

London County Council v. *Attorney-General* [1902] A.C. 165, H.L.(E.) applied.

(2) That the injunction should be discharged, for the Television Act 1964 placed on the authority the whole duty under section 3 (1) to satisfy themselves about the content of programmes, and the court could only question their decision to transmit the particular programme if it were shown that they had misdirected themselves in law or that their decision was unreasonable. Though on the original application there was a prima facie case that the authority had not done sufficient to "satisfy themselves," the evidence available on the further hearing was sufficient to require the court to hold that the decision was one which the authority could reasonably make.

Per curiam. The duty of the authority under section 3 (1) (*a*) is to consider the parts as well as the whole of a programme, though the parts may be considered in their context (post, pp. 650E–F, 652D–E, 655F–G, 658G–H).

No cases are referred to in the judgments or were cited in argument in the preliminary proceedings.

The following cases are referred to in the judgments on February 5:

Attorney-General v. *Great Eastern Railway Co.* (1879) 11 Ch.D. 449, C.A.
Attorney-General ex rel. Rhondda Urban District Council v. *Pontypridd Waterworks Co.* [1908] 1 Ch. 388.
Attorney-General v. *Westminster City Council* [1924] 2 Ch. 416, C.A.
Boyce v. *Paddington Borough Council* [1903] 1 Ch. 109.
Caldwell v. *Pagham Harbour Reclamation Co.* (1876) 2 Ch.D. 221.
Deare v. *Attorney-General* (1835) 1 Y. & C.Ex. 197.
Dyson v. *Attorney-General* [1911] 1 K.B. 410, C.A.; [1912] 1 Ch. 158, C.A.
Lewisham Metropolitan Borough and Town Clerk v. *Roberts* [1949] 2 K.B. 608; [1949] 1 All E.R. 815, C.A.
Liversidge v. *Anderson* [1942] A.C. 206; [1941] 3 All E.R. 338, H.L.(E.).
London County Council v. *Attorney-General* [1902] A.C. 165, H.L.(E.).
Prescott v. *Birmingham Corporation* [1955] Ch. 210; [1954] 3 W.L.R. 990; [1954] 3 All E.R. 698, C.A.
Reg. v. *Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118; [1968] 2 W.L.R. 893; [1968] 1 All E.R. 763, C.A.
Secretary of State for Employment v. *ASLEF (No. 2)* [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] I.C.R. 19; [1972] 2 All E.R. 949, N.I.R.C. and C.A.

[1] Television Act 1964, s. 3: "(1) It shall be the duty of the authority to satisfy themselves that, so far as possible, the programmes broadcast by the authority comply with the following requirements, that is to say—(*a*) that nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling; . . ."

S. 24: "The functions of the authority shall include the making of arrangements for bringing the programmes (including advertisements) broadcast by the authority and the other activities of the authority under constant and effective review, and in particular for ascertaining the state of public opinion concerning the programmes (including advertisements) broadcast by the authority and for encouraging the making of useful comments and suggestions by members of the public; and the arrangements shall include provision for full consideration by the authority of the facts, comments and suggestions so obtained."

T[illegible] v. *British Broadcasting Corporation* [1967] 1 W.L.R. 1104; [1967] 2 All E.R. 1225, C.A.

The following additional cases were cited in argument on the further hearing:

Attorney-General v. *Bastow* [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

N. (Infants), In re [1967] Ch. 512; [1967] 2 W.L.R. 691; [1967] 1 All E.R. 161.

Reg. v. *Customs and Excise Commissioners, Ex parte Cook* [1970] 1 W.L.R. 450; [1970] 1 All E.R. 1068, D.C.

INTERLOCUTORY APPEAL from Forbes J.

On Tuesday, January 16, 1973, the Court of Appeal interrupted the hearing of an appeal to receive an application, said to be urgent, by the applicant, Alan Ross McWhirter, a member of the public, made ex parte. He told the court that he had just been before Forbes J. in chambers asking ex parte for an injunction to restrain the Independent Broadcasting Authority, their servants or agents or programming companies under their control or otherwise or howsoever, from broadcasting on the Independent Television Network the programme advertised for 10.30 p.m. that night, devised by Associated Television, which concerned the mentality of an American film producer named Andy Warhol and which was to be preceded by a preamble ordered by the authority that "some people may find Warhol's work and life style unsympathetic or offensive," on the grounds that that was a transmission in breach of section 1 (4) (*b*) and (*c*) and section 3 (1) (*a*) of the Television Act 1964; that the judge had refused the injunction, apparently on the ground that he did not consider the applicant had any locus standi where he could show no special interest over and above the other members of the public; that the applicant had that morning served on the authority a writ in terms of the present motion, but that the authority had not appeared and was not represented before the judge. There had been no opportunity to inform the authority of his intention to come to the Court of Appeal.

He made his application supported by an affidavit referring in detail to three newspaper reports by television critics of their preview of the programme which are referred to in the judgments of the Court of Appeal on January 16 (post, pp. 633F—634D).

The applicant told the court that he had asked to have but had been refused a view of the programme himself; that he had on Monday, January 15 asked the Attorney-General's office whether the Attorney-General would move the court ex officio to stop the showing of the film on the ground that it would be in breach of the authority's statutory duty under the Act; that he had been told on that afternoon that the Attorney-General had decided not to take action ex officio; and that as the Act provided no sanction of any kind for breach of a statutory duty by the authority he had decided to come to the court in his own name because he considered that under the common law a private citizen was under a duty to see that Acts of Parliament were enforced. He submitted that as time was so short it was not possible to proceed by obtaining the Attorney-General's consent to relator proceedings, and as he was affected by having

such programmes introduced into his own home, he was entitled to come to the court. The court adjourned the application until 5 p.m. and directed that the authority should be notified that the court would like them to be present or represented.

At 5 p.m. when the court sat again, Mr. Kemp for the authority, briefed at 45 minutes' notice, was present. The applicant repeated his submissions, adding that when he had been told on January 15 that the Attorney-General would not act ex officio he had also been told that that did not rule out the possibility that the Attorney might give his consent to the applicant's proceeding ex post facto in relator proceedings properly instituted if the broadcast did go out that evening; and also that since his ex parte application he had been informed that one of the Independent network companies, Anglia Television Ltd., had decided to substitute another programme for the 10.30 p.m. slot.

Mr. Kemp, for the authority, submitted that the application was misconceived because (a) there was no breach of statutory duty by the authority; (b) the applicant had no locus standi whatever; and (c) if there was another perfectly appropriate remedy an injunction in the circumstances of the present case should not in any event be granted and that in fact the authority had complied fully with their statutory duty under the Act of 1964.

The applicant in person.

David Kemp for the authority.

LORD DENNING M.R. This is an urgent case which we have heard at short notice at this late hour. There is advertised to be shown on several independent television channels this evening at 10.30 p.m. a programme entitled "Warhol: Artist and Film-maker." Mr. McWhirter, a member of the public, has issued a writ today in which he seeks an injunction against the Independent Broadcasting Authority to restrain them from broadcasting this programme. We are grateful to the authority for instructing Mr. Kemp on their behalf, and to Mr. Kemp for attending to assist us.

Towards the end of last week a film of this programme was shown privately to a number of journalists. I expect that there was an embargo forbidding comment until Sunday. In the Sunday newspapers the journalists made very severe criticisms of the proposed programme. On the front page of the "News of the World" it was said:

> "This TV shocker is the worst ever. A programme which goes further than anything I have ever seen on TV is to be screened on Tuesday night. Millions of viewers will find its frankness offensive."

In the "Sunday Mirror" it was said:

> "Andy Warhol film shocker for ITV. Television viewers are about to see what many will consider to be the most permissive shocker to be shown on British screens . . . . I have been shown a preview of this remarkable documentary. It includes: A FAT GIRL, stripping to the waist, daubing her breasts with paint and then painting a canvas with them. She also throws paint down a lavatory pan to form weird patterns. This one she calls Flush Art."

And then another paragraph almost equally indecent. It goes on:

> "A discussion between a young girl and a man dressed as a Hell's Angel on how they can have sex. She says she will only do it at 60 m.p.h. on his motor cycle."

A little later on:

> "Conversations are laced with four-letter words. . . . It's all there all right. Especially transvestites, lesbianism and the whole freaky scene which surrounds Warhol."

In the "Daily Express" on Monday it was said:

> "Shocking world of TV by James Thomas."

It finishes:

> "The public still has to see the Andy Warhol programme. It may then turn itself into an indignant jury. Or viewers may merely find these infant antics funny. Is it art for Andy's sake—or for the sake of the I.B.A.'s ratings? We shall judge tomorrow. It could be that ITV, by throwing slush at the public, has made its biggest mistake in a decade."

Mr. McWhirter says that those comments are typical and that there are others to the same effect. He has not himself seen the programme. He asked to see it but he was not allowed to do so. So he relies on those comments in the press as the best evidence he can obtain about the contents of the programme. On the basis of them, he says that the Independent Broadcasting Authority are about to break the duty laid upon them by statute. Section 3 (1) of the Television Act 1964 says:

> "It shall be the duty of the authority to satisfy themselves that, so far as possible, the programmes broadcast by the authority comply with the following requirements, that is to say—(*a*) that nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling."

Mr. McWhirter says that there is evidence here from these newspaper reporters that this programme contains matter which offends against good taste and decency and is likely to be offensive to public feeling. He stresses the word "likely." I must say that the evidence of those who have seen the film, that is, the evidence of the newspaper reporters, does warrant the inference—it leads almost inevitably to the inference—that this programme includes some matter which will offend against good taste and decency and is likely to be offensive to the public feeling: whereas the Act requires the authority to satisfy themselves that *nothing* in it should do so.

In answer Mr. Kemp says the authority are the supreme arbiters upon this matter. He relies on the words: "It shall be the duty of the authority to satisfy themselves so far as possible." He says it is for the authority and not for the courts to sit in judgment over the programmes. To this I would answer that if the authority do not carry out their duty, the courts can inquire into it. The Act does not provide any specific way for enforcing the duty. It defines no offence. It

provides no punishment. It gives no remedy for a breach. When a statutory duty is imposed, but no means of enforcing it, the courts are the body which can see that the duty is fulfilled: and when called upon, must do so. Mr. Kemp referred to the wide powers of the Postmaster-General, now the Minister of Posts and Telecommunications, under section 18 (3). But that does not seem to me to meet the present problem. That section enables him to give general directions, but it does not enable him to intervene at short notice in a matter of this kind. It is, in my judgment, the province of the courts to see that the duties laid down by Parliament are obeyed.

The next point is, who can bring the matter to the notice of the court? Can it be done by an ordinary member of the public such as Mr. McWhirter? This is the most difficult part of the case. It is said in our law books:

> "An injunction will only be granted at the suit of a party having sufficient interest in the relief sought: if the injury complained of affects the public interest, the Attorney-General must be joined."

So it is said that Mr. McWhirter cannot come here on his own. In answer Mr. McWhirter says that he has been to the Attorney-General's office, and, although he has not been given leave to bring a relator action—that is, an action on the relation of the Attorney-General—nevertheless it is not out of the question that he might obtain leave. But the machinery of obtaining leave takes some little time to get to work. If he waited till he obtained leave, it would be too late for the court to take action: because by that time the film would have been shown and the damage would have been done. I think there is sufficient in his answer for us to anticipate that he may get leave and to act in advance of it. The obtaining of leave is just a matter of procedure. In these days we have to mould procedural requirements so as to see that the duty which the statute ordains is fulfilled. At any rate, for the time being, even at the suit of Mr. McWhirter, we have jurisdiction to grant an injunction if such be the only way of seeing that the statutory duty is fulfilled.

In this particular case it seems to me that we can and should grant an injunction to stop the performance of this film this evening. I would emphasise in particular that the statutory requirement is that it is the duty of the authority to satisfy *themselves*. I should have thought that on Sunday or Monday—when there had been all these press criticisms saying that it would be offensive to great numbers of the public—the authority themselves should have considered whether there was anything in it which was likely to be offensive to public feeling. I should have thought that the authority themselves—the members of that authority—would have intervened and said: "We must see this: we must see this for ourselves before it goes out—we must see whether it is as offensive as the newspaper reports say." But we are told they did not do so. They considered the matter, but they did not see the film.

We are told that the authority had before them a report from the staff. It said that the programme was prefaced with a statement that "some people may find Warhol's views unusual and possibly offensive"; and that in the light of the modifications that had been made, the staff felt able to

recommended that the programme be transmitted. On the faith of that report the authority seem to have authorised the transmission. But that report was made before the newspaper reporters saw the film. After the newspaper reporters saw the film and made these very severe criticisms of it, a new situation arose. At that stage it seems to me that the authority, in order to do their duty properly as the statute requires, should have seen it and satisfied themselves personally that *nothing* in it was likely to be offensive to public feeling. They may, of course, delegate many things to the staff, but occasions may arise—and this may be one—when no delegation will suffice. They must satisfy themselves personally.

I realise that it is an important case; but as a temporary measure, I think an injunction should be granted. We are told—and it is really not contradicted—that on the television channels there are standby programmes ready to be inserted. We are also told that one channel, Anglia, has already decided not to show this programme but to put something else in. It seems to me that the others should follow suit.

Although it is a difficult case, it seems to me that on the evidence of the newspaper reports there are some things included in this programme which are likely to be offensive to public feeling. There is evidence from which it can be inferred that the authority have mistaken the extent of their duties in the matter, and therefore the court should intervene by granting an injunction for a week or a fortnight. It need only be adjourned for that short time. Meanwhile the matter can be further considered. If need be, the Attorney-General can be brought in by relator proceedings, if he agrees. Then the matter can be fully debated on the various issues that arise. I would be glad for that to be done. But, to keep the matter open for the time being, I would grant the injunction as asked.

CAIRNS L.J. I should be very glad if I could agree that an injunction should be granted in this case, because I think it is very much against the public interest that this programme should be broadcast. I am, however, of opinion that it is still the law that where the injury complained of affects only the public interest, the Attorney-General must be joined. In my view the fact that it has not been possible in the time available to persuade the Attorney-General to take action is no sufficient ground for saying that the private individual is to be allowed to enforce the matter of public interest. For that reason only I must dissent from the judgment of Lord Denning M.R.

LAWTON L.J. I agree with Lord Denning M.R. that an injunction should be granted in this case, and I agree with the reasons which he has given. It seems to me that the point which is troubling Cairns L.J. is one in which, under the changing conditions of the modern world, in which there are powerful statutory bodies like the Independent Broadcasting Authority whose activities affect the public generally, the time has come to look at the procedural rules of law which hitherto seem to have restricted the right of the ordinary citizen to complain about their activities; in other words, there is a case worthy of consideration; and this is not one where there is a mere shadowy claim to an injunction. In my judgment the evidence is clear that the authority have not applied the right test. It has long been

accepted by the courts that where a statutory body has the duty of satisfying itself, that body must act in a reasonable manner. There is evidence—and I stress that I am going no further than saying that there is evidence—that the statutory body has not applied reasonable standards in saying that it has satisfied itself. One illustration will show that. According to the "Sunday Mirror"—and it is uncontradicted on behalf of the authority—this film has in it the incident relating to the fat girl which Lord Denning M.R. read out, and there is no need for me to read it out. The statutory authority have taken the view that that incident is not likely to be offensive to the public. One has only got to ask oneself what would have happened if that incident had taken place in a shop window or in any other part of a shop; and the answer is that the shopkeeper who organised such an exhibition would almost certainly have found himself charged with and convicted of wilfully exposing an indecent exhibition, contrary to section 4 of the Vagrancy Act 1824; and, as I pointed out in the course of the argument, if a television retailer had in his shop window a set with this particular programme coming through on it, he too might find himself charged with the same offence. In those circumstances it seems unlikely that the authority can have applied their minds in a proper way to this programme.

Injunction granted.
Undertaking by applicant as to damages.

Solicitors: *Allen & Overy.*

M. M. H.

MOTION.

On January 19, 1973, before the order of the court consequent on the above judgment had been drawn up, the authority moved the court for an order that the applicant's appeal against the order of Forbes J. refusing him an interim injunction be restored to the Court of Appeal's list for further hearing and that no order be perfected until after such hearing. The applicant had filed a notice of appeal on the ground that the judge had misdirected himself in holding that the applicant had no locus standi to bring the proceedings.

The hearing of the motion for further argument was fixed for January 25. On that date both the applicant and the authority were represented by counsel and the Attorney-General appeared as amicus curiae on the preliminary issue of locus standi of the applicant, but he intimated that in view of the importance of the main issue he would give his consent to relator proceedings properly instituted by the applicant. Leave was granted to amend the applicant's writ by joining the Attorney-General as plaintiff in the relator proceedings. It being agreed that once those proceedings were instituted they were in the sole control of the relator and at his expense, the Attorney-General and junior counsel withdrew, and the appeal continued on the substantive issue.

licence [illegible] not entitled to expect the programmes to conform with the statutory [illegible] when he turns them on?]

No; a member of the public has a right not to be assaulted by dust or fumes but there is as yet no right known to the law not to have one's feelings offended by programmes broadcast by the authority. [Reference was made to *Reg.* v. *Customs and Excise Commissioners, Ex parte Cook* [1970] 1 W.L.R. 450, 456, *per* Lord Parker C.J.]

It is conceded that there may be a case for giving the court some power in an extreme and urgent case to hear an individual, but it is Parliament which must confer that power on the court. The Attorney-General's part, whether ex officio or by relator proceedings, is not a mere matter of procedure.

On January 16 the court was exercised by the apparent urgency of the matter. Now that the situation has been more fully explored the court should say that the provisional decision of the majority was wrong.

In any event, before a member of the public could move the court there would have to be cogent evidence from which it could be inferred that (1) the authority, to whom Parliament has committed statutory duties, had so totally neglected those duties or had been so grossly misled by their senior staff that no 12 reasonable men could have passed the programme and (2) that the Attorney-General, who can move swiftly by no more than a telephone call was so completely out of touch with public opinion that he had completely failed to do what he ought. The long line of binding authority should not be overthrown on two such unlikely hypotheses. So far as the authority is concerned there is the sanction of the Postmaster-General, now the Minister, who can move under section 18 on sufficiently cogent evidence; and if the Attorney-General fails in his duty he is answerable to Parliament.

J. G. Le Quesne Q.C. and *Stuart McKinnon* for the applicant on the issue of locus standi. Though it is agreed that there is no case precisely comparable to the present as it came before the court on January 16 there is also nothing in the books which makes it impossible to grant the relief which the situation demanded. The authority is a public corporation entrusted with statutory duties which are of interest to almost the whole community, and some of which relate to the content of programmes under section 3. If that part of the duty is to be enforced there must be occasions when it has to be done quickly, for the content of a particular programme is unlikely to become known in advance save at very short notice. Though the Attorney-General could move ex officio without delay, the chances of getting the Minister to give a direction under section 18 at speed are doubtful; and for the alternative of relator proceedings in an emergency, the requirements are not merely those stated by the Attorney-General but in addition the relator's solicitors have to provide a certificate that the relator is a proper person to be relator and "competent to accept the costs of the proposed action": see the notes to R.S.C., Ord. 15, r. 11. That may put relator proceedings beyond the power of certain individuals, so that if the court can only act after the institution of relator proceedings, there will be cases where the court cannot act in time and this public corporation will be virtually

uncontrollable—for nothing effective can be done after a programme has gone out and the damage has been done.

[CAIRNS L.J. If the court in a situation of urgency stopped a programme on meagre evidence and later was satisfied that it was all right and the people who had prepared it were put to enormous expense over its temporary cancellation, what would happen if the applicant for an interim injunction could not meet the costs?]

That is a risk which always exists when interim injunctions are granted at short notice. The Rules of the Supreme Court have given the court a discretion in a case of urgency to grant interim relief by R.S.C., Ord. 29, r. 1 (3) even before proceedings have been instituted by writ or originating summons, though terms may be imposed providing for the issue of the writ or summons and "such other terms, . . . as the court thinks fit": see *In re N. (Infants)* [1967] Ch. 512, where Stamp J. granted interim relief to a mother on undertakings that proper steps would be taken to institute the proceedings as soon as possible. That was admittedly a private action; but there is no reason why the same procedure should not apply in a relator action, for though it is in the Attorney-General's name, the substance of such an action is that the relator is responsible for the conduct of the proceedings and the costs and it is to the relator that the relief is granted. So here, if the applicant undertakes to institute a relator action he will be entitled to interlocutory relief, if he comes to the court and explains that his reason for coming is that he has not had time to comply with all the requirements for relator proceedings. Such a case will come within R.S.C., Ord. 29, r. 1 (3). Though it is conceded that that rule requires the application to be made by "the plaintiff" and technically the Attorney-General is "the plaintiff" in relator proceedings, the relator is in reality "the plaintiff."

The authorities cited do not assist and are not challenged; but in none of them was the court directing its mind to the present question: Is it possible, having regard to the principles established over the centuries, for the court in a case of urgency to grant interim relief conditional on the grant ex post facto of the Attorney-General's consent? *Thorne* v. *British Broadcasting Corporation* [1967] 1 W.L.R. 1104, is distinguishable, for there was no element of urgency; and the matter was brought before the court not by Dr. Thorne, the member of the public, but by the B.B.C. applying to strike out his action.

There is nothing revolutionary in the submission that, without casting any doubt on the constitutional role of the Attorney-General, the court has power in an urgent case to grant interim relief if it is satisfied that it is necessary so to do in order to enforce the law or prevent a breach of statutory duty. The present case should not be decided on nice calculations of what might just have been possible in the time available. The test is whether it was reasonable for the applicant to have come to the court in person on January 16. The majority of the court thought it was, and was correct on the particular facts and circumstances in granting the temporary injunction and recognising the locus standi of the applicant.

[The court indicated that they would reserve their decision on the issue of locus standi until the whole appeal had been heard.]

Roger Parker Q.C. and *David Kemp* for the authority on the basis

that co[illegible] to relator proceedings had been given. Though the stage has now been reached, with a certain lack of formality, where it might be possible for the court to grant the applicant interim relief because the Attorney-General has given his consent and the applicant could give an undertaking to institute a relator action, that was not the position on January 16, so that in no circumstances could R.S.C., Ord. 29, r. 1 (3) avail this applicant. Though the Attorney-General may not play an active part in the proceedings once they have been instituted in his name, it is nevertheless in his power to decide tomorrow as of right that he has had second thoughts and that the relator action must be dismissed and the relator must pay the costs; so that the attempt to equate the applicant's position with that of the private litigant in *In re N. (Infants)* [1967] Ch. 512, is unsustainable. [Reference was made to *Zamir, The Declaratory Judgment* (1962), p. 275 and *Halsbury's Laws of England* 3rd ed., vol. 9 (1954), p. 69.]

On the main issue whether the injunction should have been granted on the evidence before the court on January 16 and whether it should be continued on the evidence now before the court: (1) The Independent Broadcasting Authority has been set up by Parliament under the Television Act 1964 with specific duties, in particular the duty under section 3 to "satisfy themselves" that so far as possible the programmes comply with the section's requirements. Parliament has itself made the authority quasi-censors.

(2) The wording of section 3 makes plain that virtually all the matters on which they are to satisfy themselves are matters of judgment, and that taste, decency and offensiveness will change with changing public opinion.

(3) To assist them in forming that judgment the authority are to keep in touch with public opinion as provided by section 24 which includes among the "functions of the authority" the making of arrangements "for ascertaining the state of public opinion concerning the programmes (including advertisements) broadcast by the authority and for encouraging the making of useful comments and suggestions by members of the public . . .". The authority gets guidance on those matters from letters, telephone calls and similar communications from the public.

(4) The duty on the authority does not require them to see or hear personally every programme broadcast, though there may be some instances where they should clearly do so. In such a case it is important to bear in mind that they would have the knowledge acquired from the exercise of their functions under section 24 and the views of their senior staff who would also be familiar with such sources. The qualifications and careers of the senior staff, and in particular of the deputy director-general (programme services), the head of programme services, the deputy head of programme services, and the senior programme officer as set out in the *Second Report of the Select Committee on Nationalised Industries* laid before Parliament on September 27, 1972, shows that they are qualified, experienced, and in day to day touch with programme production and informed on the state of public opinion.

(5) The duty of the authority is not to satisfy themselves that no programme ever contains anything which, standing alone or in certain

circumstances would be indecent, offensive and so on, but that "so far as possible" the programmes do not include anything which offends against good taste or decency or is offensive to public feeling. That is a duty relating to the particular context of an item, and not to some other or unconnected context. A film of a tea party with a bishop and a nun using a four-letter word three times, apparently as part of their normal conversation, may be grossly offensive; but it may be wholly inoffensive if the same word were used three times in a programme about Army training. Other examples are easy to put; but it is idle to suppose that there is an absolute standard of what is decent or indecent.

(6) It is not argued that the question whether the authority have satisfied themselves is never justiciable. It must always be open to the courts to see whether they have even purported to satisfy themselves; but only in the rarest and clearest case should the court interfere and in no case should the court ever substitute its own opinion for that of the authority. For the purpose of the present interlocutory proceedings it is conceded that the court might be able to interfere if no 12 reasonable men could have concluded that a particular programme complied with the requirements of section 3.

(7) The reason why the court should be slow to interfere is that the judiciary are not experts in the changing views of the public; they do not have access to the day to day information about public reaction and feeling which the authority are obliged to know about and keep in contact with.

(8) Therefore the court will only interfere on interlocutory proceedings if there is a strong case that no body of men properly applying the provisions of the Act could possibly have been satisfied on the matters on which they have to be satisfied.

Applying those propositions to the position on January 16, the applicant's evidence that three of the more sensational newspapers had reported that a scheduled programme contained certain incidents and that the preamble to the film conceded that some people might find Mr. Warhol's life style offensive, supplemented by information that the authority had not themselves seen the film but had relied on their staff and that one company, Anglia, had decided not to screen the film, was not enough to justify the court's intervention.

On the fuller evidence now before the court the position is that both the authority and their advisory council, the composition of which would not warrant the description of avant garde, have seen the film and, with one exception, have concluded that it should be shown and that it complies with section 3 (1) (*a*).

The court has frequently said that it is not a court of morals. Nor is it a court of good taste or decency or of what is offensive to public feeling. Its function is to administer the law; and as Parliament has made the authority the arbiter on the matters in section 3 (1) (*a*) the court will not intervene unless the subject matter was so grossly offensive that it could be said that the authority and the advisory council were wholly unreasonable in approving it. This programme does not come near such a description. If the court thinks it does, it is asked to state what public opinion requires to have excised from it.

Le Quesne Q.C. and *Stuart McKinnon* for the applicant on the basis of a relator action in being. Section 3 (1) (*a*) in terms requires the authority to satisfy themselves that "*nothing* is included" etc. It is conceded that an incident may be so trivial that it can be ignored for the purposes of paragraph (*a*) and that what is indecent in one context may not be so in another; but that truism is of limited application in television which is available to almost the whole community. Section 3 (1) (*a*) treats that which offends against good taste and decency as a separate category from that which is likely to be offensive to public feeling. Where such words are included in a statute as the test, the court may have to decide what meanings those now bear and whether there is something in a programme which offends against those meanings. It is not open to the authority to say that "This sort of thing is tolerated by some people and therefore it complies with paragraph (*a*)"; nor is it enough to say "Look at the programme as a whole," for that is not what the Act stipulates. One has to find some consensus which is public feeling.

On January 16 the court had before it the incidents described in the newspaper reports; the intervention report showing that the programme had been subject to revision and deletions and had been prefaced with a warning; and the information that the authority had not seen it, and that one company had decided not to show it. That was ample material to entitle the court to act as it did and to justify the prima facie view that the authority had not taken proper or sufficient steps to satisfy themselves that the programme complied with section 3 (1) (*a*).

The court now has fuller evidence and knows that Anglia decided not to show it because it was considered contrary to section 3 (1) (*a*); and even now the authority has not said expressly: "We have satisfied ourselves that this programme contains nothing which offends etc." They merely say they are satisfied that it complies with their interpretation of section 3 (1) (*a*). The preliminary warning, or the description of a programme as a "documentary" does not make lawful that which is otherwise unlawful. There may be a breach of section 3 (1) (*a*) whether it constitutes 10 per cent. or 90 per cent. of a programme.

On the duty to "satisfy themselves," see *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455, where the words of the Industrial Relations Act of 1971 were "Where it appears to the Secretary of State." The court there said that even those wide words did not put the Minister's decision beyond challenge and that the court might interfere where the Minister had misdirected himself: see *per* Lord Denning M.R. at p. 493 and Buckley and Roskill L.JJ. at pp. 499 and 510. The court, having seen this programme, may think it surprising that anyone could say it contains "nothing which offends etc." The only explanation must be that the authority tested it (a) by looking at the effect as a whole instead of looking to see whether it contained anything offensive; and (b) by attaching undue importance to public feeling and not appreciating that offences against good taste and decency and offences against public feeling are two separate categories, either of which leads to the conclusion that the programme contravenes the subsection. Though the standard of decency may vary, it should not be impossible to apply.

Parker Q.C. in reply. The *ASLEF* case [1972] 2 Q.B. 455, is prayed

in aid for the authority: see *per* Buckley L.J. at p. 499 on the likelihood that there would be many channels of information and advice available to the Minister in forming his view, so that it would be difficult to displace it by evidence. In the present case there is not merely a likelihood of other souces of information but a positive obligation on the authority under section 24 to provide themselves with such information; and in the absence of evidence to the contrary it must be presumed that they fulfilled their obligation under section 24. The best test is the view of a carefully selected body charged with keeping themselves informed, not the standards of the court. If the authority go wrong the matter will be ventilated in Parliament. Though context does not excuse everything the particular incidents highlighted here should be looked at in context. There is no case for interlocutory relief.

[CAIRNS L.J. If the court concludes that the injunction should continue will the authority ask for an undertaking as to damages, and against whom?]

If that arises the undertaking as to damages should be given by the relator. If the Attorney-General were asked to give such an undertaking he might say: "I am dominus litis and I do not wish to continue with the relator proceedings."

Cur. adv. vult.

February 5, 1973. The following judgments were read.

LORD DENNING M.R. When Mr. McWhirter came on Tuesday, January 16, 1973, he represented to us that it was a matter of great urgency. The Independent Broadcasting Authority were proposing, he said, that very evening, to broadcast a television film which did not comply with the statutory requirements laid down by Parliament. He produced evidence, in the shape of newspaper reports, which showed that it contained matter which offended against decency and was likely to be offensive to public feeling. He said that he had put that evidence before the Attorney-General's office, but the Attorney-General had declined to take action ex officio. So he had himself come to the courts to seek an injunction. He claimed that he had a sufficient interest. He was himself the owner of a television set; he had paid his licence fee. When he switched it on, he was entitled to expect that the programme would comply with the statutory requirements. There were thousands like him sitting at home watching. All were entitled to have their privacy respected.

On that occasion this court, acting by a majority, granted the injunction. It was essentially a "holding operation" so as to enable the important issues to be discussed when there was more time to do it. By granting an injunction—for a very short time—no irreparable damage would be done. The television companies are able to change programmes at short notice. They have substitute films standing by ready for use. We thought that if it was found, after inquiry, that the programme did comply with the statutory requirements, it could be shown a little later. But if it was broadcast at once, without complying with the statutory requirements, much damage might be done, much offence might be caused

to many. So, on balance, as an urgent and temporary measure, we grant the injunction. I do not suppose that this has done the programme any disservice. On the contrary, it has given it publicity, so that if it is shown many more will watch it than would have done so previously. Moreover, it has enabled us to debate two points of much importance.

The first is whether Mr. McWhirter had any locus standi to come to the court at all. The second is whether the injunction should be continued.

Locus standi

This is a point of constitutional significance. We live in an age when Parliament has placed statutory duties on government departments and public authorities—for the benefit of the public—but has provided no remedy for the breach of them. If a government department or a public authority transgresses the law laid down by Parliament, or threatens to transgress it, can a member of the public come to the court and draw the matter to its attention? He may himself be injuriously affected by the breach. So may thousands of others like him. Is each and every one of them debarred from access to the courts? The law is clear that no one of them can bring an action for damages, unless he has suffered special damage over and above everyone else. That was settled in 1535 in a case in the Year Books: (1535) Y.B. Mich. 27 Hen. 8, F. 27, pl. 10 translated by Mr. C. H. S. Fifoot in *History and Sources of the Criminal Law* (1949), p. 98. That rule was laid down in order to avoid multiplicity of actions. The argument was put in this way: "If one of those injured were allowed to sue, a thousand might do so": and that was considered intolerable. Sir William Blackstone in his *Commentaries* (17th. ed., Book IV, p. 166), said:

> ". . . it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects."

But does this rule—which prevents anyone suing for damages—also prevent any member of the public from seeking a declaration or an injunction? Those are discretionary remedies to which no one has a right, but which the court can grant if it thinks fit. The usual course, no doubt, is for the member of the public who is aggrieved to go to the Attorney-General and ask him to intervene—either ex officio or by granting leave to use his name in a relator action. In all proper cases the Attorney-General will, no doubt, give his leave. But it is a matter for his discretion. Suppose that, in a very rare case, he exercises his discretion wrongly and declines to intervene for no good reason or on entirely wrong grounds: or suppose he is away and cannot be reached in time, or supposing that the machinery works too slowly. I do not suggest that it was so in this case. I only put the point so as to test the position. But before doing so, it is necessary to consider the role of the Attorney-General in these matters.

The role of the Attorney-General

It is settled in our constitutional law that in matters which concern the public at large the Attorney-General is the guardian of the public interest. Although he is a member of the government of the day it is his duty to represent the public interest with complete objectivity and detachment. He must act independently of any external pressure from whatever quarter it may come. As the guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law.

His duty has been thus stated by members of this court who, each in his turn, had held the office of Attorney-General. In 1879 Baggallay L.J. said:

> "It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed . . . it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues ex officio, or at the instance of relators": see *Attorney-General* v. *Great Eastern Railway Co.* (1879) 11 Ch.D. 449, 500.

In 1924, Sir Ernest Pollock M.R. repeated those very words with approval: see *Attorney-General* v. *Westminster City Council* [1924] 2 Ch. 416, 420. To these I would add the words of Lord Abinger, who had himself been Attorney-General:

> ". . . it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a court of justice, where any real point of difficulty that requires judicial decision has occurred": see *Deare* v. *Attorney-General* (1835) 1 Y. & C.Ex. 197, 208.

Before the Attorney-General gives leave, however, there are certain regulations which any private individual is required to observe. These regulations go back a long time and are set out in *Robertson's Civil Proceedings by and against the Crown* (1908), p. 835, and repeated in the *Supreme Court Practice* (1973) (notes to Ord. 15, r. 11). The member of the public must instruct solicitor and counsel. He must get them to prepare a writ and statement of claim. The counsel must certify that "this writ and statement of claim are proper for the allowance of Her Majesty's Attorney-General." The solicitor must certify that the relator is a proper person to be relator, and that he is competent to answer the costs of the proposed action.

It sounds to me that that would all take some time, as well as money, but the Attorney-General assured us that it could be, and had been, carried through, sometimes within minutes, and certainly within hours.

At any rate, when all that is done and the Attorney-General gives his consent, he virtually drops out of the proceedings. As Sir Jocelyn Simon, when he was a law officer, told the House of Commons, December 1, 1960: "Although the Attorney-General is the nominal plaintiff in the action, in reality the action is brought by the complainant." Once the consent of the Attorney-General is obtained, the actual conduct of the proceedings is entirely in the hands of the relator who is responsible for the costs of the action.

All this, however, one thing is clear. In exercising his functions, the Attorney-General is not subject to the control of the courts. It was so laid down by Lord Halsbury L.C. in *London County Council* v. *Attorney-General* [1902] A.C. 165, 169, when he said:

> ". . . but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General."

The role of the private individual

Such is the relator procedure by which any member of the public can, in a proper case, take steps to secure that the law is observed. It is a procedure which should be taken in every case where it is reasonably available. But the question that arises for consideration here is: Suppose a case should arise in which the relator procedure is not reasonably available. Suppose the machinery works too slowly. In the present case Mr. McWhirter told us that the Attorney-General refused to take action ex officio, and that he, Mr. McWhirter, considered the matter was so urgent that he came direct to this court. Was he entitled to come here? Test it by an extreme case. Suppose the Attorney-General refuses to give leave for no good reason or on entirely wrong grounds, mistaking, maybe, the interpretation of a statute. Would a private individual be entitled to come to the court? Such a situation was not in Lord Halsbury L.C.'s mind in 1902. But it happened in 1910. There was a great case then in which this court, to quote the learned author, "struck a blow which is still reverberating 50 years later": see *Edwards on The Law Officers of the Crown* (1964), p. 295.

In such a situation I am of opinion—and I state it as a matter of principle—that the citizen who is aggrieved has a locus standi to come to the courts. He can at least seek a declaration. That is the view expressed in a resourceful book to which Mr. Roger Parker referred us, *Zamir, The Declaratory Judgment* (1962), p. 275. It is based on the celebrated case of *Dyson* v. *Attorney-General* [1911] 1 K.B. 410; [1912] 1 Ch. 158 to which I have just referred. In 1910 the Commissioners of Inland Revenue sent out a questionnaire which they required eight millions of people to answer. It was illegal. It was contrary to an Act of Parliament. A private individual, Mr. Dyson, objected to it. He came to the courts and sought a declaration. At that time he could not sue the Commissioners of Inland Revenue themselves. So he sued the Attorney-General as representing them. The Attorney-General regarded his action as frivolous and vexatious. He sought to strike it out [1911] 1 K.B. 410. It is plain that he would never have given leave to Mr. Dyson to bring the action. This court refused to strike the action out. It declared that the questionnaire was illegal and that Mr. Dyson was under no obligation to comply with it.

Since that case there have been many others, such as *Prescott* v. *Birmingham Corporation* [1955] Ch. 210, when a private individual has successfully sought a declaration against a public authority; and there

is a valuable discussion of the whole question by Professor S. A. de Smith in *Judicial Review of Administrative Action*, 2nd ed. (1968), pp. 464–479.

In the light of all this I am of opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public who has a sufficient interest can himself apply to the court itself. He can apply for a declaration and, in a proper case, for an injunction, joining the Attorney-General, if need be, as defendant. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizens of this country: so that they can see that those great powers and influence are exercised in accordance with law. I would not restrict the circumstances in which an individual may be held to have a sufficient interest. Take the recent cases when Mr. Raymond Blackburn applied to the court on the ground that the Commissioner of Police was not doing his duty in regard to gaming or pornography. Mr. Blackburn had a sufficient interest, even though it was shared with thousands of others. I doubt whether the Attorney-General would have given him leave to use his name: see *Reg.* v. *Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118, 137, 139. But we heard Mr. Blackburn in his own name. His intervention was both timely and useful.

It was suggested that if Mr. McWhirter could come to the court complaining of indecent films, so could others come objecting to boxing films or anyone else who had his own particular dislikes. But none of those could get past the sieve afforded by the Attorney-General's office. None of those would be able to produce the slightest evidence that the Independent Broadcasting Authority had not fulfilled their statutory duty. But as Mr. McWhirter's case was presented to us, it was of a highly exceptional character. There was evidence from which it could be inferred that the Independent Broadcasting Authority had not done their duty: that the Attorney-General had refused to take action himself ex officio: and that there was no time to do all the things necessary for a relator action. It was a case of the last resort: and I hold that we were entitled to hear him as we did. I have said so much because I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced. But this, I would emphasise, is only in the last resort when there is no other remedy reasonably available to secure that the law is obeyed.

It was suggested that the person aggrieved should approach the Minister so that he should give a notice under section 18 (3) of the Television Act 1964, or should approach his Member of Parliament so that he could ask a question in the House. But those do not seem to me to be remedies that are reasonably available. They are not so accessible. They are not so speedy or effective. They are not so independent as the courts of law.

This present case

On the case, as it appeared to us on January 16, 1973, Mr. McWhirter

had [illegible] other remedy reasonably available to him. But the Attorney-General has thrown more light on the circumstances. It appears that at about 2 o'clock on the Monday Mr. McWhirter was told that the Attorney-General would not take action ex officio, but that this was without prejudice to any application that Mr. McWhirter might wish to make for the Attorney-General's consent to relator proceedings. There was time then for Mr. McWhirter to get the procedure moving. During the rest of that day and the next morning, he could have instructed solicitors and counsel, and sought leave: and if it was a proper case he would have got leave. But Mr. McWhirter deliberately decided not to take that course. He came straight to this court. That was a mistake. There was another remedy reasonably available to him, and he did not take it.

So he was in the wrong. But it has all been cured now. He took steps to get the leave of the Attorney-General, as we intimated he should do. Counsel gave his certificate that it was a proper case for leave. The Attorney-General has told us that he would give leave. The necessary amendment can be made at any time, and will date back retrospectively to the issue of the writ: see *Caldwell* v. *Pagham Harbour Reclamation Co.* (1876) 2 Ch.D. 221. So all is now in order from the beginning. I turn, therefore, to the substantive question. Should the injunction be continued?

In section 3 of the Television Act 1964, Parliament specified several requirements with which programmes should comply. The first is:

> ". . . that nothing is included in the programmes which offends against good taste or decency or is likely to . . . be offensive to public feeling."

I would stress the words "nothing is included." Those words show that the programme is to be judged, not as a whole, but in its several parts, piece by piece. If a documentary dealt with life in the underworld on a restrained level, but then included by way of illustration 30 seconds of pornographic photographs, it would be a breach of the statutory requirements. It would not be cured by words being said at the beginning that "some parts of this programme may be offensive to some people." Viewers may switch on in the middle of the programme, and, in any case, the statute does not permit of a warning being an excuse for non-compliance.

Such being the statutory requirements, Parliament puts a duty on the Independent Broadcasting Authority to "satisfy themselves" that they are complied with "so far as possible." This does not mean, of course, that the members of the authority are themselves to see every programme or go through it. They can and must leave a great deal to the staff. They are entitled in the ordinary way to accept the advice of their staff on the programmes in general, and on any programme in particular: see *Lewisham Metropolitan Borough and Town Clerk* v. *Roberts* [1949] 2 K.B. 608, 621 and 629. It is only in a most exceptional case that they may be expected to see a programme for themselves in order to be "satisfied." But there are such exceptional cases, just as there are exceptional cases when a Minister must satisfy himself personally. It depends how serious is the case: see *Liversidge* v. *Anderson* [1942] A.C. 206, 223–224.

Was this film a programme which they ought to have seen for themselves? Let me state the circumstances. (i) The programme was prepared by one of the programme companies called A.T.V. Network Ltd. In its original form, the staff of Independent Broadcasting Authority were so unhappy about it that they thought that the programme should be seen by the authority itself. (ii) A.T.V. Network Ltd. thereupon deleted some of the material and introduced the film with a warning that "some people may find Warhol's views unusual and possibly offensive." (iii) In the light of those modifications, the Director-General and staff of the Independent Broadcasting Authority felt able to recommend that the programme be transmitted as the usual network documentary on Tuesday, January 16, 1973, at 10.30 p.m. They made an intervention report to that effect. The Independent Broadcasting Authority accepted that recommendation but did not see the film themselves. (iv) On January 12 or 13 journalists were invited to a preview of the film. (v) On Sunday, January 14, 1973, and Monday, January 15, some of the journalists in their papers made severe criticisms of the film. If their accounts were correct, it included incidents which were indecent and likely to be offensive to public feeling. The "News of the World," in particular said that "millions of viewers will find its frankness offensive." (vi) On reading those newspaper reports, the chairman and directors of one of the channels, Anglia Television, determined to have the film screened privately for them to see. They came to the unanimous conclusion that the programme, if broadcast, was likely to be offensive to public feeling. They announced that they were not going to supply it for broadcasting. (vii) The Independent Broadcasting Authority, however, did not see it. Some of them had an informal discussion with the senior staff, and, on their assurance, were prepared to let it be broadcast.

The question is: Did the Independent Broadcasting Authority do what was sufficient, or ought they not to have seen the film for themselves, as the chairman of Anglia Television and their directors did? When the matter was brought before this court on Tuesday, January 16, it appeared that there was a prima facie case for saying that they had not done what was reasonably sufficient to satisfy themselves that "so far as possible" there was nothing indecent or offensive in the programme. It was better to postpone its showing for a little while, using a substitute film, rather than let it go out that evening. Meanwhile, the matter could be properly considered in all its aspects, both as to the locus standi of Mr. McWhirter and as to the fulfilment of the statutory requirements.

In the circumstances I think that the Independent Broadcasting Authority ought to have seen the film for themselves on the Monday or Tuesday before passing it. Since that time they have done so. So have the General Advisory Council. The members of the general council are drawn from a broad cross section of the people, and are as representative and responsible a body as you could find anywhere. The general council, by a majority of 17 to one, passed this resolution:

> "The council felt that the staff were right to advise the authority that the film which they had seen was suitable to be shown at the suggested time."

The members of the Independent Broadcasting Authority are likewise most

representative and responsible. Ten out of the 11 saw the film and unanimously reaffirmed the decision

> "that the programme is suitable for transmission in the 10.30 p.m. documentary slot, and that it is satisfied that the programme complies with the requirements of section 3 (1) (*a*) of the Television Act 1964."

If those decisions are to be accepted as valid, they are decisive. The Independent Broadcasting Authority are the people who matter. They are the censors. The courts have no right whatever—and I may add no desire whatever—to interfere with their decisions so long as they reach them in accordance with law: see *Secretary of State for Employment* v. *ASLEF* (*No.* 2) [1972] 2 Q.B. 455. Mr. Le Quesne submitted, however, that the Independent Broadcasting Authority had misdirected themselves. He said that they had regarded the film as a whole, and not piece by piece as the statute required. Alternatively, he said that their decision was one to which they could not reasonably have come.

To test these submissions we ourselves saw the film. I hesitate to express my own views upon it, but it is part of the evidence before us and I feel I should do so. I can understand that some people would think it entertaining, but I must speak as I find. Viewing it as a whole, the film struck me as dreary and dull. It shows the sort of people—the perverts and homosexuals—who surround Mr. Warhol and whom he portrays in his work. But, taken as a whole, it is not offensive. Viewing it piece by piece, there are some incidents which seemed to me to be inserted in an attempt to liven up the dullness—an attempt which did not succeed, at least so far as I was concerned. These are the incidents which struck the newspaper reporters and were described by them, and which, no doubt, struck the chairman of Anglia Television and his colleagues. They only form about one-tenth of the whole. Speaking for myself, I would take the same view as the newspaper reporters and the chairman and directors of Anglia Television. I should have thought that those individual incidents could be regarded as indecent and likely to be offensive to many. But my views do not matter, unless they go to show that the Independent Broadcasting Authority misdirected themselves or came to a conclusion to which they could not reasonably come. I am certainly not prepared to say that. Quite the contrary. On seeing the film, they came to a decision to which they might reasonably come, and this court has no right whatever to interfere with it.

I would therefore lift the injunction. The programme can be shown as soon as can be arranged. No doubt many will wish to see it to form their own view. Some will write to the Independent Broadcasting Authority and tell them. It should give the Independent Broadcasting Authority a good guide to public feeling, and so help them in the difficult decisions which they have to make in the future. But they should always remember that there is a silent majority of good people who say little but view a lot. Their feelings are to be respected as well as those of the vociferous minority who, in the name of freedom, shout for ugliness in all its forms.

So let the programme be shown. We will not stop it.

CAIRNS L.J. When Mr. McWhirter appeared before this court on January 16 to appeal against the refusal by Forbes J. to grant him an interlocutory injunction, I was of the opinion that he was not entitled to the relief he sought because his action was an action aimed at enforcing the public duty of the defendants and not at protecting any private right of the plaintiff. That being so, the proper plaintiff would be the Attorney-General suing on behalf of the public as a whole and not Mr. McWhirter or any other private individual.

I remain of opinion that that is the law. The cases that have been cited —*Boyce* v. *Paddington Borough Council* [1903] 1 Ch. 109; *Attorney-General ex rel. Rhondda Urban District Council* v. *Pontypridd Waterworks Co.* [1908] 1 Ch. 388 and *Thorne* v. *British Broadcasting Corporation* [1967] 1 W.L.R. 1104, all support it. There is no single authority, and no sentence in any judgment, that points the other way.

What the majority of the court held on January 16 was that when the matter was one of urgency, when it appeared to the court that there had been no reasonable opportunity of obtaining the fiat of the Attorney-General for a relator action, an injunction to cover a short period could be granted on the application of the individual plaintiff. It did not seem to me then and does not seem to me now that this is a sustainable proposition. As is shown by *Thorne's* case, the plaintiff has no cause of action; the defendants could have moved to have the writ set aside on that ground. There would then have been no proceedings in being within which interlocutory relief could have been sought. It cannot be supposed that an action which the plaintiff has no right to bring can enable him to get an injunction merely because the defendants have not had an opportunity of getting it struck out. Mr. Le Quesne suggested that there was an analogy with R.S.C., Ord. 29, r. 1 (3), under which an injunction can be obtained before action brought by a person who undertakes to issue a writ. That rule is clearly not directly applicable here because a writ had in fact been issued, and if it had not it would be quite improper for the court to accept an undertaking by a person to issue a writ, naming himself as plaintiff, claiming relief to which he was not entitled. The suggestion made by counsel was rather that the undertaking should be an undertaking to apply for relator proceedings. This, however, affords no parallel to Ord. 29, r. 1 (3), or to the common law rule to the same effect which existed before the Judicature Act 1873. The issue of a writ by a plaintiff for relief which he is entitled to claim is a purely ministerial act; whether he applies to the judge for an injunction before or after he had gone to the central office to issue his writ is a difference of form and not of substance. It is very different with the application to the Attorney-General for relator proceedings. There is no *right* to obtain his fiat. It is a matter for his absolute discretion whether he gives it or not, and in this function he is controllable only by Parliament and not by the courts: *London County Council* v. *Attorney-General* [1902] A.C. 165, 168–169 *per* Lord Halsbury L.C., and at p. 170 *per* Lord Macnaghten.

In adhering to the view that the Attorney-General must be a party to the action, and in holding that no application for an injunction can be made before he is joined (or at least before he has given his fiat, which then creates a situation akin to that dealt with in Ord. 29, r. 1 (3)), I do not

consider that I am upholding a mere archaic piece of red tape. Everybody, and every statutory or other authority, is liable to be sued by any person who claims that his individual interests have been interfered with. It does not follow that a person or authority should be liable to action at the suit of any person (and it might be a multitude of different people bringing separate actions) to enforce a public duty. If there is a difference of opinion between an individual and an authority as to what the authority ought to do or refrain from doing, there may well be a difference of opinion between members of the public about it. The requirement for the consent of the Attorney-General is a useful safeguard against merely cranky proceedings and against a multiplicity of proceedings. While there may be cases in which a person seeks to restrain some action of an authority and has no time or money or opportunity to take the steps necessary to obtain the Attorney-General's consent, I think this will be rare, and on the whole the risk of damage to the public interest by allowing a right to apply for relief to such a person without such consent is greater than the risk of damage to the public interest (which is all we are concerned with) in withholding it. Take this case. If the plaintiff's contention were right, he might have obtained his injunction from a judge in chambers on an ex parte application at a moment leaving no time for an appeal. The application might have been based on apparently convincing but in fact misleading newspaper reports. The programme might really be an innocent one, and the cost of cancelling it far more than the plaintiff could afford to pay. And millions of viewers might be deprived of pleasure and instruction against their will.

The weapon of the interlocutory injunction is at all times a powerful one, the use of which involves risks. It is a valuable weapon for the protection of private rights and protecting the welfare of children. While it is a weapon that may well have its uses in relation to the protection of the public interest, I think it is right that it should not be immediately available for that purpose to any member of the public. However that may be, I am quite satisfied that the present law does not allow such an application, and if a change of the law is desirable it is for Parliament to say so.

If ever a case arose in which it appeared that the Attorney-General had failed to give proper consideration to an application for his fiat, or had refused it on wholly improper grounds, then consideration would have to be given to the question of whether any remedy is available other than control by Parliament as envisaged by Lord Halsbury L.C. No such problem arises in the present case.

Since I consider that Mr. McWhirter's action and his application for an injunction and his appeal to this court were all misconceived, I should be inclined to refuse to answer the hypothetical question of whether in other circumstances the evidence before the court on January 16 was such as to justify the grant of an injunction. But the matter has been fully argued and the parties are anxious to have an answer. I will simply say that as the description in the newspaper cuttings was in my view sufficient evidence, at any rate on an urgent interlocutory application, that indecent material was to be broadcast, and as there was evidence that the Independent Broadcasting Authority had not seen the film before giving their consent to its being shown, I consider that we were then entitled to take the

view that the authority had not complied with their duty under section 3 (1) (*a*) of the Act of 1964.

It is, however, necessary to consider whether an injunction should be granted in a relator action on the evidence now before this court. This includes the two affidavits of Lord Aylestone and the view which the members of the court have had of the film.

I adhere to the opinion which I formed on the basis of the newspaper descriptions and which I found amply confirmed by seeing the film, that in my opinion it contains a substantial amount of indecent material. It is a matter of surprise to me that ten members of the authority were unanimously of the opinion that it does not offend against good taste or decency; and a matter of greater surprise that 17 out of 18 members of the General Advisory Council took the same view of it. But they did.

The position here is not comparable to that which exists when a court holds that the verdict of a jury is perverse; because the court there knows nothing of the character or background of individual members of the jury and 11 rather weak jurymen may have been persuaded by one prejudiced strong-minded man. Here we know that the people who formed this opinion are intelligent, cultured people with a wide range of types of background. To say that they must all but one have applied some wrong test or that they must themselves be lacking in good taste and decent feeling would be a bold statement. The authority are the censors; I am not. The General Advisory Council has the duty of advising them; I have not.

The strongest part of Mr. Le Quesne's argument was, I thought, the contention based on certain passages in Lord Aylestone's first affidavit and on some of the documents produced that the authority, their staff and advisers, had directed their minds only to the programme as a whole, coupled with the warning broadcast at the beginning of it, and may have overlooked their duty to ensure as far as possible that nothing indecent is *included* in a programme. I do not, however, in the end think that that would be a proper inference. I observe in particular that in a letter written by Lord Aylestone in March 1972, he drew the attention of programme companies to an increase in the introduction of bad language into programmes, and I also bear in mind that when the staff of the Independent Broadcasting Authority considered the first version of the Andy Warhol programme they recommended the deletion of parts that appeared to them objectionable. It seems to me clear that neither the authority nor their staff limited their consideration to the general effect of the programme as distinct from examining its various parts. I would therefore not grant an injunction in relator proceedings.

LAWTON L.J. When at about 3 p.m. on January 16, 1973, Mr. McWhirter applied to this court for an interim injunction against the Independent Broadcasting Authority to restrain them from broadcasting at 10.30 p.m. the same evening a programme about a man named Andy Warhol, it seemed to me on the evidence and information then available that the court might have to solve the grave and important constitutional problem, if it could, of how a powerful statutory body like the authority could be made to obey the law if the Attorney-General was not willing to act ex officio, as the court was told correctly he was not, and the

can ...on includes the reports of members of their staff, and in most cases such evidence would be the best and only evidence before them. They should, however, remember that such reports are only evidence. If at any time credible evidence to the contrary effect to a staff report becomes available, then they should look at the programme themselves and make up their own minds. In my judgment this is what they should have done, and did not do, on January 15, 1973, when the press reports came to their notice. They are not bound to pay overmuch attention to adjectives used in newspapers to attract the attention of readers; but when newspaper reports contain factual details, as the ones relied on by Mr. McWhirter did, the position is different. After the interlocutory injunction had been granted, both the authority and their General Advisory Council each looked at the programme separately, and with one dissentient on the General Advisory Council they all agreed that it complied with what they understood to be the requirements of the Act. Mr. Le Quesne on behalf of Mr. McWhirter submitted that there was evidence that they had misdirected themselves as to the construction of the Act. I am not satisfied that they did. It follows that there remains only one question to be answered. Was their decision to broadcast the programme, if the court discharged the interlocutory injunction, one which no reasonable authority could have made? In simpler terms, did they make a perverse decision?

Before this court could adjudge that the authority had made a perverse decision there would have to be very strong evidence indeed. The only evidence we have had, besides the newspaper reports, has been a showing of the programme itself; and now that it has been put in evidence it has become the best evidence, and the newspaper reports can be put aside.

In fairness to the authority, it is right to point out that there is some basis for their chairman's complaint made in an affidavit sworn on January 24, 1973, that by stressing certain incidents an entirely false impression of the programme had been given. It lasts about 45 minutes: the incidents, five in number, to which reference was made in the newspaper reports, occupy between 10 and 12 per cent. of the running time. Three lasted about 45 to 60 seconds each; one which showed a woman trying to apply paint to a piece of paper with one of her breasts lasted between one and two minutes; and the remaining incident, which was concerned with a conversation having homosexual implications between two men, one naked, sharing a bed, lasted about two and a half minutes. In my judgment these incidents provided strong evidence that the authority intended to broadcast matter which, in the words of the statute, offended "against good taste or decency"; but I have reminded myself that my judicial task is to adjudge whether my assessment of the evidence is the only reasonable one, if it be a reasonable one at all. For this purpose it is necessary to consider the programme as a whole.

It purports to show what kind of artistic and film work Andy Warhol does and the kind of people he mixes with. In so far as it shows his artistic work there can be no doubt that many would find it attractive. His film work was illustrated by extracts from films he had made: three of the incidents complained of came from these extracts. Finally there

were shots showing his friends and associates. Most of these p... who included the woman using one of her breasts to apply p... to paper, seemed very weird indeed. A possible appreciation of the programme could be that it was an attempt to give the television viewing public an opportunity of seeing something of, and understanding what, in modern idiom, has come to be called a "sick society." If this was the intention the distasteful and indecent incidents become relevant. It would be no answer to a charge of disregarding the Television Act 1964 for the authority to say that their motives in broadcasting indecent matter were worthy; but whether an incident is indecent must depend upon all the circumstances, including the context in which the alleged indecent matter occurs. Save for the incident involving the woman, which had aspects of both bathos and pathos, all the others were concerned with indecency in words, not in acts, and show how depraved some people can become. I am far from being satisfied that the major part of the British public is willing to have broadcast to their homes the kinds of conversations which occur in this programme; the authority seem to think they are. They may be right. In the realm of good taste and decency, whose frontiers are ill defined, I find it impossible to say that the authority have crossed from the permissible into the unlawful. They have got perilously near to doing so, and in a society with constantly changing standards of outlook and behaviour they would be unwise to assume that the frontiers will always be pushed nearer licentiousness, as the history of morals in this country shows. The ribaldry and bawdiness which was enjoyed at Drury Lane Theatre up to the end of the reign of Queen Anne had gone by David Garrick's time some 50 years later: his public liked plays with a marked moral flavour.

As I can envisage, albeit with difficulty, a reasonable authority thinking that this programme complied with section 3 (1) of the Television Act 1964, I cannot say that their decision to broadcast it was perverse. I would discharge the injunction.

Appeal from decision of Forbes J. dismissed.
Injunction discharged.
Plaintiff to pay one-half of defendants' costs.
Damages under undertaking given remitted to be assessed by a master.
Leave given to amend writ.

Solicitors: *Trower, Still & Keeling; Allen & Overy; Treasury Solicitor as amicus curiae.*

M. M. H.