EXPLANATION

This paper is nothing more than a rough draft on the subject of the rule in Hollington v. Hewthorn as it applies to Matrimonial Causes in Canada. The paper, even if it was in a more finished and corrected form, would not stand on its own, but is intended to serve as one chapter, as it were, in a comprehensive treatment of the rule.

The author prepared other similar chapters, which are in the hands of Mr. D. C. MacDonald.

Tom Matkin

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MATRIMONIAL CAUSES - THE CANADIAN POSITION

A. THE CASES

Previous to Hollington v. Hewthorn (1943) K.B. 587 there were very few reported Canadian cases which discussed the admissibility of previous judgments or convictions. In Cunliffe v. Cunliffe (1901) 8 B.C.R. 18 the judge allowed the transcript of a previous divorce trial to be read, and a witness to the trial was allowed to testify that that was truly what happened at the first trial. The original witnesses were unavailable so the judge accepted this testimony as 'evidence'. It is not clear if this is tantamont to accepting a conviction or if it merely represents a rough and ready short-cut to justice that was perhaps more appropriate to conditions in turn of the century Nanaimo than would be the case today.

In Lauritson v. Lauritson (1932) 41 O.W.N. 274, Kelly J. accepted evidence of a previous criminal conviction for rape as good evidence for a divorce on the grounds of adultery. The judgment does not admit to any discussion of the point.

In Howe v. Howe (1937) 41 O.W.N. 57, (1937) 1 D.L.R. 508 (Ont. C.A.) the question was first considered by a Canadian court at the appellate level. This was a divorce case where the disputed evidence was a judgment naming the plaintiff as co-respondent in a successful divorce action on the ground of adultery. Henderson J.A. admitted the

judgment as prima facie evidence of adultery. In a short paragraph he named some of the relevant English cases[1] and followed the clearest and the best reasoned among them, Partington v. Partington and Atkinson [1925] P. 35. In that case Horridge J. was less concerned with the admissibility of the previous decree than with the question of whether or not it should be conclusive of the issue. In the end he was clear that this was not an estoppel situation, but at the same time he was confronted with a difficulty that often accompanies a judge when he abdicates his responsibility, he became uncertain of his verdict,[2] and requested the King's Proctor to review the case:

> I think in this case the man is entitled to deny his adultery if he wishes to do so, although it has been found against him in a previous suit, and as it may be that in this case it is not in the interests of anybody to put before me the evidence on which he was convicted on the last occasion, it is my duty to see that the King's Proctor is communicated with, and, if he sees fit, that that evidence is put before the Court in the form of other witnesses.

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[1] Besides Partington v. Partington [1925] P. 35 he cited Ruck v. Ruck [1896] P. 152, in the latter case a decree from a previous suit was excluded because it did not, on its face, show the respondent in the instant case to have been guilty of adultery in the earlier case, although it had shown him as co-respondent in a successful suit on the ground of adultery

[2] Certainly it is not that unusual for cases to be referred to the King's Proctor yet it is clear that cases are not referred unless the judge is concerned about collusion or is otherwise unsure of his verdict, and had Horridge J. required actual proof of the adultery, it is submitted that he could have avoided the uncertainty in this instance.

It is worth mentioning that in Hollington v. Hewthorn (1943) 1 K.B. 587 at 601-602, Goddard L.J. expressly disapproved of Partington v. Partington [1925] P. 35, referring to that case and two others (In the Estate of Crippin [1911] P. 108 and O'Toole v. O'Toole (1926) 42 T.L.R. 245) that had recently gone against the rule he said:

> In our opinion, these three cases go beyond and are contrary to the authorities and ought not to be following in future.

Where did this leave the decision of Henderson J.A. in Howe v. Howe (1937) O.R. 57, (1937) 1 D.L.R. 508 (Ont. C.A.) in terms of stare decisis? It is submitted that by undercutting the authority upon which Howe v. Howe rested, the decision itself is of doubtful significance. Surely it cannot be relied upon without dealing expressly with Hollington v. Hewthorn.

So, then, a trend that had been developing previous to Hollington v. Hewthorn, that of allowing judgments and convictions, was drained of authority by Hollington v. Hewthorn. The first matrimonial case to recognize the rule came in 1944. In Campbell v. Campbell (1944) 1 W.W.R. 349, 53 Man. R. 121, the Manitoba King's Bench court accepted the rule without comment, excluding the findings and evidence of juvenile court which would have served the purpose of identifying an adulterer by name.

The next case points out the existing dichotomy of the Canadian position. Thompson v. Thompson (1948) O.W.N. 344, (1948) 2 D.L.R. 798 was an Ontario High Court decision which ignored Hollington v. Hewthorn. In order to show adultery

the finding of a previous court was accepted as evidence. Urquhart J. did not have the benefit of hearing any arguments from the defendants as they did not appear. Had the arguments from both sides been more fully developed perhaps this case would have been of some authority,[3] but as it stands, its chief usefulness is that it gives a better picture of judicial practice in regards to the problem, as Urquhart J. admits ((1948) 2 D.L.R. 798):

> In proving this sort of case the practice has differed according to Judges. It has always been my practice not to accept such evidence, but to insist upon proof before me of the matrimonial offence by the witnesses thereto. Other Judges, I know, take the opposite course. In this case counsel for the plaintiff declined to offer any more evidence.

The next case to deal with the problem was Sellwood v. Sellwood and Markham (1949) 2 W.W.R. 1165, 58 Man. R. 390 aff'd (1950) 1 W.W.R. 1051, 58 Man. R. 396 (Man. C.A.) which was a King's Bench decision of Beaubien J. affirmed without reasons in the Manitoba Court of Appeal. This case is particularly interesting in that the court looked closely at the tendered judgment from previous divorce proceedings before rejecting it. It is doubtful if one can argue that this case is authority for the blanket exclusion of such evidence. Beaubien J. rejects it because the judgment was

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[3] The defendant in this case did not appear or defend, and the judge admits that the only Ontario case he could find was Upper v. Upper [1933] 1 D. L.R. 244, O.R. 1 which was an estoppel case. No doubt a higher degree of diligence would have turned up Howe v. Howe (1937) O.R. 57.

based on evidence that should have been inadmissible in the first instance. In other words he has retried the original case and having found sufficient irregularities he concluded ((1949) 2 W.W.R. 1165 at 1169):

> . . . I feel bound to reject the evidence of the respondent taken on her cross-examination because her rights should have been, but were not, drawn to her attention. Although she was served with a copy of the petition she was not, properly speaking, a party to the former proceedings nor did she take any part in them. That being the case I cannot see how she can be bound by the evidence taken in those proceedings.

A further difficulty, that appears not infrequently throughout this area, is that of the confusion surrounding the doctrine of estoppel. In the words of Beaubien J. quoted above we see evidence of the words of estoppel, "bound by the evidence taken in those proceedings". It is not clear if he is rejecting the evidence solely on the grounds that the statement is not an estoppel. It should be remembered that this was the single minded logic used by Rinfret J. for the majority of the Supreme Court of Canada in La Fonciere Compagnie D'Assurance de France v. Perras et al and Daoust (1943) 2 D.L.R. 129:

> Furthermore, I am of the opinion that apart from its regularity, this document was inadmissible in itself in this case. That seems to me to be the necessary result of the conclusion that the decision of a criminal Court cannot constitute res judicata before a civil Court. In fact, that clears away the only reason for which plaintiff could have an interest in offering the evidence of the conviction by the criminal Court. As long as this cannot constitute res judicata, it is impossible to see what

> other object appellant could have in view in asking for production of the certificate of judgment in the criminal matter; and on the other hand, it is easy to foresee the disadvantages in the production of a document of this nature, for example, in a trial by jury, where the mere fact of the conviction could have an influence on the verdict which it should not have.

In a short judgment in 1954, Wilson J. of the B.C. Supreme Court gathered all the threads together and made a very succinct statement of the law based on the case authorities. The case is Lingor v. Lingor (1954) 13 W.W.R. (N.S.) 446 at 447, and Wilson J. states the law thusly:

> But Hollington v. Hewthorn & Co. [1943] K.B. 587, 112 L.J.K.B. 463, expressly overrules Partington v. Partington and I find the reasoning of the Court of Appeal so persuasive that I am impelled to follow it and hold that the decree in Smith v. Smith is res inter alios acta and not admissible as evidence in this case.
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> I am confirmed in this opinion by the judgment of the Supreme Court of Canada in La Fonciere Compagnie d'Assurance de France v. Perras and Daoust [1943] S.C.R. 165.
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> I am aware that Urquhart J. in Thompson v. Thompson and Sager [1948] O.W.N. 344, has held otherwise, but in doing so he followed Crawshay-Williams v. Crawshay-Williams Times Newspaper, January 15, 1915, and Eskell v. Eskell (1919) 88 L.J.P. 128. These latter decisions, together with Little v. Little [1927] P. 224, 96 L.J.P. 131, and Swan v. Swan (1903) Times Newspaper, March 24, 1903, while not expressly overruled by Hollington v. Hewthorn & Co.,

> are so nearly identical with Partington v. Partington that I think they are, by implication, deprived of authority. I should add that Hollington v. Hewthorn & Co. was apparently not brought to the attention of Urquhart, J.

Lingor v. Lingor was shortly thereafter approved in the same court in Parker v. Pinder (otherwise known as McDougall and falsely called Parker) ((1954) 13 W.W.R. (N.S.) 495 (B.C.)) and in 1956 in Nova Scotia's Divorce and Matrimonial Causes Court a similar judgment was rendered in the case of Manuel v. Manuel (1956) 1 D.L.R. (2d) 429. This time Lauritson v. Lauritson (1932) 41 O.W.N. 274, was expressly disapproved of and Hollington v. Hewthorn was stated as authority. That same year the Saskatchewan Queen's Bench division ruled that proof of adultery by reference to other proceedings was not allowable in the case of Stevenson v. Stevenson (1956) 19 W.W.R. (N.S.) 90 (Sask.). Thompson J. not only followed good authority (Hollington v. Hewthorn (1943) K.B. 587 and Lingor v. Lingor (1954) 13 W.W.R. (N.S.) 446) in coming to his decision but he also offered a cogent reason for his position ((1956) 19 W.W.R. (N.S.) 90 at 92 and 93:

> It must be remembered that in this province a practice has grown up of relying on admissions made by the defendant as proof of the alleged adultery. Indeed, in a very large percentage of cases the main or only proof of the adultery consists of admissions made by the defendant spouse on his or her examination for discovery. It is a well recognized rule that such admissions bind no one except the persons by whom they are made. Rutherford v. Rutherford (or Richardson), [1923] A.C. 1; Shields v. Shields [1947] O.W.N. 722, and Power on Divorce, sec. 77, at 324.

This leads to the peculiar situation that while the plaintiff is entitled to a decree dissolving the marriage on the ground of the adultery of the defendant spouse with the co-respondent, the court may, nevertheless, if so requested by the co-respondent, be under the necessity of dismissing the action against such co-respondent. Garrow, J. in Harris v. Harris (1931) 40 O.W.N. 269, at 270, dealt with this phase of the matter in the following terms:

> "This leads to the curious result that, while in a proceeding of this kind against a wife and a named co-defendant in respect of adultery alleged to have been committed upon a specific occasion the evidence may establish that the wife committed the adultery charted with the person named, yet fail to shew, as against the person named, that the adulterous act took place. That this is or may be the result is plainly indicated in Rutherford v. Rutherford (or Richardson) [supra]."

In this case the decrees in the previous action of Schultz v. Schultz do not disclose the nature of the evidence by which the adultery of the defendant spouse in that action was established. There is, therefore, no assurance that there was any evidence binding on the defendant Stevenson, the co-respondent in the former action, that he had committed adultery with Ruth Schultz, the co-respondent in this action. The facts of this case are, therefore, very similar to the facts in the case of Ruck v. Ruck [1896] P. 152, 65 L.J.P. 87. In that case the wife had petitioned for dissolution of her marriage on the ground of adultery coupled with desertion and tendered a decree in a previous action in which her husband had been the co-respondent as proof of the alleged adultery. The decree showed that the jury in the previous action had found the defendant guilty of adultery with her husband but there was no finding by the jury in the former action that her husband had

> been guilty of adultery with the said defendant. It was held that the decree was not of itself sufficient evidence of the alleged adultery against the husband.
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> Under the circumstances and particularly in view of the practice which has grown up of proving adultery in divorce cases by admissions of the guilty party, I am of the opinion that the course adopted by Wilson J. in Lingor v. Lingor, supra, is the one which I should follow. I, therefore, hold that the decrees in the former action of Schultz v. Schultz must be treated as res inter alios acta, and are not, therefore, admissible as evidence of the alleged adultery of the defendant in this action.

More recently a decision of the Ontario High Court has shown that the Ontario position is still contrary to that of the other common law provinces. In Love v. Love (1964) 1 O.R. 291 at 292, Ferguson, J. came to the following conclusion:

> A judgment for divorce on the grounds of adultery between A and B makes the issue of adultery res judicata. It is a judgment in rem; that is to say one that is good not only between the parties and their privies, but good as against the world and this is so because it is a judgment affecting status.
>
> Therefore, in this action now before the Court the adultery alleged in this action between the defendants may be proved by filing the judgment nisi in the previous trial, together with proof that the defendants named in that judgment are the same as in the case at bar.

In order to reach this conclusion it was of course necessary to deal with Hollington v. Hewthorn (1969) 1 O.R. 291 at 293:

> Much reference has been made recently to what is called the rule in Hollington v. F. Hewthorn & Co. Ltd., [1943] K.B. 587, but that case concerns the admissibility in a case involving civil negligence on the part of the respondent of a judgment in a previous criminal case finding that the defendant had been guilty of careless driving. In my opinion, the discussion surrounding the proposal to make such a finding admissible by statute is not really relevant to the point involved in the instant case.

With respect, this does not deal properly with the issue. In fact the entire decision is worthy of criticism, as Ferguson J. has somehow found on estoppel where none exists. Alan W. Mewett explains this clearly in his essay "Evidence and Proof in Proceedings for Divorce", Studies in Canadian Family Law, vol. 2, Mendes da Costa (ed.), Butterworth, Toronto, 1972, p. 627:

> In the recent Ontario case of Love v. Love [1969] 1 O.R. 291 (H.C.), Ferguson J. held that, since in previous divorce proceedings the finding of adultery is res judicata, and since a divorce decree is a judgment in rem (but there is a difference between a judgment being in rem and the facts upon which that judgment is based being in rem), in subsequent proceedings the same act of adultery could be proved merely by filing the prior judgment with proof of the identity of the parties. Certainly this appears to be current practice, but it is suggested that Hollington v. Hewthorne cannot be disposed of merely by asserting that it concerned an action for civil negligence and a previous finding

> of guilt in a careless driving charge. The judgment in Hollington v. Hewthorn expressly disapproves of Partington v. Partington on a point identical to that in issue in Love v. Love, its reasoning being that a finding of adultery in proceedings A. v. A. is not res judicata in proceedings B. v. B., and that the judgment is in rem only for the purposes of the action A. v. A.

Finally, with regard to Love v. Love (1967) 1 O.R. 291 it is interesting to note the dissatisfaction that Ferguson J. felt when he concluded his judgment. Having found that the previous judgment was conclusive of the issue it was obvious that he was uncertain that this was in the best interests of justice (at 294):

> This Court, therefore, is compelled to rely on the integrity of the solicitors and counsel who conducted the case which, combined with the shaky evidence of Mr. Amey, to find this case in order. It would have been, I assume, simple for the plaintiff to have proven the adultery at Napanee in the same fashion as it was proved at Kingston. The plaintiff, of course, was called in this case, but Mrs. Hunter who was the plaintiff in the Kingston case was not called and no reason was given why this was not done. Therefore, it is with some hesitation that I grant the judgment nisi.

Judges should not be called upon to make such assumptions, and it is submitted that had Ferguson J. understood the rule in Hollington v. Hewthorn in the broad sense in which it was enunciated he would have saved himself from this dilemma.[4]

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[4] This is a similar difficulty to that of Horridge J. in Partington v. Partington [1925] P. 35 discussed at (2) page 4 of this paper. Yet in this case Ferguson J. has handcuffed himself to even a greater extent as he felt 'bound' by the previous judgment.

The case of Meshwa v. Meshwa and Lindy (1970) 75 W.W.R. 459, indicates once again that the Ontario position is anomalous. In this case Aikins J. of the British Columbia Supreme Court states the law clearly by answering four separate contentions by counsel for the defendant wife who wanted to introduce a judgment from previous proceedings (1970) 75 W.W.R. 459 at page 461 and page 462:

> (1) It is said that the Lingor case depends on the authority of Hollington v. Hewthorn & Co., supra, and that this case had been strongly criticized. No doubt this is so: See Barclays Bank Ltd. v. Cole [1967] 2 Q.B. 738, [1967] 2 W.L.R. 166, [1966] 3 All E.R. 948 and Goody v. Odhams Press Ltd. [1966] 3 W.L.R. 460, 110 Sol. J. 793, [1966] 3 All E.R. 369. However, the Hollington case has not been overruled, although the law as given in the Hollington case has been changed in England by statute. However, Mr. Lecovin's argument misses the mark; the point is that the principle enunciated in the Hollington case has been adopted by this Court in the Lingor case and even if I were minded to do otherwise, which I am not, I should follow the Lingor case.
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> (2) Mr. Lecovin argues that the so-called Hollington rule does not apply to a matrimonial case and that it was not intended to so apply. There are two short answers to this submission: (1) It must have been intended that the principle apply to a matrimonial case because the Hollington case expressly overrules Partington v. Partington, supra, a matrimonial case; and (2) In any event, the principle has been applied in the Lingor case to a matrimonial case in this province.
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> (3) Mr. Lecovin argued that I should not follow the Lingor case because that case deals with a question of evidence, whereas his argument is based on res judicata. As to this, it seems to me enough to say that if a decree in a matrimonial cause, such as

> the Sutton decree in the present case, is res inter alias acta and not admissible in evidence, it cannot be used to set up res judicata.
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> (4) Mr. Lecovin argues that even if the Sutton decree is inadmissible under the authority of the Lingor case as conclusive evidence of adultery on the basis of res judicata, it nevertheless should be admissible as some evidence of the adultery alleged and may be considered to strengthen or corroborate the evidence given by the respondent wife. This proposition is in direct opposition to what was said in both the Hollington and Lingor cases: The decree is not admissible as evidence I need say no more on this point.

In a sense this case represents an apotheosis of the rule. Aikin J. has attempted to undercut all grounds of attack by a rather arid dependence or authority. In short, he is saying that the decree is not admissible because Hollington v. Hewthorn says so, and indeed it does, and to say that it doesn't say so requires the type of legal gymnastics that were applied in Love v. Love [1969] 1 O.R. 291. But the point is, is the single fact that Hollington v. Hewthorn says it is inadmissible really a good enough reason to exclude the evidence? Traditionally the courts have thrown in the phrase "res inter alias acta",[5] but it is clear that that latin maxim is concerned with estoppel.

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[5]Indeed this was the sole basis of the trial division decision in Hollington v. Hewthorn (1943) 1 K.B. 27 at 29: "Hilbery J. I rule that evidence of this conviction is inadmissible, as being res inter alios acta." That was the whole of Hilbery J.'s judgment on this issue. In Canada we have Lingor v. Lingor (1954) 13 W.W.R. (N.S.) 446 at 447 per Wilson J.: "But Hollington v. Hewthorn & Co. [1943] K.B. 587, 112 L.J.K.B. 463, expressly overrules Partington v. Partington and I find the reasoning of the Court of Appeal so persuasive that I am impelled to follow it and hold that [Continued on next page.]

Surely the divorce courts in Canada have taken the same view as Rinfret J. quoted earlier in this paper (at page 5).

The Ontario High Court decision of T. v. T. (1970) 2 O.R. 139 touches on the problem, although it approaches it backwards for our purposes. Had Lacouriere J. arrived at the opposite conclusion it would have meant that the statutory provision of the Divorce Act abrogated the rule in Hollington v. Hewthorn in cases that involved a previous criminal conviction. The headnote sets out the situation:

> Section 3(b) of the Divorce Act, 1967-68 (Can.) c. 24, which provides that a petition for divorce may be presented on the ground that the respondent "has been guilty of . . . rape" refers to a matrimonial offence rather than a criminal offence. To establish rape as a ground for divorce does not require that the respondent has been found guilty of the criminal offence.

The latest Canadian case that I have been able to find is G. v. G. (1971) 16 D.L.R. (2d) 107, from the Nova Scotia Supreme Court (Trial Division). In that case Cowan C.J.T.D. decided that a certificate of conviction

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[Continued from page 13.]

the decree in Smith v. Smith is res inter alios acta and not admissible as evidence in this case." And a host of others including Aikins J. in Meshwa v. Meshwa (1970) 75 W.W.R. 457 at 461: "On the authority of the Lingor case, which I accept and follow, the position is simple enough: The decree in the Sutton case is res inter alios acta and is not admissible in evidence and hence has no probative value.

under the Criminal Code, s. 147 (sodomy) was inadmissible in divorce proceedings. This was a thoughtful judgment that dealt with the authorities in a logical manner, following Hollington v. Hewthorn and Manuel v. Manuel (1956) 1 D.L.R. (2d) 429. It is most noteworthy in that Cowan C.J.T.D. expresses his view that the law is in an unsatisfactory state (1971) 16 D.L.R. (3d) 107 at 109 (a discussion of Payne's article and other recommendations will follow in Part B of this paper.)

> A general analysis of the application of the rule in Hollington v. Hewthorn, supra, in matrimonial proceedings by Julien D. Payne may be found in 17 Chitty's Law Journal, p. 8 (1969).
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> I agree with the view of Payne, supra, at p. 10; that legislation of the kind adopted in the United Kingdom and in Australia is desirable in this Province. A certificate or other evidence of a conviction should be admissible in evidence but it should, perhaps, not be conclusive evidence of the commission of the offence.

By way of conclusion to the discussion of the Canadian cases I would like to comment upon a passage by Aikins J. in Meshwa v. Meshwa (1970) 75 W.W.R. 454. Speaking about the Love v. Love (1969) 1 O.R. 241, decision in Ontario this B.C. judge said (1960) 75 W.W.R. 459 at 463:

> Ferguson J. declined to follow the Hollington case and followed, inter alia, the decision of Urquhart J. in Thompson v. Thompson and Sager, supra, a case which was distinguished and not followed in the Lingor case. About all that need be said about this conflict is that the law in this province has taken a different course than it has in Ontario. It would be fruitless to explore the history of the divergence further.

If what is meant is that Love v. Love is wrongly decided and based on poor law, I accept his analysis, but if he means that Ontario has taken an irreversible course that differs from the rest of Canada I cannot agree. As it stands a strong court in Ontario is open to resurrect Hollington v. Hewthorn, and yet it seems evident that no court in any of the other provinces could honestly argue the case away, even the Supreme Court of Canada would have severe difficulties in view of the precedent of La Fonciere Compagnie D'Assurance de France v. Perras and Daoust (1943) 2 D.L.R. 129. It is clear that this rule has become entrenched to the point where only legislation can remove its effects. The various academic writers and law reform commissions have given considerable attention to the problem of finding the proper kind of legislation to deal with the admission of judgments and convictions. In the next section of this paper I will review their recommendations with particular regard, of course, to those having reference to the rule in Hollington v. Hewthorn in matrimonial causes.

B. COMMENT

There are at least three kinds of situations that involve the rule in Hollington v. Hewthorn in matrimonial causes. The cases do not usually make these distinctions so I have not dealt with them in conjunction with the cases. The first situation is like Manuel v. Manuel[6] where a criminal conviction for rape is presented as possible

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[6](1956) 1 D.L.R. (2d) 429 there MacDonald J. said: "Though rape is not per se a matrimonial offence in Nova Scotia, its commission does constitute adultery on the part of the male party and therefore a ground for divorce at the suit of his wife: Corkum v. Corkum (1902), 40 N.S.R. 48; Power on Divorce, p. 307."

evidence for a divorce on the grounds of adultery. This situation is not unlike any other case where a civil action could possibly be expedited by the admission of evidence of a criminal conviction and I don't think the problem should necessarily be dealt with under the heading of matrimonial causes. It is only incidental that the criminal conviction is tendered in a divorce case,[7] if such a conviction has probative value that outweighs any objections such as are set out in Hollington v. Hewthorn it should be admissible in any proceedings.

The second situation is more applicable to matrimonial proceedings because it is brought about by the Divorce Act. The case of T. v. T.[8] provides an illustration of the situation where the actual criminal act is grounds itself for divorce. That is under section 3(b) of the Divorce Act. Alan Mewett deals with this special circumstance in conjunction with the rule in Hollington v. Hewthorn and poses some questions about it (Studies in Canadian Family Law, Vol. II, Mendes de Costa (ed.): Butterworths, Toronto, 1972, pp. 633-635.

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[7]Unless you accept the improbable idea that because the state is in a sense a party to a divorce action and the duty of inquiry is high on the part of the judge then it should be like a criminal action, where no one has suggested that previous judgments as proof of the issue at trial. The converse of this argument has become a popular means for rationalizing the abrogation of the rule in Hollington v. Hewthorn, see pp. 20-29.

[8][1970] 2 O.R. 139 (Ont. H.Ct.) this case holds that a criminal conviction is not required to satisfy s. 3(b) of the Divorce Act.

Paragraph (b) of s. 3, extends the grounds of divorce to cases where the respondent "has been guilty" of sodomy, bestiality or rape. Presumably any husband guilty of rape would also have committed adultery, except in cases where the conviction is for being a party to the offence, other than an actual rapist.[21] Whether para. (b) is meant to cover this latter situation is dubious . . . .

The Act does not state "has been convicted" of sodomy, bestiality or rape. Nor does it say "has committed" sodomy, bestiality or rape, though in other contexts it does use similar phrases.[26] Furthermore, there is the Hollington v. Hewthorne problem referred to above. If the husband has, for example, been convicted of rape, does the petitioner have to prove the act of rape in the divorce action or will the conviction, plus proof of identity suffice?[27] Conversely, while the evidence may not be sufficient to support criminal conviction, may the wife be allowed to adduce evidence of rape that amy satisfy the lesser burden of proof in a divorce action?[28] Furthermore, if the husband has been convicted, may he attempt to establish his innocence in the subsequent divorce proceedings?[29] One can only hazard guesses in answer to these problems. . . .

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[21] By virtue of the provisions of s. 21 of the Canadian Criminal Code.

[26] Section 4(1)(a).

[27] Compare s. 11 of the Civil Evidence Act (England), 1968. See also Virgo v. Virgo (1893), 69 L.T. 460.

[28] Coffey v. Coffey, [1898] P. 169.

[29] This, of course, depends not only on the admissibility of evidence of a conviction but, even if admissible, the conclusiveness of such evidence.

> The effect of Hollington v. Hewthorne where there has been a conviction is more doubtful. What authority there is seems to suggest that this decision has been followed in Nova Scotia, British Columbia, Manitoba and Saskatchewan,[32] though not in Ontario.[33] The practice in Ontario, indeed, is to set out in the petition the date and place of conviction and assume that this is sufficient evidence of the respondent having been "guilty" of sodomy, bestiality or rape. Yet, "has been convicted of" is not the same as "has been guilty of" and it is difficult to conclude either on precedent or in logic that such a conviction should be conclusive in subsequent divorce proceedings.[34]

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[32] Manuel v. Manuel (1956), 1 D.L.R. (2d) 429 (N.S. Divorce Ct.); Lingor v. Lingor (1954), 13 W.W.R. (N.S.) 446 (B.C.S.C.); Campbell v. Campbell, [1944] 1 W.W.R. 349 (Man. K.B.)' Stevenson v. Stevenson and Schultz (1956) 19 W.W.R. 90 (Sask. Q.B.). And see now G. v. G. (1970), 16 D.L.R. (3d) 107 (N.S.S.C.).

[33] Thompson v. Thompson, [1948] 2 D.L.R. 798 (Ont. H.C.). See Power on Divorce (2nd ed., J. D. Payne), pp. 449, 450.

[34] For these reasons, it is suggested that the approach adopted by the Civil Evidence Act (England), (1968), supra, is preferable.

This writer feels that this second situation should be treated the same as the first. Rules formulated for the purpose of determining when and with what consequences criminal conviction are admissible in civil actions should be equally applicable if the conviction is to be used as proof of adultery or as proof of the offence per se.

The third situation is where there is a finding in a matrimonial case that would correspond with a pleading of

one of the parties to a subsequent divorce action. Lingor v. Lingor (1954) 13 W.W.R. (N.S.) 446 (B.C.S.C.) is an example of that situation--the respondent in that case had been found to have committed adultery in a previous divorce action where he was named co-respondent.

In this situation it is necessary to consider the difference between an ordinary civil action and a divorce action. This must be done because it has generally been admitted that civil judgments should not be admissible[9] as evidence and if divorce judgments are to be admissible there must be some logical or practical distinction.

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[9]The New Zealand report on the Rule in Hollington v. Hewthorn sums up this opinion quite nicely.

> Previous Civil Judgments and Orders
>
> **37.** We reserve matrimonial proceedings and paternity orders for separate consideration in paragraphs 39 et seq. and 42 respectively.
>
> As to the other types of civil judgments, if the parties in the previous and the later civil proceedings are the same, the admissibility of the earlier civil judgment (or order) is governed by the doctrine of estoppel per rem judicatam, coupled with the doctrine of issue estoppel. So we are here concerned only with the situation where the parties are different in the subsequent civil proceedings.
>
> **38.** An issue of fact in one civil action is seldom the same as an issue of fact in another civil action between different parties. When, exceptionally, it is the same, we agree with the English Law Reform Committee that the finding of the first court should not be admissible in the second action. In civil proceedings "the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the

[Continued on next page.]

Mewett has dealt specifically with this distinction, although not necessarily in the context of our problem. (Mewett pp. 630-631).

> The divorce action, quite simply, is sui generis and hears certain characteristics which make it impossible to equate it with the ordinary civil action. It is suggested that the following general principles apply:
>
> 1. The burden of proof is on the petitioner to establish the grounds for divorce whether under Section 3 or under Section 4;
>
> 2. The degree of proof required is that the court must be satisfied on the balance of probabilities of the existence of those grounds;
>
> 3. However, unlike the situation in the ordinary civil action, the court must determine objectively whether that burden has been discharged and may not allow the parties themselves to concede proof, however willing they may be to do so.
>
> 4. Again, unlike other civil actions, the court must determine certain issues for itself even though they have not been raised by the parties and must adopt the role of inquisitor and refuse a decree where it finds that certain matters such

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[Continued from page 20.]

> court. The thoroughness with which their case is prepared may depend upon the amount at stake in the action. We do not think it just that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action, should not be allowed to avail himself of the opportunity to improve upon it in the second." (Report, para. 38.)

as collusion, condonation or connivance, or the prospect of cohabitation resuming, exist. The difficulties that this requirement engenders will be discussed in more detail later.

Item 4 does have particular significance in dealing with the Hollington v. Hewthorn problem, and Mewett goes on later in his essay to quote the applicable sections of the Divorce Act and to comment upon them. (Mewett pp. 644-650).

L. DUTIES OF THE COURT

Sections 8 and 9 provide as follows:

8.(1) On a petition for divorce it is the duty of the court, before proceeding to the hearing of the evidence, to direct such inquiries to the petitioner and, where the respondent is present, to the respondent as the court deems necessary in order to ascertain whether a possibility exists of their reconciliation, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, and if at that or any later stage in the proceedings it appears to the court from the nature of the case, the evidence or the attitude of the parties or either of them that there is a possibility of such a reconciliation, the court shall

(a) adjourn the proceedings to afford the parties an opportunity of becoming reconciled; and

(b) with the consent of the parties or in the discretion of the court, nominate

(i) a person with experience or training in marriage counselling or guidance, or

(ii) in special circumstances, some other suitable person,

to endeavor to assist the parties with a view to their possible reconciliation.

(2) Where fourteen days have elapsed from the date of any adjournment under subsection (1) and either of the parties applies to the court to have the proceedings resumed, the court shall resume the proceedings.

9.(1) On a petition for divorce it is the duty of the court

(a) to refuse a decree based solely upon the consent, admissions or default of the parties or either of them, and not to grant a decree except after a trial which shall be by a judge, without a jury;

(b) to satisfy itself that there has been no collusion in relation to the petition and to dismiss the petition if it finds that there was collusion in presenting or prosecuting it;

(c) where a decree is sought under section 3, to satisfy itself that there has been no condonation or connivance on the part of the petitioner, and to dismiss the petition if the petitioner has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the decree;

(d) where a decree is sought under section 4 to refuse the decree if there is a reasonable expectation that cohabitation will occur or be resumed with a reasonably foreseeable period;

(e) Where a decree is sought under section 4, to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance; and

(f) where a decree is sought under section 4 by reason of circumstances described in paragraph 4(1)(e), to refuse the decree if the granting of the decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances.

(2) Any act or conduct that has been condoned is not capable of being revived so as to constitute a ground for divorce described in section 3.

(3) For the purposes of paragraph 4(1)(e), a period during which a husband and wife have been living separate and apart shall not be considered to have been interrupted or terminated.

(a) by reason only that either spouse has become incapable of forming or having an intention to continue to live so separate and apart or of continuing to live so separate and apart of his or her own volition, if it appears to the court that the separation would probably have continued if such spouse had not become so incapable; or

(b) by reason only that there has been a resumption of cohabitation by the spouses during a single period of not more than ninety days with reconciliation as its primary purpose.

Considerable evidentiary problems are engendered by the duties that are imposed upon the court. Under s. 8, a divorce action clearly is moved out of the adversary system. The trial judge is required to descend into the arena and participate in the dispute. The court must direct such enquiries "as the court

deems necessary" and some fairly uniform standards must be worked out, as to the method of questioning and the scope of the enquiry. The section imposes this duty not only before the evidence is heard but also at any time during the proceedings.

Section 9 also removes a divorce petition from the adversary system. It is a statutory enactment of some fairly well recognized general principles but some of the provisions raise certain evidentiary difficulties. . . .

Clearly some sense must be made out of these provisions and it is suggested that the results are as follows:

(i) There is no initial presumption of colusion requiring the petitioner to prove its absence;

(ii) If, as a result of evidence introduced or as a result of the trial judge's observations, the Court entertains a doubt that there might be collusion, a limited burden of proof shifts to the petitioner;

(iii) This burden is not to show affirmatively that there has been no collusion, but to introduce sufficient evidence so that at the end of the case the trial judge cannot make the inference that, on the balance of probabilities, there has been collusion;

(iv) If, at the end of the case, the trial judge is in doubt, he should not refuse the decree on this ground, not because he is satisfied that there has been no collusion but because he cannot make an affirmative finding that there has been.

N. CONCLUSION

It appears not unfair to state that common law courts have never been particularly happy with the attempt to fit divorce actions into the

> traditional adversary principles and the classical rules of evidence. The reason is simply that many of them are inappropriate. Whether it was intended or not, the Act has now placed the judiciary in the difficult role of both presiding at what on the surface appears to be an adversary process and also assuming an inquisitorial role. It requires them to adhere to the traditional rules of burden of proof and effects of presumptions but at the same time requires them to conduct their own enquiry into such matters as the possibility of collusion or condonation completely independently of the adversary system. The Act also imposes upon counsel duties which diverge from their traditional roles. Whether this is satisfactory or whether other devices, such as the appointment of counsel to safeguard the interests of children or the state, will have to be adopted remains to be seen.

I have quoted at length on this point because it comprises the pith and substance of the arguments that have been presented in other jurisdictions for an exception being made to the rule in Hollington v. Hewthorn in divorce actions. For example the English Law Reform Committee put the argument this way (Cmnd. 3391, p. 15).

Findings of Adultery in Matrimonial Cases

> 34. We have already drawn attention to the fact that in petitions for dissolution of marriage the judge is under a statutory duty to make inquiry to satisfy himself that the grounds for dissolution are made out. The only one of these grounds which is relevant for our present purposes is adultery, for this involves a stranger to the marriage sought to be dissolved. The alleged adulterer, whether co-respondent or woman named, is served with the proceedings and has the opportunity of defending himself or herself against the charge.

> But a finding of adultery against the co-respondent or woman named is not admissible as evidence of the adultery in a subsequent petition for dissolution of marriage by the spouse of the co-respondent or woman named. Having regard to the statutory duty of inquiry imposed upon the judge in suits for dissolution of marriage, and to the right of the alleged adulterer to defend the charge, we think that such a finding should be dealt with in the same way as a criminal conviction. In any subsequent civil proceedings the fact of such finding of adultery should be admissible and the person against whom the finding was made should be taken to have committed the adultery found against him, unless it is proved that such finding was erroneous. We draw attention to the fact that a similar recommendation was made in the Denning Report on Matrimonial Causes (1947 Cmd. 7024) and the Report of the Royal Commission on Marriage and Divorce (1956 Cmd. 9678).

The New Zealand position is even more forceful as the Matrimonial Proceedings Act of that country contains a very broad charge to the judge in respect of his duty to find all facts (New Zealand Report, p. 35),

> Previous Matrimonial Findings in later Civil or Criminal Proceedings
>
> 39. In petitions for divorce the Court has a statutory duty to satisfy itself "so far as it reasonably can as to the facts alleged and as to any other relevant facts."[46] The only ground of divorce which need concern us, for the purposes of this report, is adultery, for this alone involves a stranger to the marriage. A petitioner must make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds.[47]

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[46] Matrimonial Proceedings Act 1963, s. 28.

[47] Ibid., s. 22(1).

This logic led to an equally forceful recommendation (Ibid., p. 41).

> 8. Findings of adultery in matrimonial proceedings in the Supreme Court should be admissible in subsequent matrimonial or other civil proceedings, subject to the same conditions as we recommend for criminal convictions.

There is, however, a practical side to this question that should not be overlooked. Although it has been established that the judge in a divorce case is under a special duty, it is nevertheless equally true that he is often under a special disadvantage in respect of being able to discharge his responsibility. This disadvantage is a result of the very common situation where one or both of the respondents fail to appear at all or at least fail to retain adequate counsel. Another related disadvantage was brought to light in the case of Stevenson v. Stevenson (1956) 19 W.W.R. (N.S.) 90 (Sask.) discussed on pages 7, 8 and 9, where it was explained that judges in matrimonial disputes often accept evidence that is far below the ordinary standard of proof that would be required in a subsequent action. Yet another point is that when a judge suspects collusion he should not refuse a decree on that grounds, but only when he can make a positive finding that there has been collusion. From this it is apparent that in many subsequent proceedings a decree would assume a greatly magnified authority that it did not enjoy on its own merits.

The final argument on this point is admittedly semantic, but it is submitted on the basis that it illustrates

the rather technical, if not arid, nature of the original argument itself. If the presiding judicial officer is under such a firm duty of inquiry in a divorce action, why should he entertain evidence of the nature of another judgment. Indeed this is the very situation that seems to exist with regard to criminal convictions being admissible in subsequent criminal actions, a problem that is not even mentioned by the reformers, but is briefly commented upon by Cross (p. 478 Australian Edition, 1970).

In G. v. G. (1971) 16 D.L.R. (3d) 107 (Nova Scotia S.C.T.D.), Cowan C.J.T.D. felt that the rule should be abolished in matrimonial cases.

> G. v. G.
>
> The rule in Hollington v. Hewthorn & Co., supra, has been changed by statute in the United Kingdom--see ss. 11 and 12 of the Civil Evidence Act, 1968 (U.K.), c. 64.
>
> The Matrimonial Causes Act, 1959-1965, of Australia provides by s. 101 that certificates of conviction are admissible in evidence. The Matrimonial Proceedings Act, 1963, of New Zealand provides by s. 21(2) that proof that the respondent has been convicted by any Court of any of the offences of rape, sodomy or bestiality shall be conclusive proof that he has committed that offence. A general analysis of the application of the rule in Hollington v. Hewthorn, supra, in matrimonial proceedings by Julien D. Payne may be found in 17 Chitty's Law Journal, p. 8 (1969).
>
> I agree with the view of Payne, supra, at p. 10, that legislation of the kind adopted in the United Kingdom and in Australia is desirable in this Province. A certificate or other evidence of a conviction should be admissible in evidence but it should, perhaps, not be conclusive evidence of the commission of the offence.

It is clear that Co-an, C.J.T.D. had not really determined what should replace the rule, as he said that legislation of the "same kind adopted in the United Kingdom and Australia" should be adopted in Canada, and yet that legislation is strikingly different in those two countries. Australia makes convictions conclusive and the U.K. allows contradictory evidence to be called. Julien D. Payne in his article, 17 Chitty's Law Journal, p. 8 (1969) recommends that the draft provisions of the Law Reform Committee (England) be adopted. Those recommendations were accepted in the Civil Evidence Act of 1968 except for a minor change that allowed judgments from all "matrimonial proceedings" instead of only those from the High Court. This change was no doubt precipitated by a change in the duty of inquiry in all courts by the Matrimonial Causes Act (1967). The Civil Evidence Act, 1968, c. 64, s. 12 is as follows with regard to this problem.

> 12. Findings of adultery and paternity as evidence in civil proceedings.
>
> (1) In any civil proceedings--
>
> (a) the fact that a person has been found guilty of adultery in any matrimonial proceedings; and
>
> (b) the fact that a person has been adjudged to be the father of a child in affiliation proceedings before any court in the United Kingdom,
>
> shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those civil proceedings, that be committed the adultery to which the finding relates, or, as the case may be,

is (or was) the father of that child, whether or not he offered any defence to the allegation of adultery or paternity and whether or not he is a party to the civil proceedings; but no finding or adjudication other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is provided to have been found guilty of adultery as mentioned in subsection (1)(a) above or to have been adjudged to be the father of a child as mentioned in subsection (1) (b) above--

(a) he shall be taken to have committed the adultery to which the finding relates or, as the case may be, to be (or have been) the father of that child, unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court, in the matrimonial or affiliation proceedings in question shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of any enactment whereby a finding of fact in any matrimonial or affiliation proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Subsection (4) of section 11 of this Act shall apply for the purposes of this section as if the reference to subsection (2) were a reference to subsection (2) of this section.

(5) In this section--

"matrimonial proceedings" means any matrimonial cause in the High Court or a county court in England and Wales or in the High Court in Northern Ireland, any consistorial action in Scotland, or any appeal arising out of any such cause or action;

"affiliation proceedings" means, in relation to Scotland, any action of affiliation and aliment:

and in this subsection "consistorial action" does not include an action of aliment only between husband and wife raised in the Court of Session or an action of interim aliment raised in the sheriff court.

In his comment upon the Civil Evidence Act, 1968, Kean summarizes the provision of the Act with regard to matrimonial proceedings (The Civil Evidence Act, 1968, Michael Kean, Butterworth, London, 1969, pp. 32, 33).

The rebuttable statutory presumption

[127] In short therefore in any civil proceedings the fact of:

(a) the finding of guilt of adultery in any matrimonial proceedings, and

(b) the fact that a person has been adjudged to be the father of a child in affiliation proceedings before any court in the United Kingdom is admissible.

The person against whom the finding was made is taken to have committed the act of adultery, or to be the father of a child. He shall be taken to have committed the acts in question unless the contrary is proved. In other words the Act again creates statutory rebuttable presumptions which shall operate unless they are rebutted. Clearly the burden of rebutting them is on the person who disputes the correctness of the findings, or the facts on which they are based.

> The Commission agreed with the general conclusion in Hollington v. Hewthorn that it is usually "safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal"[12] but accepted the reasoning put forward by witnesses and concluded that it would be desirable to introduce exceptions to the rule in respect of matrimonial proceedings.[13]

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[12] Hollington v. Hewthorn (1943) K.B. 587, at p. 602, 112 L.J.K.B. 463.

[13] Cmd. 9678 (1956), para. 930.

Upon examination of the Royal Commission report the only reason "put forward by witnesses" that can apply are those given previously, but in the interests of clarity I think it would be best to quote the Commission itself (Royal Commission on Marriage and Divorce (England) 1951-1952, Cmd. 9678).

(2) EVIDENCE

Admissibility of previous findings

929. A finding against a party in one action is not evidence against that party in a subsequent action, unless the parties in both actions are the same.[5] Thus, if a husband is found guilty of adultery in proceedings for divorce brought against him by his wife and he is subsequently cited as co-respondent in divorce proceedings brought by the husband of the woman with whom adultery was committed, the adultery has to be proved again in the

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[5] Hollington v. F. Hewthorn & Co. Ltd., [1943] K.B. 587, in which the authorities were fully reviewed.

later proceedings by production of the material witnesses. It was suggested to us that the following exceptions to the rule ought to be made in respect of matrimonial proceedings:

(a) that a finding of adultery in matrimonial proceedings should be prima facie evidence of that adultery in subsequent proceedings in which the parties are not the same;

(b) that proof of a conviction for bigamy or for rape or any other sexual offence should be prima facie evidence of the commission of the offence for the purpose of matrimonial proceedings.

In support, it was said that the petitioner in the subsequent proceedings is now put to unnecessary expense and trouble to prove the offence again; moreover, in the case of sexual offences, the victim of the offence may be caused distress by having to give evidence again. The Denning Committee recommended that in matrimonial causes a previous finding against a party should be admissible in evidence (though not conclusive) in another proceeding against him although the other parties are not the same.[6] The Committee had in mind not only previous findings of adultery but also the case where proceedings are being taken for nullity of marriage on the ground of bigamy and there has been a previous conviction for bigamy.

930. We appreciate that usually it is "safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal."[7]

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[6] Cmd. 7024, paragraphs 75-78, Final Report.

[7] Hollington v. F. Hewthorn & Co. Ltd., [1943] K.B. 587, at p. 602.

> A general review of the rule was not undertaken by the Evershed Committee nor does such a review come within our terms of reference. Nevertheless, we think it desirable that there should be certain exceptions to the rule in respect of matrimonial proceedings. We do not suggest that the party against whom the finding has been made should be prevented from denying the commission of the offence in the subsequent proceedings[8] but we do think that, for the reasons put forward by the witnesses, the burden of proof in such proceedings should shift from the person alleging the offence to the person charged with the offence as soon as the finding has been proved or admitted.

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[8]Mr. Mace would go further. He considers that proof of a conviction on indictment for bigamy or for rape or other sexual offences should be conclusive evidence in matrimonial proceedings of the commission of the offence, on the ground that it would be undesirable to allow the offender the opportunity to re-open the matter and to question the decision of the court which had convicted him.

The three reasons, (1) undue expense, (2) undue inconvenience, and (3) distress of witnesses, are worthy of some comment. As to the first two, I see nothing about them that is distinguishable from any other kind of civil action. The rule will always cause more expense and inconvenience to one of the parties to any subsequent action. It is a doubtful area of inquiry, particularly in light of the fact that it would probably be more concerned with the area of admissibility of previous criminal convictions in subsequent matrimonial causes, and that as I said before should be covered by a general blanket policy on admissibility of criminal convictions (as opposed to, of course, previous findings in matrimonial causes).

The third and final reason was distress of witnesses. This would, it is submitted, affect an almost insignificant number of cases. But in so far as it does apply it should always be the judge's discretion to determine if a witness' evidence is sufficiently probative to require it even though it might distress the witness. There may be a few rare instances where the admission of a judgment will allow the evidence to be called without the witness, but in the absence of a policy that makes findings of other courts conclusive the witness will probably be called again anyway in a contested trial. This is illustrated by the case of Stupple v. Royal Ins. Co. (1970) 3 W.L.R. 212. The real advantage to abrogation of the rule in Hollington v. Hewthorn in a case such as this would be when the respondent does not appear to contest the petition, although it is hard to imagine just how the witness could be unnecessarily distressed if he (or more likely she) was not even cross-examined.

In his essay on Evidence and Proof in Matrimonial Proceedings, Alan Mewett states the law in Canada and then makes some interesting observations and suggestions (Studies in Canadian Family Law, Vol. 2, Mendes da Costa (ed.) Butterworths, Toronto (1972), pp. 622 and 623).

> However logical such reasoning appears to be, England, by the Civil Evidence Act (1968, c. 64, ss. 11 and 12) has now overruled the effect of Hollington v. Hewthorne, and makes the previous finding of adultery evidence of that adultery in subsequent proceedings, but not conclusive. Whether one can reach the same result in Canadian jurisdictions without statutory assistance appears doubtful. If the reasoning of Ferguson J. in Love v. Love is correct (which, with respect, it is submitted it is not) such a previous finding should be conclusive. Yet this would have the effect of compelling husband B as co-respondent in

> the action A. v. A. to defend against the allegation of adultery, lest a finding of adultery be conclusive in subsequent proceedings brought by his wife.
>
> There seems to be no real reason why divorce practice has to be governed by rules not particularly applicable to divorce proceedings, and it does not appear to entail too much hardship on the part of husband B to require him to defend against the allegation of adultery even in the action A. v. A.. It is suggested, however, that the better solution would be to make such a finding of adultery merely evidence in the subsequent proceedings, thus permitting husband B to refute it in a proper case. There may, for example, be contradictory evidence not available in the first action, or wife A may subsequently admit to perjury.[20]

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[20] This problem is, of course, different from the question of the admissibility of an admission of adultery made by husband B in the action A. v. A. in the subsequent action, B. v. B. Such an admission is admissible and involves different issues from the question of the admission of a finding of adultery.

The overwhelming majority of commentators have favoured removal of the restrictions of the rule in Hollington v. Hewthorn in cases involving the admission of criminal covictions, and all the commentators and committees that have examined the problem in respect of matrimonial causes have agreed that findings in divorce court should also be admissible. What has not been agreed upon is the proper onus to be placed upon the person against whose interest the evidence is tendered, this is not a subject for discussion in this paper but is dealt with, as I have mentioned, in another place.

C. CONCLUSIONS

It has already been explained that this is not the proper place to deal with the situation where criminal convictions are tendered as evidence in subsequent divorce proceedings. Nor is this the place to deal with civil judgments. It has been shown that divorce decrees are a result of a different process than either a civil or a criminal judgment. It has been shown that English legislation treats them, with respect to the question at hand, with the same regard as criminal convictions and New Zealand law reformers have recommended that divorce decrees and criminal convictions have equal status (although a different status than that given by the English Act).

It appears to this writer that there is a simple question that one should ask oneself with regard to this whole problem. How likely are the findings of a divorce court to be correct? (Surely the only reason that they are considered to be relevant is because they have a probative value derived from the fact that they are more likely to be right than wrong.) The English and New Zealanders seem to be saying that they are just about as likely (because of the duty of inquiry), to be correct as the findings of a criminal court. I believe that I have presented arguments to show that they are perhaps not so dependable. In my mind they are more nearly on the same level as civil judgments, although those which were uncontested by the respondent or co-respondent seem to be very much weaker indeed then most ordinary civil cases.

I think it should be recognized that if the findings of matrimonial proceedings are admitted, this is either done because it is felt that all civil judgments can also be admitted or else it is done as a public policy decision to reduce the cost and inconvenience of getting a divorce. If we feel that we can safely admit findings that are about as likely to be true as civil findings, I see no other reason for making the distinction between civil and divorce matters in this problem than on the grounds of public policy.

I am, however, confident that careful legislation, particularly in the area of the onus, and weight to be given to this type of evidence, could provide means whereby all judgments, convictions and decrees (civil, criminal and matrimonial) can be administered by the courts so as to admit those that have high probative value and to exclude those whose prejudicial effect would exceed their probbative value. I think it should also be made clear that there would be a certain price to pay, in respect of time and energy spent determining the true value of these convictions,[10] in order to allow the admissions. Whether or not this change in the law would be worth the price is a question for another paper.

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[10] This is referring of course to the problem spoken of in Hollington v. Hewthorn itself and since verified by Stupple v. Royal Ins. Co. (1970) 3 W.W.R. 217. The problem is stated briefly by Goddan, L.J. in Hollington v. Hewthorn in (1943) 1 K.B. 587 at 602:

> In many, perhaps in most, cases the correctness of the conviction would not be questioned, but where it is, its value can be assessed only by a retrial on the same evidence.