[HOUSE OF LORDS.]

SCOTT (OTHERWISE MORGAN) AND ANOTHER . . APPELLANTS ; AND SCOTT . . . . . RESPONDENT.

H. L. (E.)* 1913 *May* 5.

Divorce—Practice—Nullity—Hearing in Camera—Publication of Proceedings after Decree—Contempt of Court—Committal—Appeal—Competency—Criminal Cause or Matter—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), *ss.* 2, 6, 22, 46—*Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 47.

The Probate, Divorce and Admiralty Division has no power, either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit in camera in the interest of public decency.

Barnett v. *Barnett* (1859) 29 L. J. (P. & M.) 28, and *H.* (*falsely called C.*) v. *C.* (1859) 29 L. J. (P. & M.) 29 ; 1 Sw. & Tr. 605, followed and approved.

A. v. *A.* (1875) L. R. 3 P. & M. 230, overruled.

D. v. *D.* [1903] P. 144, considered.

Per Viscount Haldane L.C.: The general rule as to publicity must yield to the paramount duty of the Court to secure that justice is done; and it is open to a party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing in camera, and even for the prohibition of subsequent publication of the proceedings, in exceptional cases.

Per Earl Loreburn: In cases where it is shewn that the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order for hearing a matrimonial suit in camera may be lawfully made. Subject to the above limitations rules may be made under the Matrimonial Causes Act, 1857, to regulate the hearing of causes in camera.

An order was made at the instance of the petitioner in a nullity suit, which was practically undefended, for the hearing of the cause in camera. After a decree nisi had been pronounced the petitioner, through her solicitor, obtained a transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause and sent copies of this transcript to certain persons in defence of her reputation.

Upon a motion by the respondent to commit for contempt of Court the petitioner and her solicitor for publishing copies of this transcript, in contravention of the order directing that the cause should be heard in camera, Bargrave Deane J. found that the petitioner and her solicitor were guilty of a contempt of Court and ordered them to pay

* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, EARL LOREBURN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

H. L. (E.) 1913 SCOTT v. SCOTT.

the costs of the motion, and an appeal from this order was dismissed as incompetent:—

Held, (1.) that the order to hear in camera was made without jurisdiction; (2.) that the order, assuming that there was jurisdiction to make it, did not prevent the subsequent publication of the proceedings; (3.) that the order to pay costs was not a judgment in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, so that no appeal would lie from it.

Decision of the Court of Appeal [1912] P. 241, reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Bargrave Deane J. (2)

On January 12, 1911, the appellant Annie Maria Scott, otherwise Annie Maria Morgan, filed a petition in the Probate, Divorce and Admiralty Division asking that the ceremony of marriage celebrated on July 8, 1899, at St. Mary's Church, Ealing, between herself and the respondent might be declared null and void by reason of the respondent's impotence.

The appellant Percy Braby acted as the petitioner's solicitor in this suit.

On February 14, 1911, an order was made in the cause by the registrar, on a summons issued by the petitioner, appointing medical inspectors for the examination of the parties and ordering "that this cause be heard in camera."

The petitioner attended for medical inspection in pursuance of this order and was reported to be a virgin. The respondent did not attend for inspection. The respondent had filed an answer denying that he was impotent, but the answer was by leave withdrawn.

On June 13, 1911, the cause was heard before the President in camera and a decree nisi was pronounced, the cause being undefended. On January 15, 1912, the decree nisi was made absolute. In August, 1911, the petitioner instructed her solicitor, the appellant Braby, to obtain for her from the Court a transcript of the proceedings at the hearing of the cause, and, at her instance, the solicitor had three copies made of this transcript. One copy the petitioner sent to Mr. Graham Scott, the respondent's father, the second she sent to Mrs. Westenra, a sister of the respondent, and the third to another person.

(1) [1912] P. 241. (2) [1912] P. 4.

On November 23, 1911, the respondent issued a notice of motion, intituled in the cause only, asking that the appellants might be committed to prison for their contempt of Court in circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause "in contravention of an order dated the 14th day of February, 1911, directing that this cause be heard in camera."

The notice of motion further asked that the appellants might be restrained from making any similar or other communications either directly or indirectly concerning the subject-matter of the cause, and from otherwise molesting the respondent, his relatives and friends, doctors and patients and others; and that they might be directed to state on oath the names and addresses of the persons to whom similar communications had been made. The notice of motion was also addressed to Mr. Waller, Mr. Braby's partner, but at the hearing it was admitted that he had no part in the matter.

The petitioner, in an affidavit in opposition to the motion, stated that she sent the copies of the transcript to the three persons aboved named in consequence of reports issued by the respondent reflecting on her sanity and in defence of her reputation, and tendered an apology to the Court if it should be held that she had contravened the order of February 14, 1911.

On December 4, 1911, the motion was heard before Bargrave Deane J., who found that the appellants had been guilty of contempt of Court and ordered them to pay the costs of the motion.

The appellants appealed, and upon the appeal the preliminary objection was taken by the respondent that the appeal was incompetent on the ground that the order appealed from was made in a criminal cause or matter within s. 47 of the Judicature Act, 1873.

The appeal was originally argued before Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ., but it was ultimately ordered to be re-argued before the Full Court of Appeal.

The Court (Cozens-Hardy M.R., Farwell, Buckley, and Kennedy L.JJ. (Vaughan Williams and Fletcher Moulton L.JJ.

H. L. (E.) 1913 SCOTT v. SCOTT.

dissenting)) upheld the objection and dismissed the appeal as incompetent.

Having regard to the public importance of the questions involved in this appeal and to the probability that the respondent might not be represented by counsel, the Treasury, acting on the advice of the Attorney-General, provided counsel to argue the case from the respondent's point of view.

1913. March 3, 4, 7, 11. *Sir R. Finlay, K.C.*, and *Barnard, K.C.* (with them *W. O. Willis*), for the appellants. 1. The order of Bargrave Deane J., directing the appellants to pay the costs of the motion to commit, was not a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873, so that no appeal lay from it. The form of the notice of motion shews that the respondent was really applying for civil relief. It is not intituled in the manner universally adopted in quasi-criminal proceedings, namely, in the suit and in the matter of an application to commit the respondents to the motion for contempt of Court, and, in addition to committal, it asks for an injunction and discovery. The motion was a mere step in the civil proceedings and was not a criminal matter at all.

The exception to the right of appeal in s. 47 is confined to causes or matters relating to crimes which are indictable or criminal offences which are punishable summarily. Mere disobedience to an order of the Court, though it may result in imprisonment, does not fall within the section: *Attorney-General* v. *Bradlaugh* (1); *Reg.* v. *Barnardo* (2); *O'Shea* v. *O'Shea and Parnell* (3); *In re Evans.* (4) [Upon this point they also referred to *Cox* v. *Hakes* (5); *Reg.* v. *Fletcher* (6); *Reg.* v. *Steel* (7); *Witt* v. *Corcoran* (8); *Stevens* v. *Metropolitan District Ry. Co.* (9); *Bristow* v. *Smyth* (10); *Mellor* v. *Denham* (11);

(1) 1885) 14 Q. B. D. 667, at p. 687.
(2) (1889) 23 Q. B. D. 305, at pp. 308, 309.
(3) (1890) 15 P. D. 59, at pp. 63, 64.
(4) [1893] 1 Ch. 252.
(5) (1890) 15 App. Cas. 506.
(6) (1876) 2 Q. B. D. 43.
(7) (1876) 2 Q. B. D. 37.
(8) (1876) 2 Ch. D. 69.
(9) (1885) 29 Ch. D. 60.
(10) (1885) 2 Times L. R. 36.
(11) (1880) 5 Q. B. D. 467.

Reg. v. *Whitchurch* (1); *Reg.* v. *Foote* (2); *In re Dudley* (3); *In re Hardwick* (4); *In re Freston* (5); *Seldon* v. *Wilde* (6); *Harvey* v. *Harvey* (7); *Helmore* v. *Smith* (8); *In re Johnson* (9); *Crowther* v. *Elgood* (10); *Preston* v. *Etherington* (11); *In re Wray* (12); *Reg.* v. *Jordan* (13); *Ex parte Woodhall* (14); *Hunt* v. *Clarke* (15); *Rex* v. *Tibbits* (16); *In re Ashwin* (17); *In re Eede* (18); *Ex parte Pulbrook* (19); *In re Armstrong* (20); *Attorney-General* v. *Kissane* (21); *Seaman* v. *Burley* (22); *Southwark and Vauxhall Water Co.* v. *Hampton Urban District Council* (23); *In re Edgcome* (24); *Robson* v. *Biggar* (25); *Ex parte Fernandez* (26); *Cobbett* v. *Slowman* (27); *Stark* v. *Stark*. (28)]

2. An order in a nullity suit for hearing in camera, assuming that there is jurisdiction to make it, does not prevent the subsequent publication of the proceeedings. The order of Bargrave Deane J. goes far beyond any jurisdiction ever claimed or exercised by the Ecclesiastical Courts, yet the respondent bases his case upon the practice of the Ecclesiastical Courts, which is preserved by s. 22 of the Matrimonial Causes Act, 1857, in suits which were formerly within the jurisdiction of those Courts. Take the case of an innocent man summoned to answer scandalous charges of such a nature that it is necessary that the case should be heard in camera. A bald statement of the dismissal of the action would not clear his character. Can it be said that there is a duty cast upon him not to divulge the evidence given at the hearing for the purpose of vindicating his conduct? Of course

(1) (1881) 7 Q. B. D. 534.
(2) (1883) 10 Q. B. D. 378.
(3) (1883) 12 Q. B. D. 44.
(4) (1883) 12 Q. B. D. 148.
(5) (1883) 11 Q. B. D. 545.
(6) [1911] 1 K. B. 701.
(7) (1884) 26 Ch. D. 644.
(8) (1886) 35 Ch. D. 449.
(9) (1887) 20 Q. B. D. 68.
(10) (1887) 34 Ch. D. 691.
(11) (1887) 36 W. R. 49.
(12) (1887) 36 Ch. D. 138.
(13) (1888) 36 W. R. 797.
(14) (1888) 20 Q. B. D. 832.
(15) (1889) 58 L. J. (Q.B.) 490.
(16) [1902] 1 K. B. 77.
(17) (1890) 25 Q. B. D. 271.
(18) (1890) 25 Q. B. D. 228.
(19) [1892] 1 Q. B. 86.
(20) [1892] 1 Q. B. 327.
(21) (1893) 32 L. R. Ir. 220.
(22) [1896] 2 Q. B. 344.
(23) [1899] 1 Q. B. 273.
(24) [1902] 2 K. B. 403.
(25) [1908] 1 K. B. 672.
(26) (1861) 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321.
(27) (1850) 4 Ex. 747; (1854) 9 Ex. 633.
(28) [1910] P. 190.

H. L. (E.) 1913 SCOTT v. SCOTT.

a malicious disclosure of the evidence would be restrained; but any abuse of this right of publication could be effectively dealt with by the ordinary law. If the proprietor of a newspaper published the evidence of a nullity suit which had been heard in camera he would be criminally liable for an obscene libel. In *Lawrence* v. *Ambery* (1), which is the only previous case in which this point has arisen, Sir Francis Jeune appears to have expressed an opinion that there could be no disclosure of what had been heard in camera, but that dictum was obiter only, and the motion for attachment was dismissed. The effect of the practice of the Ecclesiastical Courts, as summed up in the judgment of Fletcher Moulton L.J., is that an order for hearing in camera related only to the mode of conducting the hearing and had no reference to subsequent publication, and that the Court never assumed power in matrimonial cases to enjoin perpetual silence upon the parties or others. *Rex* v. *Clement* (2), upon which Farwell L.J. relied, really supports the appellants' contention. There several persons charged with high treason by the same indictment severed in their challenges and were consequently tried seriatim. Abbott C.J. having stated publicly that he thought it necessary to prohibit any publication of the proceedings until they were completely terminated, it was held that the proprietor of a newspaper who had published an account of the trial of two of the prisoners whilst the others remained to be tried was properly found guilty of a contempt of Court; but the basis of the decision was that the trial of all the prisoners constituted one entire proceeding. Subsequent publication may be prohibited in cases relating to trade secrets and to wards of Court and lunatics, but those cases depend upon different principles and have no bearing on the present case.

3. The Court had no jurisdiction to make the order for hearing in camera. In the Court below the Master of the Rolls relied upon the view expressed by Sir Francis Jeune in *D.* v. *D.* (3) that the Court possessed an inherent jurisdiction to hear any case in private where it was necessary for the due administration of justice. But the rule of English law is that all cases must be

(1) (1891) 91 L. T. Jo. 230. (2) (1821) 4 B. & Ald. 218.
(3) [1903] P. 144.

heard in open Court subject to certain specified classes of exceptions. This is stated explicitly by Jessel M.R. in *Nagle-Gillman* v. *Christopher* (1), where he lays it down that the High Court has no power to hear cases in private, even with the consent of the parties, except (1.) in cases affecting lunatics and wards of Court or (2.) where a public trial would defeat the whole object of the action or (3.) where the practice of the old Ecclesiastical Courts in this respect is continued. The appellants submit that the last exception is not well founded, but they rely upon the general proposition of law there stated. The first exception depends upon the quasi-paternal jurisdiction which the Court, acting as the representative of the King as parens patriæ, exercises for the protection of the lunatic or ward of Court. Accordingly, in the case of a ward of Court, it has been held that the Court, without the consent of the parties, may make an order for hearing in private—*Ogle* v. *Brandling* (2)—and may treat as a contempt of Court the subsequent publication of the proceedings: *In re Martindale.* (3) The second exception relates primarily to cases of trade secrets, and in such cases also it may be necessary to prohibit disclosure after the trial in order to prevent the destruction of the property the subject-matter of the action: *Andrew* v. *Raeburn* (4); *Mellor* v. *Thompson* (5); *Badische Anilin und Soda Fabrik* v. *Levinstein.* (6) In *Malan* v. *Young* (7), the Sherborne School libel action, Denman J., with the consent of the parties, made an order for hearing in camera, notwithstanding the protest of a barrister, but during the progress of the trial the learned judge stated that considerable doubt existed amongst the judges as to his jurisdiction to make the order and invited the parties to elect whether they would take the risk of proceeding with the case in camera or would begin de novo in open Court; and in the result the case was heard in private before the judge as arbitrator. That case therefore is not an authority in support of the inherent jurisdiction of the Court to hear cases in camera.

(1) (1876) 4 Ch. D. 173; 46 L. J. (Ch.) 60.
(2) (1831) 2 Russ. & My. 688.
(3) [1894] 3 Ch. 193.
(4) (1874) L. R. 9 Ch. 522.
(5) (1885) 31 Ch. D. 55.
(6) (1883) 24 Ch. D. 156.
(7) (1889) 6 Times L. R. 38.

H. L. (E.)
1913
SCOTT
v.
SCOTT.

[EARL OF HALSBURY referred to *Lord Portsmouth's Case.* (1)]

With regard to the third exception, s. 22 of the Matrimonial Causes Act, 1857, provides that in all suits other than a suit for dissolution, that is to say, in all suits which could have been entertained by the old Ecclesiastical Courts, the Court is to act upon the principles of the Ecclesiastical Courts, but subject to the provisions of the Act and the rules and orders thereunder. The proviso is important. Sect. 46 provides that, subject to any rules and regulations made under the Act, the witnesses are to be examined orally in open Court. Sect. 53 empowers the Court to make rules and regulations concerning the procedure under the Act, and by s. 67 these rules and regulations are to be laid before Parliament. The effect of these sections taken together is that all suits in the Divorce Court are to be heard in open Court, subject to any rules and regulations which may be made to the contrary. The only rule which relates to the mode of hearing is r. 205 of the Divorce Rules and Regulations, but that rule gives no authority to the Court to hear cases in camera. Therefore, if there ever was any power in the Ecclesiastical Courts to order proceedings in nullity suits to be heard in camera, that power has been taken away by the terms of the Act. The appellants admit that a practice supposed to be based upon the practice of the Ecclesiastical Courts has sprung up by which suits for nullity have been heard in camera, but it is submitted that there is no justification for that practice. In *Barnett* v. *Barnett* (2), which was decided very shortly after the passing of the Matrimonial Causes Act, 1857, Sir Cresswell Cresswell held that the Act did not confer upon the Court any power to order a matrimonial suit to be heard in camera. That was a suit for judicial separation, which could have been entertained by the Ecclesiastical Courts; and as regards the practice of the Ecclesiastical Courts there is no ground for distinguishing between a suit for nullity and any other suit which those Courts could have entertained—divorce a mensa et thoro, restitution, jactitation. That case was followed in the same year by *H.* (*falsely called C.*) v. *C.* (3), which was a nullity

(1) (1815) G. Coop. Ch. Ca. 106.
(2) 29 L. J. (P. & M.) 28.
(3) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.

suit, where the Full Court (Sir Cresswell Cresswell, Williams J., and Bramwell B.) held that the Divorce Court had no power to sit otherwise than with open doors. In *C.* v. *C.* (1) Lord Penzance held that he had no power to hear a suit for dissolution in camera, although he expressed the opinion obiter that nullity suits might be heard in private by virtue of s. 22 of the Matrimonial Causes Act, 1857. In *A.* v. *A.* (2) Sir James Hannen held that he had power, even without the consent of the parties, to hear a suit for restitution of conjugal rights in private, and he based his decision upon the practice of the Ecclesiastical Courts. In *D.* v. *D.* (3), where there were consolidated suits, namely, a suit by the wife for judicial separation and a suit by the husband for dissolution of marriage, Sir Francis Jeune, with the consent of the parties, ordered the suits to be heard in camera, and his judgment proceeded partly on the ground of the inherent jurisdiction of the Court, and partly on the ground that the Court had inherited the powers and practice of the Ecclesiastical Courts. Those cases are inconsistent with *H.* (*falsely called C.*) v. *C.* (4) and ought to be overruled. Further, it is a mistake to suppose that it ever was the practice of the Ecclesiastical Courts to hear nullity suits or any other matrimonial suits in private. Under that practice the witnesses on each side were examined in private, and in the absence of the parties, before an examiner, and the mode of cross-examination was by interrogatories previously delivered to the examiner by the adverse party, but after the publication of the depositions all causes were heard publicly in open Court: Shelford on Marriage and Divorce, pp. 520, 522, 524, 530. And see Conset's Ecclesiastical Practice, 3rd ed., p. 158, and Blackstone's Commentaries, 11th ed., vol. 3, pp. 448—450. Until 1843 nullity suits were reported with the full names of the parties, and until 1864 there never was any hearing of nullity suits in private. (5) The modern practice is founded upon a misapprehension of the powers of the Ecclesiastical Courts.

4. Assuming that the order of Bargrave Deane J. was within

(1) (1869) L. R. 1 P. & M. 640.
(2) L. R. 3 P. & M. 230.
(3) [1903] P. 144.
(4) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.
(5) See reporter's note to *A.* v. *A.*, 3 P. & M. at p. 232.

H. L. (E.) 1913 SCOTT v. SCOTT.

his jurisdiction, the publication was privileged, and the appellants ought not to have been ordered to pay the costs of the motion: *In re Pollard.* (1)

Sir John Simon, S.-G., and *Danckwerts, K.C.* (with them *Bayford*), for the respondent 1. As to the question of jurisdiction, the appellants' contention with regard to the practice of the Ecclesiastical Courts is clearly wrong. In a note to *Briggs* v. *Morgan* (2) reference is made to a nullity suit (August 1, 1821) the medical evidence in which was heard "in camera." That reference shews not only that the evidence was taken in private, but that the presentation to the Court was also in private. In *Deane* v. *Aveling* (reported on hearing 1 Rob. Eccl. 279) on May 13, 1845, an application was made by letter for the hearing of a nullity suit in private (3), and the letter assumes that the matter was within the discretion of the judge. It does not appear whether the application was granted. Those cases are sufficient to shew that the Ecclesiastical Courts had the power to hear nullity suits in private, although that power was not universally exercised; and the existence of this power is recognized by the text-writers: Cockburn's Clerk's Assistant in the Practice of the Ecclesiastical Courts, c. 14, s. 10; Swabey's Law of Divorce and Matrimonial Causes, 2nd ed., p. 97. This was also the view of a number of very eminent judges,—Jessel M.R., Lord Penzance, Lord Hannen, and Lord St. Helier. As regards the getting in of the evidence, it was the invariable practice of the Ecclesiastical Courts to examine the witnesses in secret: *Herbert* v. *Herbert* (4), which is the foundation for the passage in Shelford on Marriage

(1) (1868) L. R. 2 P. C. 106.

(2) (1820) 2 Hagg. Cons. at p. 332.

(3) The following is a copy of this letter:—

"Doctors Commons,
"13th May, 1845.

"Dear Sir,

"*Deane agst. Aveling.*

"As this is a case of nullity of marriage by reason of malformation to avoid unnecessary publicity of the disclosures in the evidence we shall feel obliged by your intimating our wishes to the judge that *if he shall be so pleased* it may be heard in private.

"We are, Dear Sir,
"Yours faithfully,
"W. Rothery.
"Edwd. W. Crosse.

"Jno. Shephard, Esq."

(See addendum at p. 487.)

(4) (1819) 2 Hagg. Cons. 263, at p. 267.

and Divorce on p. 522; Conset's Ecclesiastical Practice (1685), pt. iii., s. 3; pt. vi., s. 4. When the evidence was complete publication was decreed, which meant, not publication to the world, but communication to the other party to the suit: see Coote's Ecclesiastical Practice, p. 806. Then as to the hearing and judgment or sentence, it is conceded that the sentence was required to be given in open Court: Burn's Ecclesiastical Law, tit. Marriage XI. (Divorce), s. 7. That is expressly provided by canon 106 of the Canons of 1603, and canon 108 imposes penalties for the violation of this rule. The reason for that rule was obviously that it was essential that in any proceedings affecting a question of status the result should be publicly known. But there is no corresponding provision as to the hearing of the suit, and the fact that it is expressly provided that the sentence shall be in open Court lends support to the inference that no such rule existed as to the hearing. The statement in Shelford on Marriage and Divorce, p. 530, that all causes are heard publicly in open Court was conveyed without acknowledgment from the report of an Ecclesiastical Commission appointed in 1830 to inquire into the practice of the Ecclesiastical Courts, and, divorced from its context, it is misleading. The main issue to be determined by that Commission was whether the method adopted by the Common Law Courts of viva voce evidence ought not also to be adopted by the Ecclesiastical Courts, and the Commission, when, in describing the practice of the Ecclesiastical Courts, it speaks of the hearing in open Court, was using the words in connection with that issue. It was not referring to the admission or non-admission of the public, but was contrasting the method of hearing, which was before the judge in Court in the presence of the parties, with the secret examination of witnesses which it had previously described: Parliamentary Papers 1831-32, vol. 24, pp. 18, 19. Moreover the Commission was not dealing with this special class of cases, namely, nullity suits, at all. [They referred to Burn's Ecclesiastical Practice (9th ed.), vol. 3, pp. 202, 207.] Therefore the passage in Shelford is not an authority against the respondent's contention.

Assuming then that the Ecclesiastical Courts had jurisdiction to

H. L. (E.) 1913 SCOTT v. SCOTT.

hear causes in private, that power is preserved by s. 22 of the Matrimonial Causes Act, 1857. Sect. 46 is not opposed to this view. Until 1854 the Ecclesiastical Courts had no power to examine witnesses viva voce, but in that year an Act was passed (17 & 18 Vict. c. 47) conferring that power upon them. In that state of things s. 46 of the Act of 1857 says, not that the trial shall be in open Court, but that the witnesses shall be examined orally in open Court. That section is not aimed at the admission of the public to the Court, but is intended to secure that the method of taking evidence shall be by oral examination before the judge in Court as distinguished from the old method of examination in secret. But, whatever be the construction of s. 46, it is prefaced by the words "Subject to such rules and regulations as may be established as hereinafter provided" (see s. 53), and it is submitted that r. 205 of the Divorce Rules, though it contains no specific provision as to hearing in camera, is wide enough to create, if need be, the necessary exception to s. 46. As regards *H.* (*falsely called C.*) v. *C.* (1) the report contains no reference to s. 22 and the case must be read with the suspicion that that section was not before the Court. Further, Williams J., although he expresses his opinion that the Court, being a new Court, had no jurisdiction to hear cases in camera, admits that other judges had taken a different view, and he assumes that he had a discretion in the matter and declines to exercise it. Bramwell B. starts from the same point and, on the assumption that the Court is a new Court, says it has no jurisdiction to hear in private. There is, however, a stream of authority subsequent to that case shewing that the Court has such a jurisdiction. In *C.* v. *C.* (2) Lord Penzance says in terms that the Ecclesiastical Courts did hear nullity suits in private and that the Divorce Court had maintained and followed up that practice. In *A.* v. *A.* (3) Sir James Hannen puts the case higher and states that the power of the Ecclesiastical Courts was not limited to nullity suits and that the Divorce Court had the same power, and he adds that the rule laid down in *H.* (*falsely called C.*) v. *C.* (1) had not been acted upon. In

(1) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.
(2) L. R. 1 P. & M. 640.
(3) L. R. 3 P. & M. 230.

Nagle-Gillman v. *Christopher* (1) Jessel M.R. states distinctly that the practice of the Ecclesiastical Courts to hear suits for nullity or judicial separation in private was preserved by s. 22 of the Matrimonial Causes Act, 1857. Finally in *D.* v. *D.* (2) Sir Francis Jeune states not only that the Divorce Court had inherited the power of the Ecclesiastical Courts to hear cases in camera, but that the Court had an inherent power to hear a suit for dissolution in camera. He bases his decision upon the general power of the Court to hear in camera any case in which justice cannot be done otherwise and suggests that in many matrimonial cases a hearing in public would bring about a denial of justice because a modest woman would refuse to assert her rights. Such a power is required in the interests of justice and to enable the Court to maintain its own efficiency and its own dignity. Both the general rule as to hearing in open Court and the exceptions thereto are explicable upon the common principle that the Court will so conduct its business as to do justice efficiently. The gravity of the consequences of insisting upon a hearing in public in matrimonial cases may be just as great as in the case of a trade secret, for in both instances the result might be to defeat the ends of justice. Putting aside the cases of wards of Court and lunatics, hearing in camera is not confined to trade secrets, but may be ordered wherever the object of the suit would be defeated. Neither *Andrew* v. *Raeburn* (3) nor *Mellor* v. *Thompson* (4) was a case of a trade secret. It is an axiom of English law that prima facie the administration of justice should be open to all the world, but that is not an absolute rule of natural justice, and the cases which have been cited are illustrations of the general power of the Court to exclude the public wherever the interests of justice require it. See *Lewis* v. *Levy*. (5) This jurisdiction existed in the Divorce Court apart from the Judicature Act, but, if necessary, the respondent prays in aid the provisions of that Act. In the Children Act, 1908, s. 114, which expressly empowers the Court to exclude the public whilst a child or young person is giving

(1) 4 Ch. D. 173; 46 L. J. (Ch.) 60.
(2) [1903] P. 144.
(3) L. R. 9 Ch. 522.
(4) 31 Ch. D. 55.
(5) (1858) E. B. & E. 537, at p. 546, per Lord Campbell.

H. L. (E.) 1913 SCOTT v. SCOTT.

evidence in any proceedings relating to an offence against decency or morality, the Legislature has been careful to preserve to the Court any power which it might have independently to hear cases in camera. [They also referred to the Summary Jurisdiction Act, 1848, s. 12.] Further, the jurisdiction of the Court to make the order for hearing in camera was not contested by the appellants in the Court of Appeal, and therefore the point is not now open to them : *Kay* v. *Marshall.* (1)

2. As to subsequent publication, the privilege of reporting what takes place in a Court of justice is based on the fact that the hearing is in public, and the publication of the proceedings is merely enlarging the area of the Court : *Macdougall* v. *Knight* (2); and see *Popham* v. *Pickburn.* (3) It follows that in cases where the public is excluded from audience the privilege of publication goes too, since the public has no right to this secondary form of audience, which stands on no higher ground than the right to attend in Court and hear. The maxim "Cessante ratione cessat lex" applies. In cases such as nullity suits the protection accorded by an order for hearing in camera ought as a matter of common sense to be extended to the subsequent publication of the proceedings : *Lawrence* v. *Ambery* (4) and see *In re Martindale.* (5)

[LORD ATKINSON referred to *M'Leod* v. *St. Aubyn.* (6)]

3. Assuming that a contempt was committed, the question whether it was a criminal contempt within s. 47 of the Judicature Act, 1873, depends upon whether the disobedience to the order was an interference with the course of justice or was merely an interference with the rights of the parties. The order for the hearing in camera was made not to secure a private right but for the efficient administration of justice, and disobedience to such an order is a misdemeanour punishable by fine and imprisonment. *Seaward* v. *Paterson* (7) illustrates the difference between

(1) (1841) 8 Cl. & F. 245.
(2) (1889) 14 App. Cas. 194, at pp. 200, 206.
(3) (1862) 31 L. J. (Ex.) 133, at p. 136.
(4) 91 L. T. Jo. 230.
(5) [1894] 3 Ch. 193, at p. 200.
(6) [1899] A. C. 549.
(7) [1897] 1 Ch. 545.

the two kinds of contempt. When once the matter is before the Court, the question whether or not a criminal contempt has been committed cannot depend upon the form of the application to commit. The Court of Appeal was therefore right in allowing the objection to the competency of the appeal. [Upon this point, in addition to the cases cited by the appellants, they referred to Russell on Crimes, 5th ed., vol. 1., p. 561 ; Chitty on Criminal Law, 2nd ed., vol. 2, p. 279; *Miller* v. *Knox* (1); *In re Clement* (2); *Wellesley* v. *Mornington* (3); *Reg.* v. *Rudge* (4); *Ex parte Savarkar.* (5)]

Sir R. Finlay, K.C., replied.

The House took time for consideration.

May 5. VISCOUNT HALDANE L.C. (6) My Lords, the facts in this case are not in controversy, but questions of law of considerable public importance are raised.

The appellant Mrs. Scott filed her petition against her husband, the respondent, for a declaration that their marriage was void because of his impotence. She then took out a summons asking for the appointment of medical inspectors, and that the petition should be heard in camera, and on this summons an order was made for such hearing. The petition duly came on in camera, and the appellant obtained a decree of nullity. The petition was practically undefended, and the evidence was very simple. There was nothing to differentiate the case from many others which are heard in open Court, and so far as the public were concerned it might quite well have been so heard. The decree was subsequently, on January 15, 1912, made absolute.

In August, 1911, the appellant Mrs. Scott, and the appellant Braby, who was her solicitor, sent copies of the shorthand notes of the proceedings at the hearing to Mr. Graham Scott, the father of the respondent, and to Mrs. Westenra, the respondent's sister, and also to a third person. Mrs. Scott appears to have been under the impression that an inaccurate account had been given by the respondent of the position of the parties to the case, and of what really took place.

(1) (1838) 4 Bing. N. C. 574.
(2) (1822) 11 Price, 68.
(3) (1848) 11 Beav. 181.
(4) (1886) 16 Q. B. D. 459.
(5) [1910] 2 K. B. 1056.
(6) Read by Lord Atkinson.

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

In December, 1911, the respondent moved to commit the appellants and Mr. Waller, who was the appellant Braby's partner, for contempt in so sending the copies of the shorthand notes, in breach, as was alleged, of the order for hearing in camera, and he also moved for an injunction. The motion was heard by Bargrave Deane J., who decided that the two appellants had been guilty of contempt of Court, and ordered them to pay the costs of the motion. From this order they appealed. On the hearing of the appeal a preliminary objection was taken on behalf of the respondent that no appeal lay, inasmuch as the order of Bargrave Deane J. amounted to a judgment in a criminal cause or matter within the meaning of s. 47 of the Judicature Act of 1873. The Court of Appeal, consisting of the Master of the Rolls and Fletcher Moulton and Kennedy L.JJ., ordered the appeal to be re-argued before the Full Court of Appeal. It was in consequence so re-argued, and was finally dismissed. The Master of the Rolls and Farwell, Buckley, and Kennedy L.JJ. were of opinion that the order appealed from was right, while Vaughan Williams and Fletcher Moulton L.JJ. took a different view.

My Lords, the question which we have now to decide necessitates consideration of the jurisdiction to hear in camera in nullity proceedings, and of the power of the judge to make an order which not only excludes the public from the hearing, but restrains the parties from afterwards making public the details of what took place. Without such consideration it is not possible to arrive at a satisfactory conclusion as to whether such an order as was made in this case amounted to a judgment in a criminal cause or matter within the meaning of the section of the Judicature Act to which I have referred. We, therefore, invited counsel to address us more fully as to the history and character of the jurisdiction than appears to have been done in the Courts below.

My Lords, I think it is established that the Ecclesiastical Courts in the exercise of their jurisdiction in nullity suits, prior to the Act of 1857, which established the Divorce Court, did from time to time direct the hearing to take place in camera. But in estimating the significance of this fact it is necessary to remember that the procedure of these Courts was very

different from that of the High Court of Justice. Until shortly before the Divorce Court was set up it was not their practice to take evidence viva voce in open Court. The evidence was taken in the form of depositions before commissioners, who conducted their proceedings in private. The parties were not represented at this stage in the fashion with which we are familiar. When a witness was tendered for examination the commissioners could, in the course of taking his deposition, put to him interrogatories delivered by the other side, but there was no cross-examination, or, for that matter, examination-in-chief, of the parties. Each side could tender witnesses, but until the evidence was complete neither side was allowed to see the depositions which had been taken. After the commissioners had finished their work, what was called publication took place.

This did not mean that the evidence was published to the world, but only that the parties had access to it. The next stage was that arguments were heard by the judge of the Court, and finally he gave judgment and pronounced a sentence. So much of the proceedings took place before the commissioners that the modern distinction between hearing in camera and hearing in open Court obviously had nothing approaching to the importance which it possesses to-day. As a rule the proceedings in nullity suits, subsequent to what was called publication, appear to have been conducted in open Court. But sometimes this was not so, with the exception of the final stage at which sentence was pronounced. The sentence itself appears always to have been pronounced in open Court. As regards the arguments the Court seems to have exercised a discretion as to whether the public should be admitted while they took place.

In 1857 the jurisdiction of the Ecclesiastical Courts in matrimonial proceedings was terminated by the statute of that year, and a new Court was established with the title of the Court for Divorce and Matrimonial Causes. Decrees for judicial separation were substituted for the old decrees for divorce a mensa et thoro, and a wholly new power was given to entertain petitions for dissolution of marriage. Sect. 22 provided that in all suits and proceedings, other than proceedings for dissolution, the Court should proceed and act and give relief on

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

principles and rules which in its opinion should be as nearly as might be conformable to the principles and rules on which the Ecclesiastical Courts acted, but this was to be done subject to the provisions of the statute itself, and of the rules and orders made under it. By s. 36 the Court was empowered to direct the trial to take place with a jury. By s. 46, subject to such rules and regulations as might be established, the witnesses in all proceedings before the Court were, where their attendance could be had, to be sworn and examined orally in open Court. A proviso to this section allowed the parties to verify their cases by affidavit, but subject to cross-examination on such affidavits in open Court, if the opposite party so desired. By s. 53 power was given to the Court to make rules and regulations, and by s. 67 any such rules or regulations were to be laid before Parliament.

My Lords, I think that the effect of s. 46 of the Divorce Act was substantially to put an end to the old procedure, and to enact that the new Court was to conduct its business on the general principles as regards publicity which regulated the other Courts of justice in this country. These general principles are of much public importance, and I think that the power to make rules, conferred by ss. 46 and 53, must be treated as given subject to their observance. They lay down that the administration of justice must so far as the trial of the case is concerned, with certain narrowly defined exceptions to which I will refer later on, be conducted in open Court. I think that s. 46 lays down this principle generally, and that s. 22 is, so far as publicity of hearing is concerned, to be read as making no exception in any class of suit or proceeding save in so far as ordinary Courts of justice might have power to make it. This appears to have been the view taken in the cases of *Barnett* v. *Barnett* (1) and *H.* (*falsely called C.*) v. *C.* (2), both decided in 1859, shortly after the Divorce Act had come into operation. The second case came before the Full Court, which included Bramwell B. In giving his judgment he observes that the Divorce Court "being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its

(1) 29 L. J. (P. & M.) 28.
(2) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.

proceedings should be conducted in public." It is not easy to see how, the provision as to the making of rules notwithstanding, a different interpretation could have been put on the statute from that put by Bramwell B., and for some time this interpretation appears to have been adhered to.

In a note to the case of *A.* v. *A.* (1), decided in 1875, the reporter observes that down to July, 1864, nullity cases were always heard in open Court, but that in the case of *Marshall* v. *Hamilton* (2) the evidence was of such a character that Sir J. Wilde signified a desire that for the future such cases should be heard in camera, and, with the consent of counsel, ordered such a hearing. In *A.* v. *A.* (1), however, Sir James Hannen held that, notwithstanding the objection of the petitioner, he could direct the hearing to take place in camera, and he relied partly on a dictum in *C.* v. *C.* (3) to the effect that the Court had power, under s. 22 of the Divorce Act, to follow the old practice, and partly on a new practice which had begun to grow up.

My Lords, I think that Sir James Hannen laid down the law much too widely, for reasons which I have already given. Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.

My Lords, it was not unnatural that the judges of the Divorce Court should have felt embarrassed by the want of the power which the old Ecclesiastical Courts possessed to hear in camera any case which for reasons of decency they thought ought to be so heard, and it is not surprising that Sir James Hannen's judgment was followed by Sir Francis Jeune in *D.* v. *D.* (4) But while that learned judge held, somewhat hesitatingly I think, that

(1) L. R. 3 P. & M. 230.
(2) (1864) 3 Sw. & Tr. 517.
(3) L. R. 1 P. & M. 640.
(4) [1903] P. 144.

H. L. (E.)
1913
SCOTT
v.
SCOTT.
Viscount Haldane L.C.

the Divorce Court had in a suit for judicial separation inherited the power of the Ecclesiastical Courts to hear in camera, he went on to say that even in suits for dissolution this could be ordered if it was reasonably clear that justice could not be done unless the hearing was so conducted. My Lords, this second ground of decision is a very different one from the first. As to the proposition that the Divorce Court has inherited the power to hear in camera of the Ecclesiastical Courts, I am of opinion that, since the Divorce Act of 1857, it has been untrue of every class of case, and not merely of suits for divorce strictly so called. I am in accord with the reasoning of Bramwell B., in the case I have already referred to, which led him to the conclusion that the Court which the statute constituted is a new Court governed by the same principles, so far as publicity is concerned, as govern other Courts.

In cases in other Courts, where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude, and I am unable to see how their consent can justify the taking of an exceptional course. But Sir Francis Jeune does not appear to have thought that it could. He proceeds, in the final reasons for his judgment, on the ground that justice could not be done in the particular case before him if it were not heard in camera. This, he thought, was a general principle which applied to all Courts.

My Lords, provided that the principle is applied with great care and is not stretched to cases where there is not a strict necessity for invoking it, I do not dissent from this view of the existing law. To exclude it would, in certain classes of litigation, mean a denial of justice. In *Andrew* v. *Raeburn* (1) Lord Cairns and James and Mellish L.JJ. appear to express themselves in its favour, but in carefully guarded terms. In

(1) L. R. 9 Ch. 522.

interpreting their decision I think that North J. in *In re Martindale* (1), which was cited to us, went much too far, and, while I agree generally with the judgment of Sir George Jessel M.R. in *Nagle-Gillman* v. *Christopher* (2), from what I have already said it will be evident that if its concluding sentence is meant to do more than raise a question as to the continuance of the practice of the Ecclesiastical Courts, I cannot concur in it. The case of wards of Court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.

In order to make my meaning distinct, I will put the proposition in another form. While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly

(1) [1894] 3 Ch. 193. (2) 4 Ch. D. 173.

H. L. (E.) 1913

SCOTT v. SCOTT.

Viscount Haldane L.C.

yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.

I think that if the principle in cases of secret process be what I have stated, it affords guidance in other cases. In *Rex* v. *Clement* (1), where under special circumstances it was held that daily publication of the evidence in a particular criminal trial in defiance of the judge had impeded justice, and was, therefore, an offence against it, we have a different illustration of a rule which may have manifold application, and may cover cases of the class before us in this appeal. But unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to shew that the evidence can be effectively brought before the Court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult in a matrimonial case than in the case of the secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open Court. In either case he must satisfy the Court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors.

My Lords, it may well be that in proceedings in the Divorce Court, whether the proceedings be for divorce, or for declaration

(1) 4 B. & Ald. 218.

of nullity, or for judicial separation, a case may come before the judge in which it is evident that the choice must be between a hearing in public and a defeat of the ends of justice. Such cases do not occur every day. If the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public, the case may come within the exception to the principle that in these proceedings, and not the less because they involve an adjudication on status as distinguished from mere private right, a public hearing must be insisted on in accordance with the rules which govern the general procedure in English Courts of justice. A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made. Whether this state of the law is satisfactory is a question not for a Court of justice but for the Legislature. I observe that in the Incest Act of 1908 the principle has been altered in cases coming under that Act, and in the report of the recent Royal Commission on Divorce recommendations are made which, if Parliament gives effect to them, will materially modify the law as I conceive it to stand to-day. But it is with that law, as I have endeavoured to define it, that we are concerned in the present case.

My Lords, in my opinion the facts before Bargrave Deane J. fell short of what was requisite to justify departure from the principle which requires the hearing, in all but exceptional cases of the class I have indicated, to take place in open Court. No doubt the petitioner and the respondent preferred to give their evidence in private. But the evidence actually given was of a brief and simple character, and it might without difficulty have been tendered in open Court. In my opinion there was no valid reason for hearing the case in camera and the order was made in reality for the benefit of the parties who concurred in asking for it, and was therefore made under a mistaken impression as to the law. And if that be the substance of the matter it disposes of the appeal. The order was wrong, and it could not effect the

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

abrogation of the prima facie right, excluded only in exceptional cases such as I have already spoken of, which the parties and the public possess to make known what takes place at the hearing and to discuss it.

Even if the order had been validly made by reason of the consent of the parties, it could have provided nothing more than an instrument for enforcing an agreement come to as to the mode in which the hearing should take place. A breach of the order would, therefore, have in substance been punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction; and a punitive order made with reference to the breach falls, in such cases, outside the language of s. 47 of the Judicature Act of 1873, which provides that no appeal shall lie from a judgment of the High Court in any criminal cause or matter. If the principle which governs the jurisdiction of the Divorce Court to hear in camera is that which I have sought to explain, this conclusion is the only one which is consistent with the section and the decisions which interpret it.

I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed and the order of Bargrave Deane J. discharged, and that the respondent should pay the costs here and in the Courts below. I move accordingly.

EARL OF HALSBURY. My Lords, the facts out of which this question arises have been sufficiently explained by the Lord Chancellor, and I will not waste time by repeating them; but the case raises such important issues of law that I am unwilling that there should appear to be any doubt about them.

I am of opinion that every Court of justice is open to every subject of the King. I will deal presently with what have been called exceptions to that rule, though I think it is a mistake as to some of the so-called exceptions thus to describe them, but I want in the first instance to emphasize the broad rule I believe to be the law.

I believe this has been the rule, at all events, for some centuries, but, as I will attempt to shew presently, it has been the unquestioned rule since 1857, unquestioned by anything that I can recognize as an authority. My Lords, if this were

merely an antiquarian investigation I might point to the treatise of Mr. Emlyn in 1730, as a preface to the second edition of the State Trials, in six volumes folio. "In other countries," Mr. Emlyn says (at p. iv.), "the Courts of justice are held in secret; with us publicly and in open view."

He is there speaking of criminal trials, but he certainly has no good word to say of the Ecclesiastical Courts of his time, and if he could have added that they claimed a right to sit in secret he certainly would not have omitted to do so.

Mr. Daines Barrington, writing in 1766, and suggesting that the Courts were not open as of right in the time of Edward I., even in England (1), says "In the modern sense of an open Court the Legislature could never have allowed any fees to be taken for admittance." "I do not recollect," he adds, "to have met in any of the European laws with any injunction that all Courts should be held ostiis apertis, except in those of the republic of Lucca." At all events Mr. Daines Barrington and Mr. Emlyn (both learned lawyers) were under the impression that the law of England required in their days that Courts should be open; this may be a matter for legal research, but the law as it now stands requires no such investigation. It has been settled by statute, and the exception supposed to have been introduced as to the Ecclesiastical Courts under the statute is, I think, completely disposed of by the learned exposition of the practice of those Courts by Lord Moulton in his judgment in the Court of Appeal and the instructive judgment of the noble lord, Lord Shaw, which I have had the privilege of reading.

There are three different exceptions commonly so called, though in my judgment two of them are no exceptions at all. The first is wardship and the relation between guardian and ward, and the second is the care and treatment of lunatics.

My Lords, neither of these, for a reason that hardly requires

(1) [Observations on Statutes, ed. 1796, p. 144. Barrington's comment is on the Statute of Westminster the Second, cc. 42, 44, which he seems to have misunderstood. The excessive fees there in question were taken from parties, not from the public, and "pro ingressu *vel egressu*." But Barrington wanted to air his own opinion that the idle spectators who crowded the Courts might well be kept down by a moderate fee for admission.—F. P.]

H. L. (E.) 1913

SCOTT v. SCOTT.

Earl of Halsbury.

to be stated, forms part of the public administration of justice at all.

Again, the acceptance of the aid of a judge as arbitrator to deal with private family disputes has, by the express nature of it, no relation to the public administration of justice, and it will be observed how careful Lord Eldon was when intervening in such a case (*In the Matter of Lord Portsmouth* (1)) to point out that it was only by consent of the parties on both sides that he consented so to hear it, and in the Sherborne School case, *Malan* v. *Young* (2), it was clearly recognized that it was only heard in private when a regular agreement of the parties that it should be so heard was entered into.

My Lords, while I agree with the Lord Chancellor in the result which he has arrived at in this case, and generally in the principles he has laid down, I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it, because it is impossible to prove what cases might or might not be brought within that category, but I should require to have brought before me the concrete case before I could express an opinion upon it. Your Lordship has said that a mere desire to consider feelings of delicacy or to exclude from public hearing details which it would not be desirable to publish is not, in your Lordship's opinion, enough to prevent a public hearing, which must be insisted on in accordance with the rule which governs the general procedure in English Courts of justice, and that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment.

The difficulty I have in accepting this as a sufficient exposition of the law is that the words in which your Lordship has laid down the rule are of such wide application that individual judges may apply them in a way that, in my opinion, the law does not warrant.

I am not venturing to criticize your Lordship's language, which, as your Lordship understands it, and as I venture to say

(1) G. Coop. Cas. in Ch. 106. (2) 6 Times L. R. 38.

I myself understand it, is probably enough to secure the observance of the rule of public hearing, but what I venture to point out is that it is not so definite in its application but that an individual judge might think that, in his view, the paramount object could not be attained without a secret hearing. Although I am very far from saying that such a case may not arise, I hesitate to accede to the width of the language, which, as I say, might be applied to what, in my view, would be an unlawful extension.

I confess I am amazed to find three such learned judges as Sir Cresswell Cresswell, Williams J., and Bramwell B. (in *H.* (*falsely called C.*) v. *C.* (1)) overruled by any single judge, and especially when it is remembered that this was a judgment given after consultation upon this very point—after consultation with the Judge Ordinary—and determining that "the Court had no power to sit otherwise than with open doors."

My Lords, from that judgment there was no appeal, and I should have thought until it was brought before this House it would have been accepted as the law, but considering that Lord St. Helier's decision (*D.* v. *D.* (2)) has never been challenged, I do not wonder that the order was made apparently as a matter of course in this case.

My Lords, as to the injunction of perpetual secrecy, there is not a judgment of authority to justify it. The supposed analogy of trade secrets or private correspondence is no analogy at all.

In the one case the trade secret is being protected as a species of property, and, indeed, the other is in the same category. In either it might be protected by injunction, and it would be the height of absurdity as well as of injustice to allow a trial at law to protect either to be made the instrument of destroying the very thing it was intended to protect. I cannot agree with the Court of Appeal that this is a criminal case in the sense in which these words are used in the Judicature Act, and I think they ought to have heard the appeal, and I entirely agree to the motion which the Lord Chancellor has proposed.

EARL LOREBURN. My Lords, I concur in holding that the Court of Appeal had jurisdiction to entertain this case. The test

(1) 1 Sw. & Tr. 605. (2) [1903] P. 144.

H. L. (E.) 1913 SCOTT v. SCOTT. Earl Loreburn.

of their jurisdiction under s. 47 of the Judicature Act is not whether criminal proceedings could (if they could) have been taken for disobedience to the order, but whether the cause or matter in which the order was made was in point of fact a criminal cause or matter. I can see nothing here except the penal enforcement of a direction for hearing in camera obtained at the request of Mrs. Scott, and for her protection, in a petition for nullity, and interpreted by the learned judge to be equivalent to an order for perpetual silence. If that is a criminal matter, then an action for assault is so also (for a man may be indicted for assault), a position which no one has ever attempted to maintain. I further think that, even assuming Bargrave Deane J. had full power to direct a hearing in camera and to treat it as an order for perpetual silence, he was wrong in treating as a contempt of Court the publication by Mrs. Scott in good faith of the true evidence in justifiable defence of her own reputation and happiness. If this be so, then the Court of Appeal ought to have heard and reversed Bargrave Deane J.'s decision, and in the circumstances of this case we ought to end the litigation by making the order which they should have made, though in ordinary circumstances, I apprehend, the case would be remitted to the Court of Appeal.

Here I would prefer to take leave of this litigation altogether, for the function of a Court is simply to do justice between the parties who come before it. But, in view of the far-reaching statements of law which are to be found in some of the judgments in the Courts below, I feel constrained to say something, as little as possible.

In the argument here and below, or in the judgments, a number of most important questions were raised. In what circumstances can a judge direct a case to be heard with closed doors? When a case has been so heard, has any one, and if so, who and to whom, and in what circumstances, a right to repeat what was said in the secrecy of the trial? What were the powers and what the practice of the old Ecclesiastical Courts in this respect, and has the present Divorce Court inherited those powers? When is contempt of Court criminal and when merely civil, so as to admit of an appeal to the Court of Appeal? Is

there any power, and over whom, to prohibit repetition of what happens in chambers as well as of what happens in a closed Court? It would require a treatise to expound the law upon all these subjects, and it would be a treatise without authority, liable to the risk of error or misconception which inevitably attends judicial efforts to declare the law at large and in general terms outside of the points really raised by the facts of the case, instead of following the method by which the common law of this country has been gradually built up into a coherent though irregular structure. I will advert only to the points raised by the facts here.

I cannot think that the High Court has an unqualified power in its discretion to hear civil proceedings with closed doors. The inveterate rule is that justice shall be administered in open Court. I do not speak of the parental jurisdiction regarding lunatics or wards of Court, or of what may be done in chambers, which is a distinct and by no means short subject, or of special statutory restrictions. I speak of the trial of actions including petitions for divorce or nullity in the High Court. To this rule of publicity there are exceptions, and we must see whether any principle can be deduced from the cases in which the exception has been allowed.

It has been held that when the subject-matter of the action would be destroyed by a hearing in open Court, as in a case of some secret process of manufacture, the doors may be closed. I think this may be justified upon wider ground. Farwell L.J. aptly cites Lord Eldon as saying, in a case of quite a different kind, that he dispensed with the presence of some of the parties "in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts." An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice.

Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the

H. L. (E.) 1913 SCOTT v. SCOTT. Earl Loreburn.

exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others. Or, to use the language of Fletcher Moulton L.J., in very exceptional cases, such as *D.* v. *D.* (1), where a judge finds that a portion of the trial is rendered impracticable by the presence of the public, he may exclude them so far as to enable the trial to proceed. It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.

Applying this principle to proceedings for nullity, if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made. But I cannot think that it may be made as a matter of course, though my own view is that the power ought to be liberally exercised, because justice will be frustrated or declined if the Court is made a place of moral torture. Very learned judges of the Divorce Court have acted upon the view that they possess peculiarly extensive powers in this respect, inherited from the old Ecclesiastical Courts. I do not think so. The 46th section of the Matrimonial Causes Act, 1857, requires evidence to be given in open Court, an expression so clear that I was surprised to hear its meaning contested, and this provision overrides the old practice of secret hearing in the Ecclesiastical Courts. I do not, however, read s. 46 of the Matrimonial Causes Act, 1857, as prohibiting a trial in camera where such considerations may require it as in other Courts equally bound to sit in public. That section almost invites the framing of rules under the Act to regulate hearings otherwise than in open Court. Such rules would, in my opinion, be valid if they did not go beyond the

(1) [1903] P. 144.

limitations indicated. But no rules to that effect have been made, and the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception. I incline to the opinion that the High Court also may make such rules, but this was not argued.

In this connection there remains one other matter upon which comment is necessary. Some passages in various judgments in this and other cases indicate that the Court has a right to close its doors in the interest of public decency. Apart from some Act of Parliament authorizing such a course in particular cases, I regret that I cannot find warrant for this opinion. However true it may be that the publicity given to obscene or bestial matter by trial in open Court stimulates and suggests imitation, as many judges have learned from experience at assizes, and however deplorable it may be that they have no power to prevent it, the remedy must be found by the Legislature or not at all. It is a great evil. And though the traditional law, that English justice must be administered openly in the face of all men, is an almost priceless inheritance, it does seem strange that it may be relaxed in order to save property, but cannot be relaxed in order to safeguard public decency against even the foulest contamination. I feel certain that considerations of this kind have influenced judges, especially in the Divorce Court, and I wish that I could agree with their view of the law.

Another main question raised by the judgments under review is, what power has the High Court to prevent or punish disclosure of what has taken place in camera after the hearing is over? It is almost an uncharted sea. Until this case hardly any direct authority can be cited. Yet nothing can be more clear than that an order for a hearing in camera of a trial involving a secret process might be utterly illusory if the evidence could be published afterwards with impunity. There must be some power to prevent that, or the undoubted assertion by the very highest authorities of a right to close the Court in such cases would be reduced to an idle mockery. I think that after such an order has been made no one has a right to be present on terms of defying the order. It is not a bargain to maintain secrecy. It is a duty to obey the order for secrecy so far as the order lawfully

H. L. (E.) 1913 SCOTT v. SCOTT. Earl Loreburn.

goes. The authority of the Court to treat disobedience in this matter as a contempt rests on the same basis as its authority to treat as a contempt the wilful intrusion of a witness after an order has been made that all witnesses shall leave the Court. But what is the degree and duration of secrecy which the Court can impose?

Confining myself for the moment simply to cases of secret process, it seems to me that the limitations of the jurisdiction to impose silence or secrecy must be commensurate with the purpose for which the jurisdiction exists. That purpose is to keep the Court available for the enforcement of rights or the redress of wrongs, and it would not be so available if it could be made a vehicle for publishing the secret after the hearing is over. I think we are driven to say that there is jurisdiction to treat as a contempt of Court any wilful and malicious publication of such a kind as that, if it were known to be allowed, ordinary sensible people would not come to the Court at all.

This conclusion appears to me the inevitable corollary once you admit that a case of trade secret can be heard in camera. And I think it is equally an inevitable corollary in any other class of case so heard. In nullity and in divorce cases it may be that justice would be frustrated as much by the terror of publicity after trial as by publicity at the hearing. But to say that all subsequent publication can be forbidden and every one can be ordained to keep perpetual silence as to what passed at the trial is far in excess of the jurisdiction, and is indeed an unwarrantable interference with the rights of the subject. It is not that a Court ought to refrain from exercising its power in such a way. It is that the Court does not possess such a power. The jurisdiction must surely be limited to wilful and malicious publications going beyond the necessity. To take the present case as an illustration. The right of this lady to tell the truth and to furnish the best evidence of the truth in defence of her own character and reputation is inalienable, and cannot lawfully be taken away by any judge. It is but an elementary right, though if the claim of right be merely put forward as a pretext to cover some malicious communication it could not prevail. There is no more difficulty in deciding whether a particular case comes

within this line or lies outside it than in deciding whether there has been express malice in uttering defamatory matter on an occasion of privilege. If the communication be made in good faith and in fulfilment of any social or moral duty to oneself or any one else, it cannot be either prohibited or punished.

I have felt very strongly in this case the duty so admirably expressed by Fletcher Moulton L.J., that Courts of justice, who are the guardians of public liberties, ought to be doubly vigilant against encroachments by themselves. But when a Court has to decide either that there shall be no justice available for people suffering under wrong or that malicious publication shall be prevented, I believe that the second is the right alternative, and that so to hold is merely to apply a principle acted upon by high authorities and indispensable in itself. There does, indeed, remain a danger that a Court may not be so jealous to do right when its proceedings are not subject to full public criticism. I acknowledge that this is always possible, and it is not an adequate answer to say that the judges can be trusted, though I believe entirely that they can be trusted. It comes to a choice between the administration of justice in some cases without the safeguard, on the one hand, and on the other hand no administration of justice in such cases at all. That is not to be considered here as a matter of policy but as a matter of law, and in my interpretation of it the law is in principle what I have endeavoured to state.

LORD ATKINSON. My Lords, I concur. The argument in this case has ranged over a very wide field: many topics have been discussed, principles of vast importance have been laid down, principles which in their application might, I think, involve a serious encroachment on the liberty of the subject, but the fundamental proposition upon which the respondent's case in the ultimate result rests is, in my view, this, that an order to hear a cause in camera enjoins perpetual silence upon everybody as to what transpired at the hearing, except perhaps the result of it. If this proposition be unsound then the respondent's whole case collapses like a house of cards; neither the petitioner nor her solicitor have been guilty of any contempt of Court, nor disobeyed any order of Court, nor committed any crime, and the order

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

of Bargrave Deane J. was not, and could not have been, made in any criminal cause or matter. In my view the proposition is unsustained by authority and is in itself unsound. Two arguments, and in reality only two, have been urged before your Lordships in support of it. The first is I think based on a false analogy, and the second involves a fallacy. Cases such as *Badische Anilin und Soda Fabrik* v. *Levinstein* (1), *Andrew* v. *Raeburn* (2), and *Mellor* v. *Thompson* (3) were cited, and it was sought to apply the principles on which they were decided to suits brought to have a marriage annulled on the ground of the impotence of one of the parties. But the first of these suits was wholly different in character and nature from a nullity suit; there is no similarity whatever between them. In it a secret process was involved. The whole value of the property in the process in most, if not all, of such cases depends on the details of the process being kept secret. If the secret be disclosed the value of the property vanishes. It would be manifestly unjust to allow a disclosure of a secret, made during the hearing of such a suit in camera, either under the compulsion of the presiding judge or at his invitation, in order to enable him to decide the points at issue, to be made use of at any time thereafter to destroy the value of the property.

Perpetual silence as to what transpired at the hearing of such a case in camera may become absolutely essential in order to avoid the perpetration of this wrong; otherwise the whole object of a suit brought to protect property might be defeated by the form of procedure adopted by the tribunal from which the relief desired was sought to be obtained.

Andrew v. *Raeburn* (2) was a suit for an injunction to restrain the publication of certain letters which passed between one or other of the plaintiffs in the suit and a third party. The application with which Lord Cairns dealt in the judgment so much relied upon was an application to hear the appeal in camera. The application was refused on the ground that the case was not one "which would cause an entire destruction of the matter in dispute."

(1) 24 Ch. D. 156. (2) L. R. 9 Ch. 522.
(3) 31 Ch. D. 55

Lord Cairns, in giving judgment, said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute, I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private, even without the consent of both parties, in order to prevent an entire destruction of the matter in dispute. But from the nature of the case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." This is the very principle upon which the cases dealing with secret processes were decided. *Mellor* v. *Thompson* (1) is to the same effect. Nullity suits are not instituted to protect property. The publication of the evidence taken in camera in such a suit even after the cause has ended may, no doubt, cause pain, but it cannot render property valueless or cause the destruction of the whole matter of dispute. The relief prayed for will have been granted or refused, the issues in the suit decided, subsequent publication of the evidence could not have an effect at all resembling that mentioned in these cases respectively.

Even, therefore, if it should be held to be the law that in the former class of suits all persons should, for the special reasons indicated, be enjoined to perpetual silence touching everything disclosed during a hearing in camera, it would, in my view, be quite illegitimate to attempt to extend a practice springing in these cases from the very necessity of things, and adopted for a special and peculiar object, to suits of the latter kind, in which such a disclosure, if made after the cause had ended, could not inflict any of those wrongs the practice was designed to guard against.

These authorities, therefore, afford, in my opinion, no support to the respondent's first proposition. The second argument urged in support of it appears to me to be fallacious in this respect: it is said that it would be futile to order a nullity suit to be heard in camera if every one were free, after the hearing, to publish an account of the proceedings. The answer to that is, that this is not so; first, because the order would have secured that which is now, apparently, regarded as the great desideratum, without which, according to Sir Francis Jeune, justice cannot be

(1) 31 Ch. D. 55.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

done, namely, this, that the parties concerned, especially the woman, should be examined in private; and, secondly, because if anything which took place in camera were published it must be published without the privilege which protects the publication of a full and fair report of proceedings in public open Courts of justice, and would subject the publishers to all the risks attending the publication of anything which takes place in a private house or at a private meeting. If the matter published amounted to a libel or to a slander, the person defamed could sue for damages, or, possibly in the former case, prosecute for criminal libel. If the printed matter published were, in addition, indecent, the public authority might prosecute for the publication of an obscene libel, &c. To say, therefore, that an order to hear a cause in camera would be futile if people were left free to publish what took place there after the cause had ended involves an entirely inaccurate and misleading use of the word "free," quite as inaccurate and misleading as if one were to lay it down that according to the law of this country every man is free to libel or slander his neighbour.

An argument founded, as this appears to be, upon a lack of appreciation of the value of the privacy secured by such an order, and upon this rather misleading use of the word "free," is, to my mind, entirely unconvincing. Your Lordships have not been referred to any direct authority in support of the proposition contended for. And what makes the lack of direct authority all the more strange, if the proposition be sound, is this, that the records of the old Ecclesiastical Courts have been searched; passages from several old books on the practice of those Courts have been quoted; a parliamentary report, dealing, amongst other things, with the practice of the Ecclesiastical Courts, has been referred to; and the statements of many most distinguished judges made since 1857 have been dwelt upon, all in order to shew that not only had those Courts power to order nullity suits to be tried in camera, but that they frequently exercised that power, and yet nothing has been found to convey even the faintest suggestion that these orders when made had the perpetual operation and effect contended for in the present case. It is scarcely conceivable, I think, that if the respondent's contention

were sound, some reference to the matter would not have been found, or some case discovered where the restraint proved too much for human nature, and the transgressor who dared to speak was punished for his delinquency.

Speaking for myself I must therefore decline to give to the order of the learned judge, that this nullity suit be heard in camera, a meaning and operation for which, as I conceive, there is no true analogy, no precedent, no authority direct or implied, and no imperative necessity.

I think the order in its true interpretation means what on its face it plainly says, and nothing more, namely, this, that the place where the case is to be heard shall be a private chamber, not a public Court. All the consequences I have indicated follow from that alteration of the place of hearing. The order was, I think, spent when the case terminated, and had no further operation beyond that date. One of the strangest things in this strange case is that the case of *Rex* v. *Clement* (1) should be cited as an authority for the proposition that a Court of Assize or one of the Divisions of the High Court has power to prohibit the publication, after a trial has ended, of a report of the proceeding which took place at that trial.

That case is a weighty authority having regard to the eminence of the learned judges who decided it, but it is an authority against, rather than in favour of, the proposition in support of which it was cited. In that case Thistlewood and several others were jointly indicted for high treason. They pleaded not guilty. The issue knit on that plea between the Crown and the prisoners was whether they were guilty or not. In effect it was whether they, or any, and which of them were guilty, since it was quite competent for the jury to have acquitted some of them and convicted others. They would have been all tried together had they joined in their challenges. They severed in their challenges, however, with the consequence that of necessity this single issue was split up into several branches, and they were tried seriatim; but, to use the language of Bayley J. (2), these several trials constituted one entire proceeding. Abbott C.J., as he then was, knowing that the evidence in each trial would be very much the same, and

(1) 4 B. & Ald. 218. (2) Ibid. p. 229.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

fearing that if a report of each trial were published in the Press as it took place an opportunity would be given to the witnesses to trim their evidence, to the sacrifice, perhaps, of truth and the possible defeat of justice, made an order that no report of the proceedings should be published till all the trials had concluded. A report of the trials of Thistlewood and another who had been convicted was published by Clement in his newspaper, before the trial of any of the other prisoners had commenced. He was brought up before the Chief Justice and punished for contempt of Court in having acted "contrary to the order of this Court, and to the obstruction of public justice," not merely the first. The order prohibiting publication was impeached upon the ground that it prohibited the publication of a fair and accurate report of proceedings taking place in a public Court of justice after these proceedings had terminated, and it was successfully defended on the ground that all the trials formed together one entire proceeding, and that Clement's newspaper was published in the middle, and not at the end of that proceeding.

Bayley J. (1) is reported to have expressed himself thus: "But, it is argued, that if the Court has this power of prohibiting publication, there is no limit to it, and they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very different; for the prohibition, here, has only been till the whole trial was completed." And Holroyd J., the only other judge who gave at length reasons for his decision, is (2) reported to have said: "The object for which it (the order) was made was clearly, as it appears to me, one within their jurisdiction, viz. the furtherance of justice in proceedings then pending before the Court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. . . . . It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case, that the Court have that power during the pendency of the proceedings."

The second proposition for which the respondent contends is,

(1) 4 B. & Ald. at p. 230. (2) Ibid. at pp. 232, 233.

as I understand it, this: that if a superior Court or a judge of such a Court should make a valid order in a civil suit prohibiting the doing of a particular act, not per se a crime, the doing of that act in disobedience to the order becomes a crime, a criminal contempt of Court. Even though the first proposition put forward by the respondent should, contrary to my view, be held to be sustainable, it would still be necessary for him to establish this second proposition in order to succeed on this appeal, because the act of the petitioner, in sending at the time she did copies of the shorthand writer's notes of the medical evidence given in camera to her father-in-law, sister-in-law, and a lady friend, even if not done, as she swears it was, in defence of her character and good repute, was not per se a crime. If it became a crime at all it must be because she was by the order of the Court prohibited from doing it. The same considerations apply to the act of her solicitor, who aided and abetted her in doing this forbidden act. Her contempt of Court does not appear to me, however, to fall within any of the classes of criminal contempt of Court mentioned by Lord Hardwicke in *Roach* v. *Garvan* (1), or by Lord Cottenham in *Lechmere Charlton's Case* (2), or by Lord Blackburn in *Skipworth's Case*. (3) It did not involve the scandalizing of a judge, such as was dealt with in *McLeod* v. *St. Aubyn* (4) or in *Reg.* v. *Gray*. (5) It did not involve the intimidation or corruption of jurors or witnesses in any pending or prospective suit, nor the prejudicing of the case of any litigant in any pending suit, such as was attempted in *O'Shea* v. *O'Shea and Parnell*. (6) Still less was it directed or calculated to interfere with the due course of justice in any pending litigation. It is not enough, I think, to bring it under this last head of criminal contempt of Court, that men or women may exist who, though their evidence and that of all their witnesses should be taken in camera, would prefer to suffer under the wrong nullity suits are designed to redress, rather

(1) (1742) 2 Atk. 469, at pp. 471, 472.
(2) (1836) 2 My. & Cr. 316, at p. 342.
(3) (1873) L. R. 9 Q. B. 230, at pp. 232, 233.
(4) [1899] A. C. 549.
(5) [1900] 2 Q. B. 36.
(6) 15 P. D. 59.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

than have that evidence published even after the case has ended. But the deterring of such people from seeking redress in a Court of justice is not the kind of interference with the course of justice which Lord Cottenham had in mind in the case above mentioned, when he said that its essence consisted in the doing of something calculated or designed to obtain a result of legal proceedings different from that which would follow in the ordinary course.

Of course, if the act prohibited be in itself a crime, the fact that it has been done in defiance of the prohibition would necessarily, one would suppose, aggravate the culprit's guilt. But if it be the law that disobedience of the order in itself constitutes a crime, then this result seems necessarily to follow, that all orders of Court punishing persons in any way for disobedience of this kind cannot be reviewed in the Court of Appeal inasmuch as each of them would have been made in "a criminal cause or matter" within the meaning of the 47th section of the Judicature Act of 1873. The following cases (in addition to those dealing with orders of justices made at sessions to be presently referred to) may be taken as fair specimens of those cited on behalf of the respondent in support of this, his second proposition: *Lord Wellesley* v. *Earl of Mornington* (1), *Seaward* v. *Paterson* (2), *Avory* v. *Andrews* (3), and *In re Freston.* (4)

It was contended that these cases shew that the disobedience of an order of Court constitutes in itself a crime, a criminal contempt of Court. Unfortunately for this contention, however, they do something more than that; they shew I think, conclusively, that if a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court. It would appear to me to be almost inconceivable that the law should tolerate such an absurd anomaly as this: that a principal who does an act he is expressly prohibited by injunction from doing should only be guilty of a civil contempt of Court, while a person not expressly or at all

(1) 11 Beav. 181.
(2) [1897] 1 Ch. 545.
(3) (1882) 30 W. R. 564.
(4) 11 Q. B. D. 545.

prohibited who aids and abets the principal in doing that very act should be held guilty of a crime, a criminal contempt of Court, with the result that the more flagrant transgressor of the two, the principal, would have a right to appeal to the Court of Appeal against any order punishing him for his misdeed, while the accessory would have no right of appeal from the order punishing him for aiding and abetting the principal to commit the forbidden act. The disrespect to the Court which made the order that was disobeyed, and the defiance of its authority, would seem to be greater in the case of the principal than in that of the accessory. The interference with the course of justice if that resulted would probably be the same in both. It can hardly be that the fact that the principal was named in the order he has disobeyed is to palliate rather than aggravate his guilt, and if not, on what principles are the cases to be differentiated? In the first of the before-mentioned cases, one Batley, the unnamed aider and abettor of the named principal who disobeyed the order of the Court, submitted, when brought before the Court, to answer for his contempt. The plaintiff in the suit did not press for punishment. The Master of the Rolls said that had he been pressed it would have been his duty to commit Batley, but he does not say for what form of contempt of Court, whether the civil contempt of Court for which the principal was found to have been guilty, or a criminal contempt of Court. The case is rather a blind one, therefore, on this point as to the nature of the contempt.

In *Seaward* v. *Paterson* (1), a case much relied upon by the respondent, the principal, Paterson, his agents and servants were restrained by injunction from, amongst other things, having, or permitting to be held, exhibitions of boxing on his premises. He held, or permitted to be held there, such an exhibition in breach of this injunction. One Murray, who was neither his agent nor servant, was present at the exhibition, aiding and abetting Paterson in holding it. The plaintiff moved that both principal and accessory should be committed for breach of the injunction. The whole controversy before North J. was whether Murray could be committed, as he was not a party to the suits, and was

(1) [1897] 1 Ch. 545.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

not named in the injunction. The learned judge held that he could be committed, not indeed for breach of the injunction, but for contempt of Court in aiding and abetting Paterson in doing an act which the latter was by the injunction prohibited from doing, and committed both Paterson and Murray to prison. Murray alone appealed from this order to the Court of Appeal. The appeal was entertained and the order appealed from upheld, but neither on the hearing before North J. nor in the Court of Appeal was it ever suggested that Murray's contempt of Court was a criminal contempt of Court. Sect. 47 of the Judicature Act of 1873 was not referred to. The points discussed were those raised in the Court below. Lord Lindley is, at p. 555, reported to have expressed himself thus: "A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the Court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls." The motive and object of the person who brings the offender before the Court may be different in the one case from the other. That, however, one would think could not change the nature of the offence. Lord Lindley did not grapple with the absurdity of a man who does a certain thing which he was not prohibited from doing thereby becoming a criminal, and a man who does the same thing, though he was prohibited from doing it, not

becoming a criminal. It is difficult to conceive that a judge of Lord Lindley's well-known knowledge, ability, and acuteness of mind would have gone through this long analysis of the subject without ever suggesting that either, or both, of the kinds of contempt of Court with which he dealt was necessarily criminal, if he had so regarded it.

In *Avory* v. *Andrews* (1) trustees of a friendly society were restrained by injunction from disposing of certain funds of the society in a certain way. They resigned, and new trustees were appointed in their stead. These latter did the prohibited act Kay J. held they were guilty of contempt of Court because, though not named in the injunction, they stepped into the place of those who were named and did what the former were forbidden to do, but it was not suggested that the new trustees were guilty of any contempt of Court differing in kind from that of which the old trustees would have been guilty had they disobeyed the injunction, or that the new trustees, though not the old ones, were guilty of a criminal offence.

In the case of *In re Freston* (2) a solicitor (Freston) was, by an order of the Court of which he was an officer, required to deliver up certain documents, and also pay to a person named a sum of 10*l.* and the costs of an application made against himself. He delivered the documents, but refused or omitted to pay the sum of 10*l.* or the costs. Thereupon Denman J. made an order that an attachment should issue against him, and he was arrested while he was returning home from the police office, where he had been professionally engaged, and imprisoned. He applied to be discharged on the ground that at the time of his arrest he was privileged as an advocate from arrest. The Queen's Bench Division refused this application. Thereupon Freston appealed to the Court of Appeal. In this case, as in that of *Seaward* v. *Paterson* (3), the appeal was entertained. It was not suggested that under s. 47 of the Judicature Act the Court of Appeal had no power to hear the appeal. Lord Esher, at p. 554 of the report, lays down that where an attachment is issued for a breach of the law, or as a remedy for something that

(1) 30 W. R. 564. (2) 11 Q. B. D. 545.
(3) [1897] 1 Ch. 545.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson

is a breach of the law and in the nature of an offence, no privilege can be claimed, but where it is issued for the purpose of enforcing judgments in civil disputes, and where the breach of the order cannot be said to be an offence, the privilege can be claimed. He apparently relied much on the 4th sub-section of the Debtors Act of 1869 and s. 1 of the Debtors Act of 1878, and came to the conclusion that Freston's contempt was in the nature of an offence, but whether or not this was because of the disciplinary jurisdiction which Courts exercise over solicitors as their own officers it is rather difficult to discover. Later on the the same page he says: "The rights of those employing solicitors are not merely of a civil nature; and the Courts dealt with defaulting solicitors on the ground, that they had been guilty of breaches of duty and breaches of the law."

Lord Lindley, at p. 556, says, "Is this attachment simply in the nature of civil process? If it is, this solicitor ought to be discharged. In *McWilliams' Case* (1) Lord Redesdale L.C. has pointed out that all contempts are not the same; they are of different kinds; some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents—in these cases there is no privilege from arrest. In this case the attachment was granted for something more than a mere theoretical contempt, and therefore it was something more than merely civil process: there was therefore no privilege. This view is strengthened by the language of the Debtors Act, 1869, s. 4, sub-s. 4: it assumes that a solicitor who fails to pay a sum of money when ordered by the Court, is guilty of misconduct and also of an offence for which he may be punished by imprisonment; and this tends to shew that the attachment was not upon civil process." And Fry L.J., at p. 557, says, "The attachment was something more than process; it was punitive or disciplinary, for the Court was proceeding against its own officer." The appeal was dismissed.

There is not a suggestion in this case that Freston had done anything for which he could have been indicted, as every person can be who is guilty of criminal contempt of Court. Nothing

(1) (1803) 1 Sch. & Lef. 169, at p. 174.

would have been easier for the members of the Court than to have said that he was guilty of a crime if they had thought so. That would at once have solved the difficulty as to whether or not the attachment order was merely civil process. The fair inference is that they did not think so. I am, therefore, of opinion that this case, so far from being an authority that disobedience per se of an order of Court, irrespective of the nature of the thing ordered to be done, is a criminal offence, is an authority to the contrary. Some reliance was, in argument, placed upon authorities not cited in the Court of Appeal, such as *Reg.* v. *Ferrall* (1), to shew that the disobedience of an order made by justices of the peace constitutes an indictable offence. These cases are dealt with in Russell on Crimes, 7th ed., vol. 1, p. 543, and Chitty's Criminal Law, 2nd ed., vol. 2, p. 279, and are all collected in Archbold's Criminal Pleading and Evidence, 23rd ed., p. 1088. The orders referred to are usually made upon the treasurer of a county to pay the costs of prosecutions, or upon a person to pay under the poor law the costs of maintenance of a relative, or upon putative fathers to pay the cost of the maintenance of their illegitimate children. In *Rex* v. *Robinson* (2) Lord Mansfield lays it down broadly that disobedience of an order of sessions is an indictable offence at common law. *Rex* v. *Bristow* (3) is to a similar effect. In *Rex* v. *Johnson* (4) the order was made by the justices on the county treasurer to pay the expenses of a prosecution, and it was held this officer might be indicted if he refused or omitted to do so. The same result would apparently follow if a similar order had been made by the going judge of assize: *Rex* v. *Jeyes*. (5)

The observations of Pollock C.B. in giving judgment in *Reg.* v. *Ferrall* (6) are very significant. He says: "The authorities are clear upon the point, that an indictment will lie for a refusal to comply with an order of justices for the payment of money; and although I individually should not be disposed to hold, for the first time, that such a refusal was indictable since a like refusal to comply with an order of a superior Court is not so, yet, I feel

(1) (1850) 2 Den. C. C. 51.
(2) (1759) 2 Burr. 799, at p. 804.
(3) (1795) 6 T. R. 168.
(4) (1816) 4 M. & S. 515.
(5) (1835) 3 Ad. & E. 416.
(6) 2 Den. C. C. at p. 56.

H. L. (E.) 1913

SCOTT v. SCOTT.

Lord Atkinson.

bound by the authorities to concur with the rest of the Court in this view of the law."

This rule of the common law would appear to have sprung out of the necessities of such cases as these. The money ordered to be paid could not be sued for and recovered as a debt, specialty or simple contract, due to the person to whom it was ordered to be paid, and justices had no power to issue writs of attachment to compel obedience to their orders. Indictment was, therefore, the only remedy available. But these orders were not orders made inter partes in civil suits, such as orders to hear a civil cause in camera, and do not support in any way, in my view, the respondent's second proposition. In my opinion that proposition is unsound. The burden of establishing it lay upon the respondent. He has, I think, failed to discharge that burden. Lord Moulton, in his able and elaborate judgment in the Court of Appeal in this case at p. 268 of the report, lays down in the following passage what, in my opinion, is the true and sound principle of the law. "It is only the Legislature that can render criminal an act which is not so by the common law of the land. An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act, and therefore it is that the Court of Appeal has consistently and without any exception held that orders punishing persons for disobedience to an order of the Court are subject to appeal." This view of the law is not, I think, in conflict with authority, and is logical and rational in itself.

In my opinion the cases cited in reference to wards of Court afford no assistance upon any of the points in controversy on this appeal, inasmuch as judges in these cases act as the representatives of the Sovereign as parens patriæ, and exercise on his behalf a paternal and quasi-domestic jurisdiction over the person and property of the wards for the benefit of the latter. Even if it be assumed that the Ecclesiastical Courts had jurisdiction to order nullity suits to be tried in camera, that power is now only to be exercised by the Court for Divorce and Matrimonial Causes,

according to the provisions of the 22nd section of the Matrimonial Causes Act of 1857, subject to the provisions of that Act and the rules and orders made thereunder. The words "rules and regulations" not "rules and orders" are used in the 46th and 67th sections. I think these two expressions mean the same thing. No such rules, regulations, or orders having been made, the provisions of the 46th section operate directly with their full force and effect on suits of this character. And it certainly appears to me that the hearing of these suits in camera is opposed not only to the policy of this statute, but is prohibited by the express and positive enactments of its 46th section. These provisions may to some extent be modified by "rules and orders" framed and published in the mode provided, but they cannot be modified by the order of a judge.

It is not necessary in the present case to determine whether the broad proposition laid down by Sir Francis Jeune (as he then was) in *D.* v. *D.* (1) is well founded. The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect. I am inclined to think that the practice of which the learned judge approved and in this case inaugurated would restrict this wholesome publicity more than is warranted by authority. And I desire to point out that, if the practice were adopted, and if orders to hear a cause in camera were to have the effect contended for in the present case, this rather injurious result might follow. If perpetual silence were enjoined upon every one touching what takes place at a hearing in camera, the conduct and action of the judge at the trial, his rulings, directions, or decisions on questions of law or fact, could never be reviewed in a Court of Appeal at the instance of a party aggrieved, unless indeed upon the terms that that party should consent to become a criminal

(1) [1903] P. 144.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

and render himself liable to be fined and imprisoned for criminal contempt of Court, a serious invasion of the rights of the subject.

Even if the party aggrieved might be able to obtain from the Court that made the order permission to violate it to the extent necessary to prosecute the appeal, the secrecy enjoined could only be secured by the appeal to the Court of Appeal, and, possibly, from that Court to this House, being also heard in camera, a serious alteration, I think, of the present practice.

It only remains for me to deal with the form of the proceedings adopted in this case taken in connection with the construction of the 47th section of the Judicature Act. If a certain act may be viewed in either of two aspects, the one criminal and the other simply tortious, it is, I think, essential, in order to bring a judgment or order dealing with it within this section, that it should clearly appear on the face of the judgment or order that the act is dealt with in its criminal, and not in its civil, aspect. Were it otherwise a judgment for damages in a case of wilful and deliberate assault could not be reviewed by a Court of Appeal since wilful assault is a crime. Now Lindley L.J., in *O'Shea* v. *O'Shea and Parnell* (1), is reported as having expressed himself thus: "There are obviously contempts and contempts; there is an ambiguity in the word; and an attachment may sometimes be regarded as a civil proceeding. For instance, where an order was made by the Court of Chancery in former days there was no mode of enforcing such an order but by attachment. We must not, therefore, be misled by the words 'contempt' and 'attachment,' but we must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies." To accuse one, therefore, of being guilty of a contempt of Court does not, I think, necessarily imply that he has committed a crime, nor is the criminality of the act necessarily implied by the added allegation that the contempt consisted in the violation of an order of Court.

In this case the order alleged to have been disobeyed was

(1) 15 P. D. 59, at p. 64.

simply an order "that the cause should be heard in camera," nothing more. If one turns to the notice of November 23, 1911, of the motion upon which the order appealed from was made, it is obvious that the person who framed it never thought he was making any criminal charge whatever. The notice is not entitled in any separate cause or matter, as it should have been according to the judgment of the Court of Appeal in *O'Shea* v. *O'Shea and Parnell* (1), in order to shew that it dealt, to use the words of Lopes L.J., with something outside the cause, and was not a mere step in the cause. On the contrary it is entitled just as any notice of a motion which was a step in the cause would be entitled. The charge made was that the petitioner (a party to the suit bound by the orders made in it) and her solicitor (over whom as an officer of the Court the judge had disciplinary powers) had been guilty of contempt of Court in publishing a transcript of the shorthand writer's notes of the medical evidence in contradiction of the order of February 11, 1911, directing the cause to be heard in camera. The relief prayed for is, in substance, this: (1.) That the petitioner and her solicitor should be committed to prison; (2.) that they should be restrained from making any similar or other communication either directly or indirectly concerning or relating to the subject of the suit; (3.) that they should be restrained from molesting in this or in any other way the respondent and friends, doctors, patients, or others (the others not being identified in any way); (4.) that the petitioner and her solicitor should be required to state on oath the names and addresses of the persons to whom they have made similar communications.

All these different kinds of relief might possibly be rightly and rationally asked for (I express no opinion upon that point) if what was complained of was a civil contempt of Court, like the mere breach of an injunction, but if it was meant to charge these two persons with a criminal offence, and to ask for their summary conviction for it, the notice of motion is grotesque in its absurdity. Who ever heard of a criminal being restrained by an order similar to an injunction from the repetition of his crime, or the commission of some other and different though

(1) 15 P. D. 59.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

similar crime, not to speak of a criminal having been asked to discover on oath the evidence to secure his own conviction of the crime of which he is accused, or of some other crime of a similar character?

There is a well-known procedure in the nature of preventive justice, by which it may be sought to prevent the commission of crime, but it is not this. It consists in requiring the person likely to commit the crime to enter into recognizances to keep the peace and be of good behaviour to all His Majesty's subjects, and in default to be committed to prison. It is impossible to think that Bargrave Deane J. should have consciously taken a part in such a travesty of criminal procedure as this notice invites him to embark in. Yet he makes no allusion to the absurdities of the notice of motion. The curial part of his order runs thus: "The judge found that the petitioner and her solicitor had been guilty of contempt of Court, and thereupon ordered that the petitioner and her solicitor, Mr. Percy Braby, do pay the costs of this application." But of what kind of contempt, civil or criminal, he has found them to have been guilty the order does not disclose.

In the absence of any allegation expressed or implied to the contrary, it must, I think, be assumed that the contempt of Court for which the parties were condemned was the particular kind of contempt charged in the notice of motion. I quite admit it was competent for the learned judge to have put aside all the nonsense contained in the notice of motion, to have had its title amended, and to have had entitled his own order in conformity with the amended notice, but he has not done so. The relevant portion of his judgment leaves one still in doubt as to the sense in which he used those words, "of ambiguous meaning," according to Lord Lindley. It runs thus:

"It must be clearly understood in future that the whole object of trying these unhappy cases in camera is that they should be kept secret and private. The result may be known, but none of the details; and it is a gross contempt of Court when the Court says, 'I will try this case in my private room,' for people to go spreading about the country the shorthand notes of what took place in the private room. It must be understood in future

that anything done in chambers is private. Even summonses are not reported without leave of the Court when there is something important." (1)

It puts everything done in chambers on a level with nullity suits heard in camera, and, if the respondents are right in their first contention, announces that perpetual silence shall be enjoined in the one class of cases as well as in the other.

I concur, therefore, with Vaughan Williams L.J. in thinking that the order appealed from to the Court of Appeal was an order in a civil proceeding, and not an order in a criminal cause or matter within the meaning of the 47th section of the Judicature Act of 1873, and for this, as well as for the other reasons I have mentioned, am of opinion that this appeal should be allowed, with costs.

I am further of opinion that the decision of Bargrave Deane J. was erroneous, and that, as your Lordships have now before you all the materials necessary to enable you to do complete justice between the parties, the order should now be made which your Lordships are of opinion the Court of Appeal ought to have made had they not yielded to the preliminary objection and had heard the appeal, namely, an order that the order appealed from to the Court of Appeal be set aside and vacated, and the applicant be ordered to pay the costs of the motion to commit the petitioner to prison, and also the costs in the Court of Appeal and the costs of this appeal.

LORD SHAW OF DUNFERMLINE. (2) My Lords, the appellant, Annie Maria Scott, and the respondent, Kenneth Mackenzie Scott, were married on July 8, 1899. On January 12, 1911, the appellant instituted this suit for a declaration of nullity of marriage. On February 14 an order was pronounced, of the character familiar in such cases, for the medical examination of the parties and for report. The concluding words of that order were as follows: "And I do further order that this cause be heard in camera."

(1) This passage appears in a somewhat different form in the report of the judgment of Bargrave Deane J. in the *Law Reports*.

(2) Read by Lord Atkinson.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

Thereafter the respondent withdrew an answer which he had put in to the case—which accordingly proceeded undefended. The evidence was given and the hearing took place in camera, and on June 13, 1911, the President pronounced a decree nisi with costs. So far as the hearing of the case in camera was concerned, the order made was obeyed.

Towards the end of the year 1911, however, Mrs. Scott obtained an official transcript of the shorthand notes of the proceedings, and sent to the respondent's father, to his sister, and to one other person, typewritten copies thereof. She swears in her affidavit that she did this with a view to vindicate herself in the eyes of those persons, and to prevent their being prejudiced against her by false reports. There is no question in this case that the three copies issued were accurate, or that the report of the proceedings was true.

The respondent founds upon this action by the appellant as a contempt of Court, and in his notice of motion for December 4, 1911, he asks that the appellant, Annie Maria Scott, and her solicitor, Mr. Percy Braby, and his partner, Mr. Waller (who on her instructions had obtained the copies of the proceedings), be committed to prison for their contempt of Court; secondly, that they be restrained "from making any similar or other communications, either directly or indirectly, concerning or relating to the subject-matter of this cause," and, thirdly, "from otherwise molesting the respondent, his relatives and friends, doctors, patients, and others"; while fourthly, he moves that the appellants "be directed to state on oath the names of the persons and their addresses to whom similar communications have been made."

If this motion be, as was contended, a motion in a criminal cause or matter, it is manifest that it was also much more, for it was not a motion merely for commitment in respect of the alleged contempt, but it was also a motion for an injunction of perpetual silence with regard to what had transpired in the proceedings in camera. In the next place, it was an injunction against molestation; and, lastly, it was a discovery, and a discovery sought from the alleged criminals by their stating on oath the names, addresses, and particulars of their criminal contempt. These

and particularly the last, are singular accompaniments of a step in a criminal cause or matter. The last seems to be an abrogation of the elementary principle that an accused person is not bound to incriminate himself. The majority of the Court of Appeal, holding that the question arose in a criminal cause or matter, have declared a civil appeal incompetent. Against this judgment the present appeal to this House is brought.

But the argument before your Lordships was not confined to this point of competency—of civil or criminal; it ranged over the whole merits of the occurrence and was full and elaborate; it included a discussion of the powers of the old Ecclesiastical Courts and necessitated a reference to the question of the open administration of English justice as a whole.

On the actual case before the House there are two substantial matters falling to be dealt with. In the first place, did the communication of a transcript of the Court proceedings—after the actual proceedings had come to an end—constitute a contemptuous disobedience to the order that they should be heard in camera? In the second place, was that order itself properly and legitimately pronounced? Both of these matters, my Lords, appear to me to be deserving of grave and serious consideration. And I observe of both, but particularly of the latter, that I think them to be closely connected with questions of the deepest import affecting the powers of Courts of justice and the liberty of the subjects of the Crown.

After a not inconsiderable study of the authorities and history in relation to this subject, I will venture to enter, notwithstanding the dicta to which I am about to refer, my respectful protest against the assumption of any general power by the present English Courts of law to administer this branch of justice and to try suits for declaration of nullity of marriage, or indeed to hold any Courts of justice with closed doors. Nor do I confine my rejection of this assumption merely to the existing High Court under the Judicature Act of 1873, nor even to the Matrimonial Court set up by the statute of 1857. For I think it right to make some examination in the first place of the power of the old Ecclesiastical Courts, as to which I humbly think that much misapprehension has prevailed.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

My Lords, the forms of the old Ecclesiastical Courts were manifestly derived from those in use under the general body of canon law, which, as Stair expresses it in a passage adopted by the Ecclesiastical Commissioners of 1832, "extended to all persons and things belonging to the Roman Church, and separate from the Laity; to all things relating to pious uses; to the guardianship of orphans; the wills of defuncts; and matters of marriage and divorce; all which were exempted from the civil authority of the Sovereigns, who were devoted to the See of Rome. So deeply has this law been rooted, that even where the Pope's authority has been rejected, yet consideration has been had to these laws, not only as those by which Church benefices have been erected and ordered, but as likewise containing many equitable and profitable laws, which because of their weighty matter, and their being received, may more fitly be retained than rejected."

In the early stages of the suit, the Ecclesiastical Court, charging itself with the interests of both parties, took upon itself the inquiry into the facts, not in foro contentioso nor in foro aperto, but by way of obtaining, first from the one side, and then, if there was a denial or a counter case, from the other side, and from each apart from the other, the testimony of witnesses, this testimony to lie in retentis until, according to modern ideas, the real trial of the case should begin.

The true meaning of these preliminary inquiries was substantially this, that the story of each side was told without either the fear or the presence of the other, and without the knowledge or the desire to evade or mitigate the force of opposing evidence. They constituted an official precognition; I think they are referred to under that name. When these private and preliminary inquiries were ended, and after that stage of precognition was completed, the stage of "publication" was reached; and publication meant the opening of the documents—up to that point sealed—and the disclosure of their contents to the other party and to the judge. (1)

The true question to be determined as to the procedure of the

(1) [Such was also the course of the old Court of Chancery, which was founded on the "summary" ecclesiastical procedure.—F. P.]

Ecclesiastical Courts is not what had been done up to that stage, but what was done after that stage. For my own part I incline to the opinion that, after the stage of publication was reached, the Ecclesiastical Courts conducted their proceedings openly, and that there is no real ground for the suggestion that this subsequent procedure was secret. I accordingly enter my respectful dissent against observations—mostly made obiter—which have been cited from learned judges, that a continuance of the old ecclesiastical procedure justifies any inference that this department of justice was to be optionally secret.

These observations, although made from the Bench, were in point of fact cited by the learned counsel for the respondent, not as observations made in judicio but rather in testimonio. It was said that when Lord Penzance, Sir James Hannen, and Sir Francis Jeune made allusions to the old practice of the Ecclesiastical Court, they may have felt justified in their language by their own recollections. There is force in this view; although, of course, it would be improper to attach too serious weight to these references, which are, with one exception, of a slender and almost casual kind. But they have induced me, after an independent investigation, to trouble your Lordships with more than a passing reference to the practice of the Ecclesiastical Court. Its procedure is detailed with the utmost minuteness in Oughton's "Ordo Judiciorum," published in London in 1738; and it will be found from such a text-book that no support can be obtained for the view that subsequent to the stage of "publication" to which I have referred, the Ecclesiastical Courts, either as a matter of practice or in the exercise of a power, acted as secret tribunals.

But it is in truth unnecessary to go through the text-books—Conset and the others; because testimony of the greatest weight on this topic is obtained from the report of the Commissioners appointed to inquire into the practice and jurisdiction of the Ecclesiastical Courts in 1832. The personnel of the Commission gives this unanimous report the highest authority. For, in addition to the Archbishop of Canterbury and several members of the Episcopal Bench, the Commission included Lord Tenterden, Lord Wynford, and Chief Justice Tindal, together with other men

H. L. (E.) 1913

SCOTT v. SCOTT.

Lord Shaw of Dunfermline.

of great accomplishments and learning, including Mr. Stephen Lushington.

The course of proceeding of the Ecclesiastical Courts is dealt with in detail, including the mode of taking evidence by depositions, and the examination and cross-examination of witnesses by the examiners of the Court, who were employed for that purpose by the registrars. So far up to the stage of publication. The report then proceeds as follows:—

"The evidence on both sides being published, the cause is set down for hearing. All the papers, the pleas, exhibits, interrogatories and depositions, are delivered to the judge; who, having them in his possession for some days before the cause is opened, has a full opportunity of perusing, and carefully considering, the whole evidence, and all the circumstances of the case, and of preparing himself for hearing it fully discussed by counsel. All causes are heard publicly, in open Court; and on the day appointed for the hearing, the cause is opened by the counsel on both sides, who state the points of law and fact which they mean to maintain in argument; the evidence is then read, unless the judge signifies that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the counsel.

"The judgment of the Court is then pronounced upon the law and facts of the case; and in discharging this very responsible duty, the judge publicly, in open Court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged. Reports of decisions in the Ecclesiastical Courts were not in former times laid before the public, like those of the Courts of Westminster Hall; but for the last twenty years and upwards, the judgments of these Courts have been regularly reported. These reports are not only useful in the jurisdiction itself, and the inferior Courts, but they also serve to explain to the Temporal Courts the principles of ecclesiastical decisions, so as to enable them to form a more correct

judgment of the proceedings, when they may have occasion to refer to them."

My Lords, accepting, as I do, this account of ecclesiastical procedure in England, I do not entertain any real doubt that the Ecclesiastical Courts, from the moment when they sat to open the depositions of the witnesses, and throughout the whole course of the trial thereafter, were open Courts of the realm. They did not presume to pursue a practice or exercise a power inconsistent with that fact.

This state of matters may, no doubt, have been occasionally, and perhaps with increasing frequency, in the fourth and fifth decades of last century, departed from; but it was, I incline to believe, never departed from under challenge, and this undermining of what was, in my view, a sound and very sacred part of the constitution of the country and the administration of justice did not take place under legislative sanction, nor did it do so by the authority of the judges, on any occasion where the point of power to exclude the public was argued pro and contra.

And so far as regards even cases thus tried in camera by request or without objection, the large body of Consistorial Reports forms a comprehensive and complete refutation of the suggestion that such an order for a private trial was equivalent to a decree of perpetual silence on the subject of what had transpired within the doors of a Court thus closed. Until this case occurred I never suspected that parties, witnesses, solicitors, or counsel were put under such a disability or restraint; nor did it ever occur to me that the learned reporters of consistorial causes have by a series of contempts of Court continued to instruct the world.

My Lords, I am aware that the view which I now put forward as to the old practice and power of the Ecclesiastical Courts is not shared to the full by the judges of the Court below, but after the full argument at your Lordships' Bar I see no reason to doubt its substantial accuracy. I think the state of matters when the Divorce and Matrimonial Causes Act of 1857 became law was what I have ventured to describe. Occasional lapses had occurred from the wholesome rule of open justice in this country—lapses accounted for in all possibility sometimes by a

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

feeling of delicacy, and sometimes, I do not myself doubt, by the idea that the rule of open justice might be occasionally obscured in the interests of judicial decorum. I mention this last idea because its recrudescence, even after the statute of 1857, is one of the striking historical developments of this branch of the law.

By s. 22 of the statute of 1857 it was provided, "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." My Lords, there is nothing in that section which sanctions the idea that the Ecclesiastical Court had either a principle or a rule of sitting with closed doors. It had undoubtedly a principle of having the witnesses interrogated by examiners representing the Court registrars, but beyond that, and from the stage of publication onwards, there was no principle or rule for a secret tribunal.

The new Court set up would have remained accordingly free to deal with the taking of evidence itself as a preliminary and in private. But this was specifically the subject of s. 46, which is to the following effect: "Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court: Provided that parties, except as hereinafter provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed."

This section of the Act of 1857, my Lords, although no doubt it may have been meant incidentally as a useful corrective to dangerous ideas which were appearing to invade little by little the open administration of justice, was substantially a declaratory

section, for, once the preliminary inquiries had been brought within the range of judicial proceedings, then the proceedings as a whole were by a statute declared to be in open Court throughout.

I may observe that, although the law and practice of Scotland are far less dependent on statute than in England, yet in the particular under discussion Scotland had anticipated the Act of 1857 by express statutory enactment passed in the year 1693. The two Acts of June 12 of that year were in truth a part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution Settlement and to secure against judges, as well as against the Sovereign, the liberties of the realm. The one Act affects civil procedure; the other statute affecting criminal procedure is to the same effect, with an excepting declaration applicable to cases "of rapt, adultery, and the like."

And, my Lords, in my humble opinion these sections of the Act of 1857 were declaratory in another sense. They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than that for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground. So that the tests of whether we are in the region of constitutional right or of judicial discretion—of openness or of optional secrecy in justice —are general tests.

As to the Act of 1857, my Lords, I repeat that I make no excuse for founding upon the terms of these two sections—ss. 22 and 46—in combination. For if the view which I have taken be correct, namely, that all was open in the Ecclesiastical Courts except the examination of witnesses, then these two sections put together mean this, that all was to be open in future in the Ecclesiastical Courts, without any such exception whatsoever. When a cause is begun in the Divorce Court a contract of litis contestatio is entered into in short upon the ordinary terms. The old private examination of witnesses is abolished; the new system is an open system.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

I am of opinion that the order to hear this case in camera was beyond the power of the judge to pronounce. I am further of opinion that, even on the assumption that such an order had been within his power, it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end. But in order to see the true gravity of what has occurred, these two things must be taken together. So taken, my Lords, they appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security. The Court of Appeal has by its majority declared a review of this judgment by it to be incompetent. I therefore make no apology for treating the situation thus reached as most serious for the citizens of this country.

Consider for a moment the position of the appellants. The case of *Scott* v. *Scott* was heard in camera. All interruption or impediment either to the elucidation of truth, or the dignity or decorum of the proceedings,—conceived to be possible by the presence of the public—had been avoided. The Court had passed judgment in private and the case was at an end. And now judgment has been passed upon the appellants in respect of disclosing what transpired in Court by exhibiting an accurate transcript of what had actually occurred, and the appellants are enjoined to perpetual silence. And against this—which is a declaration that the proceedings in an English Court of justice shall remain for ever shrouded in impenetrable secrecy—there is, it is said, no appeal. I candidly confess, my Lords, that the whole proceeding shocks me. I admit the embarrassment produced to the learned judge of first instance and to the majority of the Court of Appeal by the state of the decisions; but those decisions, in my humble judgment, or rather,—for it is in nearly all the instances only so,—these expressions of opinion by the way, have signified not alone an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security. This result, which is declared by the Courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved

under, and have accorded with, the genius and practice of despotism.

What has happened is a usurpation—a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary—and they appear to me still to demand of it—a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure,

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law.

To begin with it was not so. No encroachment upon the broad stipulations of the statute of 1857 may have at first occurred. But two years after the Act was passed the cases of *Barnett* v. *Barnett* (1) and of *H.* (*falsely called C.*) v. *C.* (2) were tried. In the former, which was a suit by a wife for judicial separation on the ground of cruelty, her counsel asked that the evidence might be taken before an examiner. The meaning of that, my Lords, was that it was a motion almost in express terms that the secret procedure which had been ended by Parliament should be resumed by the Court. The motion was refused by Sir Cresswell Cresswell. In the latter, which was a suit to declare a nullity of marriage, on the same ground as in the present case, counsel asked that the cause might be heard in camera. The cause came on for hearing before the Full Court, namely, Sir Cresswell Cresswell, the Judge Ordinary, Williams J., and Bramwell B. The judgment of Bramwell B. was conclusive, none the less so that he indicates that he knew already that the practice, which he was condemning as illegal, was already creeping in. The learned judge said: "If this had been the first application of the kind, I also should have thought it perfectly clear that this being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its proceedings should be conducted in public. Upon that question I should not have felt the slightest doubt; and the only doubt I now entertain is in consequence of this Court having since it was established, on two occasions, sat in private. But in those cases I understand that that course was adopted with the consent of both parties, and that no discussion took place. In my opinion the Court possesses no such power."

My Lords, I think it would have been better had those

(1) 29 L. J. (P. & M.) 28. (2) 29 L. J. (P. & M.) 29.

attempts to evade the publicity commanded by the statute then ceased and the judgment of Bramwell B. been accepted as law. But the respondents found upon expressions of opinion such as those to which I now refer. In *C.* v. *C.* (1), in the year 1869, Lord Penzance, dealing with a case which was not a suit for nullity, made this observation: "The only causes which have been heard in private are suits for nullity of marriage, and in doing so, the Court has followed the practice of the Ecclesiastical Courts, which it is expressly empowered to do in such suits by the 22nd section of 20 & 21 Vict. c. 85." My Lords, that point was not a point of decision. I do not see that any argument upon the subject was presented to the Court. I cannot take the learned judge as having laid down that the practice of the Ecclesiastical Court was anything other than what is recorded with much authority by the Ecclesiastical Commissioners in the passage which I have cited.

The next expression founded upon is that by Sir James Hannen. (2) It is clear that that learned judge was much exercised upon the subject; for, having cited the judgments of Sir Cresswell Cresswell and Williams J. and Bramwell B., to which I have just referred, "that the Court had no power to sit otherwise than with open doors," the learned judge adds: "It would seem, however, that that rule has not been acted upon. On the contrary, such cases have been heard in camera both by my predecessor and myself, and I therefore think it must be taken that the impression which was entertained by Sir Cresswell Cresswell was afterwards abandoned." I must say, my Lords, that, accepting this as historically accurate, it appears to me to be a confession of a progressive departure from the law. No doubt it bound the learned judge, but it is an illustration of that to which I have already alluded, namely, the liability, unless the most vigorous vigilance is practised, to have constitutional rights, and even the imperative of Parliament, whittled away by the practice of the judiciary. It was no wonder that in the later case in 1876 (3) even the Master of the Rolls, Jessel, made an exception to the rule of open Courts of justice of "those cases

(1) L. R. 1 P. & M. 640. (2) *A.* v. *A.*, L. R. 3 P. & M. 230.
(3) *Nagle-Gillman* v. *Christopher*, 4 Ch. D. 173.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

where the practice of the old Ecclesiastical Courts in this respect is continued." But it is perfectly manifest that the practice of the old Ecclesiastical Courts was not continued. Taking evidence under private examination was stopped. What was continued was the remainder of the practice, which was open, and the closed portion was by statute declared also to be open. But while this observation was made by Sir George Jessel, obiter in that case, his judgment upon the main question was one that must command respect. He "considered that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action." These, my Lords, constitute the exceptions, definite in character and founded upon definite principles, to which I shall in a little allude.

But in the year 1903, in *D.* v. *D.* (1), Sir Francis Jeune brought these dicta to this culmination: "I believe that the reason why the Ecclesiastical Courts were accustomed to hear suits for nullity in private was not merely because they were suits for nullity, but because, in the exercise of the general powers which those Courts possessed, they were of opinion that those suits ought not to be heard in public. In my view, they might have heard every suit in private." My Lords, I respectfully differ from this dictum. It appears to me to be historically and legally indefensible.

I cannot do justice to this subject without a reference to two cases which were much discussed. One of these was a test case which occurred so late as the year 1889. I refer to *Malan* v. *Young*. (2) By this time undoubtedly the occasional usurpation —for I call it no less—by the Courts of a power to hear cases in camera was beginning to grow into at least the semblance of a practice; and Denman J. held that he had power to hear the Sherborne School case in camera. Mr. Gould, a member of the Bar, objected to leave the Court, and only retired therefrom upon express order by the judge and under protest. But the case had a sequel which is described in the judgment of Vaughan Williams L.J., who ratifies with his authority and on his own knowledge and recollection the following account in the Annual

(1) [1903] P. 144. (2) 6 Times L. R. 38.

Practice of 1912:—"The following subsequent occurrence is, however, unreported:—The trial proceeded in camera on 11th, 12th, and 13th November, 1889, and was adjourned to 15th January, 1890, when the judge stated that, in view of the fact that there was considerable doubt among the judges as to the power to hear cases in camera, even by consent, he would ask the parties to elect to take the risk of going on with the case before him in camera, or begin it de novo in public. The parties elected to go on with the case before the judge as arbitrator, and to accept his decision as final, subject to the condition that judgment should be given in public, which was done (extracted from the Associate's recorded note of the case)."

The other case referred to was that of *Andrew* v. *Raeburn*. (1) But, my Lords, there was there no decision whatsoever of the point to be now determined. It was an action to prevent the disclosure of documents alleged to be private and confidential. In the course of his judgment Earl Cairns said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute," (a matter not of the rule but of an exception to the rule, as I shall hereafter explain) "I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private even without the consent of both parties, in order to prevent such entire destruction of the matter in dispute. But from the nature of this case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." Thus far for the decision. But in a concluding sentence the learned Earl said, "Under these circumstances I do not think it would be right to deviate from what has undoubtedly been the practice of the Court—not to hear a case in private except with the consent of both parties." To infer from this sentence, not adopted or concurred in by either James L.J. or Sir John Mellish, that it was open to the judges of England to turn their Courts into secret tribunals, if both parties to any suits asked or consented to that being done, is to make an inference from which I feel certain that the noble Earl would himself have shrunk, and against which, indeed, my belief is that he

(1) L. R. 9 Ch. 522.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

would have strongly protested. For myself, I think such an inference to be contrary to one of the elements which constitute our true security for justice under the Constitution, and to form no warrant for an invasion and inversion of that security, such as has been made in the present case.

My Lords, it is very necessary, indeed, to make, in the matter of contempts of Court, clear distinctions. One has, for instance, to distinguish acts external to the administration of justice and truly subversive of it. These are essentially of a criminal character. They tend to prejudice a party to a suit in the eyes of the public, the Court, or the jury, or to intimidate witnesses, or interfere with the course or achievement of justice in a pending action. The case of *O'Shea* (1) was of this class. One has also to distinguish acts—also essentially criminal in their nature—acts of disturbance, or riot, which prevent the business of a Court of justice being duly or decorously conducted.

In both of these cases a Court can protect its administration and all those who share or are convened to its labours. And in both cases the authors of the prejudice or intimidation, on the one hand, or the participators in the disturbance or riot, on the other, are guilty of a contempt: and a Court of justice can protect itself against these things both by suppression and by punishment.

But here, my Lords, the question affects not such a power, namely, to see to it that justice shall be conducted in order and without interruption or fear, but a power—for that is what is really claimed—to make the proceedings of an English Court of justice secret because of something in the nature of the case before it.

Upon this head it is true that to the application of the general rule of publicity there are three well recognized exceptions which arise out of the nature of the proceedings themselves.

The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two of these

(1) 15 P. D. 59.

cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs. The third case—that of secret processes, inventions, documents, or the like—depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the Court may judicially determine to be of patrimonial value and to maintain.

But I desire to add this further observation with regard to all of these cases, my Lords, that, when respect has thus been paid to the object of the suit, the rule of publicity may be resumed. I know of no principle which would entitle a Court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane—after he had fully recovered his sanity and his liberty—to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity. And even in the last case, namely, that of trade secrets, I should be surprised to learn that any proceedings for contempt of Court could be taken against a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the secrets had become public property.

The present case, my Lords, is not within any of these exceptions, and is not within the ratio or principle which underlies them. The learned judge himself, following certain encroachments of authority, made a general exercise of power concerning proceedings of a certain nature in his Court, and really bringing the denial of the open administration of this part of the law within the range of ordinary judicial discretion.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

For the reasons which I have given, I am of opinion that the judgment of Bargrave Deane J. cannot be sustained. It was, in my opinion, an exercise of judicial power violating the freedom of Mrs. Scott in the exercise of those elementary and constitutional rights which she possessed, and in suppression of the security which by our Constitution has been found to be best guaranteed by the open administration of justice. I think, further, that the order to hear the case in camera was not only a mistake, but was beyond the judge's power; while, on the other hand, the extension of the restrictive operation of any ruling—that a case should be heard in camera—to the actions of parties, witnesses, counsel, or solicitors, in a case, after that case has come to an end, seems to me to have really nothing to do with the administration of justice. Justice has been done and its task is ended; and I know of no warrant for such an extension beyond the time when that result has been achieved. It is no longer possible to interfere with it, to impede it, to render its proceedings nugatory. To extend the powers of a judge so as to restrain or forbid a narrative of the proceedings either by speech or by writing, seems to me to be an unwarrantable stretch of judicial authority.

I may be allowed to add that I should most deeply regret if the law were other than what I have stated it to be. If the judgments, first, declaring that the cause should be heard in camera, and, secondly, finding Mrs. Scott guilty of contempt, were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic, and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law. Had this occurred in France, I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cachet had returned.

There remains this point. Granted that the principle of openness of justice may yield to compulsory secrecy in cases involving patrimonial interest and property, such as those affecting trade secrets, or confidential documents, may not the fear of giving evidence in public, on questions of status like the present, deter

witnesses of delicate feeling from giving testimony, and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus be in some cases defeated. My Lords, this ground is very dangerous ground. One's experience shews that the reluctance to intrude one's private affairs upon public notice induces many citizens to forgo their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keeps us secure: and it must further be remembered that, in questions of status, society as such—of which marriage is one of the primary institutions—has also a real and grave interest as well as have the parties to the individual cause.

The cases of positive indecency remain; but they remain exactly, my Lords, where statute has put them. Rules and regulations can be framed under s. 53 by the judges to deal with gross and highly exceptional cases. Until that has been done, or until Parliament itself interferes, as it has done in recent years by the Punishment of Incest Act, and also in the Children Act, both of the year 1908, Courts of justice must stand by constitutional rule. The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider. As an instance of the watchful attention of the Legislature in regard to any possible exceptions to the rule of publicity, s. 114 of the latter Act may be referred to. It provides for the exclusion of the general public in the trial of offences contrary to decency or morality, but this exclusion is to be only during the giving of evidence of a child or young person, and under this proviso, that "nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency." I may add that for myself I could hardly conceive it a likely thing that a general rule consigning a simple and inoffensive case like the present to be tried in camera could ever be made; but that is a consideration which is beyond our range as a Court administering

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

the existing law. Upon the basis of that law I am humbly of opinion that the judgments of the Courts below cannot stand.

My Lords, I am relieved to think that in the opinion of all your Lordships the judgment of Bargrave Deane J. was not pronounced in a criminal cause or matter. For, notwithstanding all the discussion, I confess even yet to some inability to understand what is meant. The learned Solicitor-General, in answer to a question by me, answered from the Bar that his case implied that not only was the conduct of the appellants criminal, but that his argument demanded that he should say it was indictable. My Lords, the breach by a party of an order made against him or her in the course of a civil case is a perfectly familiar thing. Cases for breach of injunction are tried every day. But I have never yet heard that they were anything but subject to trial by the civil judges as in a civil cause or matter. And in the course of that trial it is open to the person accused of breach to establish upon the facts that what has been done was not a breach in fact, but was a legitimate and defensible action. That is precisely analogous to the present case. Mrs. Scott, for instance, maintains that, even granted that the order for hearing the case in camera was properly made, it was an order only that the trial should be conducted in camera, and that she was guilty of no violation of that order whatsoever. The proper Court to try that was undoubtedly the Court which tried the civil proceeding and made the order. As I say, my difficulty still remains of understanding how these two things can be differentiated, and what, in an infringement of patent case or the like would be notoriously a civil matter, becomes a step in a criminal cause or matter in a case like the present.

I will only add that, if the respondent's argument and the judgment of the majority of the Court of Appeal were right, this singular result would follow: In the year 1908 Parliament interposed to give a right of appeal in criminal causes. The Court of Appeal in the present case has held that no appeal lies from the judgment of Bargrave Deane J., because the decision of the learned judge is in a criminal cause or matter. Grant, accordingly, that this is so; yet, nevertheless, the Criminal Appeal Act, 1907, affords no remedy to the unfortunate appellants.

Under the argument against them they have been denied a civil appeal because their conduct was indictable, and under the Act of 1907 they can obtain no remedy by way of criminal appeal because they have not been convicted on indictment. In juggles of that kind the rights of the citizen are lost.

I concur.

Sir John Simon, S.-G., asked whether in the peculiar circumstances of this case the House would not depart from its ordinary rule and allow the appeal without costs.

EARL OF HALSBURY, in moving that the order appealed from be reversed and that the respondent do pay the costs both here and below, said that in his opinion the ordinary order should be made, but intimated that that which was most properly done by the Treasury and by the Attorney-General ought not to be at the expense of the private parties, because the judgment had established a most important principle and one which it was most important the public should have the benefit of, and therefore private individuals should not be at the expense of establishing it.

Order of the Court of Appeal reversed: the respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, May 5, 1913.

Solicitors for appellants: *Braby & Waller.*

Solicitors for respondent: *Treasury Solicitor* (1); *W. S. Jerome.*

ADDENDUM.

Mr. Harold Moore, of the Divorce Registry, during the course of the hearing in the House of Lords looked up the papers in the Registry in a number of nullity cases from 1820 to 1857. In a letter to the Treasury Solicitor he stated the result of his search as follows: "The papers in cases tried in the Consistory Court of London were handed over to the Probate and Divorce Court in the last-named year and we have an index of them. My search established the fact that it was the practice to hear such suits in camera and that informal application was made to the judge or his clerk by the proctors concerned either by letter or verbally. I think I found three letters—the cases are not very numerous—and in one instance where there was no letter there was a pencil note 'to be heard in the dining hall by order of the judge.'"

(1) The Treasury Solicitor was put on the record, after the appeal was presented, to enable him to instruct counsel.

ERRATA.

Page	*Line*	*For*	*Read*
136	11 from bottom	*C. H. P. Macmillan, K.C.*	*H. P. Macmillan, K.C.*
144	20 and 21 *should read*	*Atkin, K.C., Constable, K.C.* (of the Scottish Bar), and *Norie-Miller*, for the respondents.	
288	16 from top	*Marten*	*Masten*
391 394	14, 27, 30 9 from bottom	Sheriff's Court	Sheriff Court
481	5 from bottom	Sir John Mellish	Sir George Mellish
497	7 from top	806	836
498	footnote (2)	[1906] 2 Ch. 403	[1896] 2 Ch. 403
519	9 from bottom	*Royce* v. *Birley*	*Royse* v. *Birley*
519	footnote (1)	L. R. 4 C. P. 269	L. R. 4 C. P. 296
819	4 from bottom	*Moore* v. *Robinson*	*Rex* v. *Justices of Middlesex*
819	footnote (1)	2 B. & Ad. 817	2 B. & Ad. 818
849	footnote (1), line 7	require	refuse