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Court : House of Lords

Decided On : May-05-1913

Judge : Lord Viscount Haldane L.C., Lord Earl of Halsbury, Lord Earl Loreburn, Lord Atkinson &Amp; Lord Shaw of Dunfermline

Appeal No. : [1913] UKHL 2

Appellant : Scott (Otherwise Morgan) and Another

Respondent : Scott

Judgement :

Viscount Haldane LC:

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 15 January 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. 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 Supreme Court of Judicature Act, 1873. The Court of Appeal, Consisting Of Cozens-Hardy (Master of the Rolls), Fletcher Moulton and Kennedy, LJJ, ordered the case to be re-argued before the full Court of Appeal. It was in consequence so regard, and was finally dismissed Cozens-Hardy (Master of the Rolls), and Farwell, Buckley and Kennedy, LJJ, were of opinion that the order appealed from was right, while Vaughan Williams and Fletcher Moulton, LJJ, took a different view.

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 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 hose been done in the courts below.

I think that it is established that the ecclesiastical courts, in the exercise of their jurisdiction in nullity suits prior to the Matrimonial Causes Act, 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 today. 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 court 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. Section 22 provided that in all suits and proceedings other than proceedings for

dissolution, the court should proceed and act and give relief on 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, when 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. I think that the effect of s 46 of the Act of 1857 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 reed 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 here been the view taken in Barnett v Barnett (1859) Sea and Sm 20; 29 LJP and M 28 and H-(falsely called C-) v C- [1865] EngR 200; (1865) 1 Sw Tr 605 164 ER 880 both decided in 1859, shortly after the Act of 1857 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, it was constituted with the ordinary incidents of other English. courts of justice, and therefore that its 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 A v A (1875) LR 3 P and D 230; 44 LJP and M 15; 23 WR 386 the reporter observes that down to July 1864, nullity cases were always heard in open court, but that in M-(falsely called H-) v H- [1864] EngR 651; (1864) 3 Sw Tr 517; [1899] AC 549; 68 LJPC 137; 81 LT 158; 48 WR 173; 15 TLR 487 or in R v Gray [1900] 2 QB 36; 69 LJQB 502; 82 LT 534; 64 JP 484; 48 WR 474; 16 TLR 305; 44 Sol Jo 362. 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 (1890) 15 PD 59; 59 LJP 45; 62 LT 713; 38 WR 374; 6 TLR 221; 17 Cox CC 107 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 and 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 which nullity suits are designed to redress, rather 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 cuplrit's guilt. But if it be the law that disobedience to the order in itself constitutes a crime, then this result seems necessarily to follow, that no orders of court punishing persons in any way for disobedience of this kind can 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 s 41 of the Supreme Court of Judicature Act, 1873. The following cases (in addition to those dealing with orders of justices made at sessions, to be referred to presently) 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 (1848) 11 Beav 181; 11 LTOS 286; 50 ER 786 Seaward v Paterson [1897] 1 Ch 545; 66 LJ Ch 267; 76 LT 215; 45 WR 610; 13 TLR 211 Avery v Andrews (1882) 51 LJ Ch 414 and Re Freston (1883) 11 QBD 545; 52 LJQB 545; 49 LT 290; 31 WR 804. It was contended that these cases show that disobedience to an order of court constitutes in itself a crime, a criminal contempt of court. Unfortunately for this contention, however, then do something more than that; they show, 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 which he is expressly prohibited by injunction from doing should only be guilt – of a civil contempt of court, while a person not expressly or at all 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 in the commission of the forbidden act. The disrespect to the court which made the order which 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 which he has disobeyed is to palliate rather than aggravate his guilt, and it not, on what principles are the cases to he differentiated?

In the first of the above-mentioned cases one Batty, 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, but the Master of the Rolls said that, had he been pressed, it would have been his duty to commit Batty, but he does not say for what form of contempt of court, whether for the civil contempt of court of which the principal was found to have been guilty, or for a criminal contempt of court. The

case is, therefore, rather a blind one on the point as to the nature of the contempt. In Seaward v Paterson [1897] 1 Ch 545; 66 LJ Ch 267; 76 LT 215; 45 WR 610; 13 TLR 211 a case much relied on by the respondent, the principal Paterson, his agents and servants, were restrained by injunction from, among other things, holding, 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 his 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 as to whether Murray could be committed, as he was not a party to the suit, and was 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 he 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 was upheld, but neither at 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. Section 47 of the Supreme Court of Judicature Act, 1873, was not referred to. The points discussed were those raised in the court below. Lindley, LJ, is reported as having expressed himself thus ([1897] 1 Ch at p 555):

"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 the court will not allow its process to be set at naught and treated with contempt. In the one case the person who is enforcing the order is enforcing it for his own benefit; in the other, 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 own 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 the cave falls."

The motive and object of the person who brings the offender before the court may be different in the one case and in the other. That, however, one would think would not change the character of the offence Lindley, LJ, 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 Lindley, LJ'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 was dealing was necessarily criminal, if he had so regarded it.

In Avery v Andrews (1882) 51 LJ Ch 414 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 that they were guilty of contempt of court because, though not named in the injunction, they stepped into the place of those who ware named, and did what the latter 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 former, though not the latter, were guilty of a criminal offence.

In Re Freston (1883) 11 QBD 545; 52 LJQB 545; 49 LT 290; 31 WR 804 Freston, a solicitor, was by an order of the court, of which he Was an officer, required to deliver tip certain documents, and also to hay to a person named a sum of 10 pounds and the costs of an application made against himself. He delivered the documents, but refused or omitted to pay the sum of 10 pounds or the costs. Thereupon Denman, J, made an order that an attachment should issue against him, and he was arrested while returning home from the police court in which 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 refused this application. Thereupon he appealed to the Court of Appeal. In this case, as in that of Seaward v Paterson [1897] 1 Ch 545; 66 LJ Ch 267; 76 LT 215; 45 WR 610; 13 TLR 211 the appeal was entertained. It was not suggested that under s 47 of the Supreme Court of Judicature Act, 1879, the court had no power to hear the appeal. Lord Esher (Master of the Rolls), lays down that where an attachment is issued for a breach of the law or as a remedy for something which is a breach of the law and in the nature of an offence, no claim of privilege can be sustained, but where it is issued for the purpose of enforcing a judgment in a civil dispute, and the breach of the order cannot be said to be an offence, privilege can be claimed. He apparently relied much on s 4(4) of the Debtors Act, 1869, and s 1 of the Debtors Act, 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. He says (11 QBD at p 554):

"The rights of those employing solicitors are not merely of a civil nature, and the courts deal with defaulting solicitors on the ground that they have been guilty of breaches of duty and breaches of the law."

Lindley, LJ, says (ibid at p 566):

"Is this attachment in the nature of civil process? If it is, the solicitor ought to be discharged. In Re McWilliams (1803) 1 Sch and Lef 174 Lord Redesdale, LC, 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 mere theoretical contempt, and therefore it was something more than mere civil process; there was, therefore, no privilege. This view is strengthened by the language of the Debtors Act, 1869, s 4(4). It assumes that the 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 show that the attachment was not upon civil process."

Fry, LJ says (ibid at p 557):

"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 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 as to an order of the 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 placed in argument upon authorities not cited in the Court of Appeal, such as R v Ferrall (1850) 2 Den 51; T and M 390; 4 New Sess Cas 393; 20 LJMC 39; 16 LTOS 539; 15 JP 20; 15 Jur 42; 4 Cox CC 431 to show that disobedience to an order made by justices of the peace constitutes an indictable offence. These cases are dealt with in Russell On Crimes (7th Edn) vol 1, p 543, and Chitty's Criminal Law (2nd Edn) vol 2, p 279, and are all collected in Archbold's Criminal Pleading And Evidence (23rd Edn) 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 R v Robinson (1759) 2 Burr 799; 2 Keny 513; 97 ER 568 Lord Mansfield, CJ, lays it down broadly that disobedience to an order of sessions is an indictable offence at common law. R v Bristow (1795) 6 Term Rep 168; 101 ER 492 is to the same effect. In R v Johnson (1816) 4 M and S 515; 105 ER 925 the order was made by the justices on the county treasurer to pay the expenses of a prosecution, and it was held that 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: R v Jeyes [1835] EngR 745; (1835) 3 Ad E 416; 111 ER 471 . The observations of Pollock, CB, in

giving judgment in R v Ferrall (1850) 2 Den 51; T and M 390; 4 New Sess Cas 393; 20 LJMC 39; 16 LTOS 539; 15 JP 20; 15 Jur 42; 4 Cox CC 431 are very significant He says (2 Den at p 56):

"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 individually I 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 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 for that end. 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, in my view, support in any way 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. Fletcher Moulton, LJ, in his able and elaborate judgment in the Court of Appeal in this case lays down in the following passage what, in my opinion, is the true and sound principle of the lair:

"It is only the legislature which 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 generally 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 patriae, and exercise on his behalf a paternal and quasi-domestic jurisdiction over the person and property of the wards for their benefit. 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 s 22 of the Matrimonial Causes Act, 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 ss 46 and 67; I think that these two expressions mean the same thing. No such rules, regulations, or orders having been made, the provisions of s 46 operate directly on suits of this character with their full force and effect, and it certainly appears to me that the hearing of these suits in camera is not only opposed to the policy of this statute, but is prohibited by the express and positive enactments of s 46. 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 in D v D [1903] P 144 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 be found on the whole the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect. I am inclined to think that the practice of which the learned judge approved, and in that 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 everyone 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 the party should consent to become a criminal, 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 which 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 s 47 of the Supreme Court of Judicature Act, 1873. 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 appear clearly 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 the case of a deliberate and wilful assault could not be reviewed by a Court of Appeal, since wilful assault is a crime Now Lindley, LJ, in O'Shea v O'Shea and Parnell (1890) 15 PD 59; 59 LJP 45; 62 LT 713; 38 WR 374; 6 TLR 221; 17 Cox CC 107 is reported as having expressed himself thus (15 PD at p 64):

"There are obviously contempts and contempts. There is 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 except by attachment. We must not therefore be misled by the words 'contempt' and 'attachment,' but 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 the court. In this case the order alleged to have been disobeyed was simply an order "that the cause should be heard in camera"

nothing more. If one turns to the notice of motion of 23 November 1911, upon which motion the order appealed from was made, it is obvious that the person who framed it never thought that 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 (1890) 15 PD 59; 59 LJP 45; 62 LT 713; 38 WR 374; 6 TLR 221; 17 Cox CC 107 in order to show that it dealt, to use the words of Lopes, LJ, 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 this cause would be entitled. The charge made was that the petitioner, a party to the suit and bound by the orders made in it, and her solicitor, over whom as an officer of the court the judge has disciplinary powers, had been guilty of contempt of court in publishing a transcript of the shorthand writer's note of the medical evidence, in contravention of the order of 11 February 1911, directing the cause to be heard in camera. The relief prayed for is in substance this: First, that the petitioner and her solicitor should be committed to prison; secondly, 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; thirdly, 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); and, fourthly, 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 right and rationally asked for – I express no opinion upon that point – if what was complained of was a civil contempt of court, such as 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. Whoever 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 similar crime, and still less of a criminal ever 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 recognisances to be of the peace and 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, would have consciously taken a part in such a travesty of criminal procedure as this notice invites him to embark in. Yet he makes no reference to the absurdities of the notice of motion. 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 la, the cost of this application."

But of what kind of contempt, civil or criminal, he has found them to be 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 that it might have been 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 entitled his own order in the same way as the amended notice, but he did not do 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 Lindley, LJ 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 that 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."

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 will be enjoined in the one class of cases as well as in the other. I concur, therefore, with Vaughan Williams, LJ, 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 s 47 of the Supreme Court of Judicature Act, 1873; and for this, as well as for other reasons which I have mentioned, I 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 before you now 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 that 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.

Lord Shaw:

The appellant, Annie Maria Scott, and the respondent, Kenneth Mackenzie Scott, were married on 8 July 1899. On January 12 1911, the appellant instituted this suit for a declaration of nullity of marriage. On February 14 an order was made, 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." Thereafter the respondent withdrew an answer which he had put in to the case, and it accordingly proceeded undefended. The evidence was given and the hearing took place in camera and on 13 June 1911, Bargrave Dean, J, 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 the view of vindicating herself in the eyes of these persons, and to prevent them from being prejudiced against her by false reports. There is no question in this case that the three copies issued were accurate, and 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 4 December 1911, he asks that the appellant, and her solicitor, Mr Percy Braby, and his partner Mr Waller, who had on her instructions obtained the copies of the proceedings, should be committed to prison for their contempt of court; secondly, that they should be restrained "from making any similar or other communications, either directly or indirectly, concerning or relating to the subject-matter of this cause"; thirdly, "from otherwise molesting the respondent, his relatives, and friends, doctors, patients, and others"; and, fourthly, he moves that the appellant "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 committal 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 for an injunction against molestation, and, lastly, it was for a discovery, and a discovery sought from the alleged criminals by their stating on oath names, addresses, and the 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 your Lordships' 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 case, 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 he 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 matter,: 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 the 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 Supreme Court of Judicature Act, 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 think that much misapprehension has prevailed. 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:

"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: wills of defuncts: and matters of marriage and divorce, all of 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 having been received, may more fitly have been retained than rejected."

In the early stages of the suit the ecclesiastical courts, charging themselves with the interests of both parties, took upon themselves 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 that they are preferred 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.

The true question to be determined as to the procedure of the 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 references to the old practice of the ecclesiastical courts, 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 courts. Their procedure is detailed with the utmost minuteness in Oughton's Ordo Judiciorium published in London in 1728; and it will be found that no support can be obtained from such a text-book 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. In my humble opinion the sections of the Act of 1857 which I have mentioned 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 cases whatsoever. 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, 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 contestation is entered into, in short, upon the ordinary terms. The old private examination of witnesses is abolished; the new system is an open system.

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 Tyndal, CJ, together with other men 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 deposition 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 decision, 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 the 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."

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 the 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 end 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. 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. 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 that the state of matters when the Matrimonial Causes Act, 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 probability sometimes by the 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 hereinafter contained, and to the rules and orders under this Act."

There is nothing in that section which sanctions the idea that the ecclesiastical courts 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 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 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, 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 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 those of England, yet in the particular point under discussion Scotland had anticipated the Act of 1857 by express statutory enactment passed in 1693. The two Acts of June 12 of that year were in truth a pert of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution settlement, and to secure against the 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 rape, adultery, and the like."

In my humble opinion the sections of the Act of 1857 which I have mentioned 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 cases whatsoever. 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, 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 contestation is entered into, in short, upon the ordinary terms. The old private examination of witnesses is abolished; the new system is an open system.

I am of opinion that the order to bear 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, 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 a 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. Scott v Scott was heard in camera. All interruption or impedient 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 appellant, in respect of disclosing what occurred in court by exhibiting an accurate transcript of what had actually transpired, and the appellants are enjoined to perpetual silence. Against this, which is a declaration that the proceedings in an English court of justice shall remain forever shrouded iii impenetrable secrecy, there is, it is said, no appeal. I candidly confess that the whole proceeding shocks me. I admit the embarrassment caused 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 surest of all guards against improbity. It keeps the judge himself while trying under trial."

"The security of securities is publicity."

But among 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:

"The civil liberty in this kingdom has two direct guarantees, the open administration of justice according to known laws truly interpreted, and the fair construction 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 institution 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 to still 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, and at the instance of judges themselves. I must say frankly that I think that 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 Barnett v Barnett (1859) Sea and Sm 20; 29 LJP and M 28 and of H- (falsely called C-) v C- [1865] EngR 200; (1865) 1 Sw Tr 605 164 ER 880 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 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 motion came on for hearing before the full court – namely, Sill Cresswell Creswell (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 that the practice which he was condemning as illegal was already creeping in. He 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 not be conducted in private. Upon that question I should not have felt the slightest doubt; and the only doubt which I now entertain is in consequence of this court, since it was established, having on two occasions sat in private; but in those cases I understand that the course was adopted with the consent of both parties, and no discussion took place. In my opinion the court possesses no such power."

I think that it would have been better had those 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 (1869) LR P and D 640; 38 LJP and M 37; 20 LT 280 in the year 1869, Lord Penzance, dealing with a case which was not a suit for nullity, made, this observation:

"The only cases 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 and 21 Vict, s 85."

That point was not a point of decision. I do not see that any argument upon the subject was present to the court. I cannot take the learned judge as having laid down that the practice of the ecclesiastical courts 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 in A v A (1875) LR 3 P and D 230; 44 LJP and M 15; 23 WR 386 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 that it must be taken that the impression which was entertained by Sir Cresswell Cresswell was afterwards abandoned."

I must say 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 referred – namely, the liability, unless the most vigorous vigilance is practised, to have constitutional rights, and even the imperative right of Parliament, whittled away by the practice of

the judiciary. It was no wonder that in the later case of Nagle. Gillman v Christopher (1876) 4 Ch D 173; 46 LJ Ch 60 in 1876, even Jessel (Master of the Rolls), made an exception to the rule of open courts of justice of "those cases 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 Lo be open. But while this observation was made by Jessel (Master of the Rolls), obiter in that case, his judgment upon the main question was one which 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 constitute the exceptions, definite in character and founded upon definite principles, to which I shall in a little while refer But in the year 1903, in D v D [1903] P 144 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."

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 (1889) 53 JP 822; 6 TLR 38. 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 that 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, LJ, who

ratifies with his authority and on his own knowledge and recollection the following account in the Annual Practice of 1912:

"The following subsequent occurrence is, however, unreported: The trial proceeded in camera on the 11th, 12th, and 13th Nov, 1889, and was adjourned to the 15th Jan, 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 (1874) 9 Ch App 522; 31 LT 73; 22 WR 564. But 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 afterwards 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 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."

Thus far for the decision, but in a concluding sentence the learned earl said:

"In these circumstances I do not think that 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, LJ, or Mellish, LJ, that it was open to the judges of England to turn their courts into secret tribunals, if both parties to any suit 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, indeed, my belief is that he would have strongly protested against it. 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.

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. O'Shea v O'Shea and Parnell (1890) 15 PD 59; 59 LJP 45; 62 LT 713; 38 WR 374; 6 TLR 221; 17 Cox CC 107 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 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-recognised 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 classes depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriae. The affairs are truly private affairs; the transactions are truly transactions intra familiam; and it has long been recognised that an appeal for the protection of the court in the cases 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 it 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 secrecy 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 – 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 he taken against a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the facts had become public property. The present case 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.

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 it, task 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 to the point of restraining or forbidding a narrative of the proceedings within 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 that which 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 that it has any warrant in our law. Had this occurred in France, I suppose that Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cashet had returned.

There remains this point. Granted that the principle of openness of justice may yield to compulsory secrecy in case, involving patrimonial interests 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. This ground is very

dangerous ground. One's experience shows that the reluctance to intrude one's private affairs upon public notice induces many citizens to forego 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 keep 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 individual cause.

The cases of positive indecency remain; but they remain exactly where statute has put them. Rules and regulations can be framed under s 47 by the judges to deal with gross and highly exceptional cases. Until that has been done, or until Parliament itself interfere, as it has done in recent year. He 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, "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 law sent to be tried in camera could ever be made; but that is a consideration which is beyond our range a, a court administering 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 reply 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 that it was indictable. 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 fact 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 only an order that the trial should he conducted in camera, and that she was guilty of no violation of that order whatsoever. The proper court to tip 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 the case of the infringement of a patent, 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 1907 Parliament interposed to give a right of appeal in criminal cases. 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 was 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 in the motion proposed.

Appeal allowed.