against the Bank were in respect of moneys which they paid upon cheques drawn by his wife during the period referred to. These cheques were obviously honoured upon the faith of the security known by the Bank to be in their possession, and believed to be effective. If the appellant kept the benefit of the money paid by the Bank, as he did, he thereby affirmed the transaction as a whole, and the deeds in their Lordships' opinion stand as security for that money.

That will dispose of all the questions which were raised in this case, and it is enough to say that their Lordships will humbly advise His Majesty that these appeals should be dismissed with costs.

[HIGH COURT OF AUSTRALIA.]

THOMAS RYAN . . . . . APPELLANT;
RESPONDENT,

AND

HENRIETTA RYAN . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1914.

PERTH, *Oct.* 30; *Nov.* 2.

Barton, Gavan Duffy, and Rich JJ.

Husband and Wife—Judicial separation—Dismissal of petition—Discovery of fresh evidence—New trial—Appellate Jurisdiction Act 1911 (*W.A.*) (*No.* 4 *of* 1912), *secs.* 3, 4, 5—*Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 37.

Where a petition for judicial separation has been heard by a Judge without a jury and dismissed, a new trial may, having regard to the *Appellate Jurisdiction Act* 1911 (W.A.), secs. 3, 4, 5, and the *Judiciary Act* 1903, sec. 37, be granted by the High Court on petitioner proving to the Court that the granting of such new trial, in the light of fresh evidence discovered since the hearing of the petition, will conduce to the ends of justice.

Decision of *Rooth* J. and order of Full Court (W.A.) set aside.

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RYAN v. RYAN.

APPEAL from the Full Court of Western Australia.

The parties to the present appeal, Thomas Ryan and Henrietta Ryan, were married in 1890, and lived together until 1912. About the latter portion of that year they quarrelled and did not cohabit further. About two months later the husband went into a private hospital, and it is alleged remained there on and off about fifteen months. The wife complained that he became very friendly with the matron, whom, it was admitted, he had driven out in a sulky several times, sometimes without companions. On 22nd February 1914 the husband again drove out alone with the matron. The wife followed later in a motor car, and found the sulky tied up to the fence of the Leederville Pleasure Reserve, a place covered with the native bush. The wife alighted, and some distance inside the fence, she alleged, she discovered the husband and the matron lying on one of the sulky rugs and in the act of adultery. Thereupon, she filed a petition for judicial separation on the ground of adultery, and the suit was heard by *Rooth* J., who on 30th April, after hearing evidence for each party, dismissed the petition on the ground that the adultery was not proved. The wife then appealed to the Full Court against this decision, and applied for a decree of judicial separation, or alternatively for a new trial on the ground of the discovery of fresh evidence. On 27th May the Full Court allowed the appeal, and made the decree.

From the decision of the Full Court the husband now appealed to the High Court.

Pilkington K.C. and *Penny*, for the appellant. The Full Court, looking at the circumstances, decided that adultery had been committed. Assuming that where a man and a woman go to a convenient place and remain there a certain time and then of their own volition come away there is a presumption that they have committed adultery, there is no such presumption where they are disturbed very soon after reaching that place: *Dearman* v. *Dearman* (1); *Sampson* v. *Sampson* (2); *Healey* v. *Healey* (3).

(1) 7 C.L.R., 549.

(2) 13 C.L.R., 338.

(3) 14 C.L.R., 271.

Villeneuve-Smith K.C. and *W. Dwyer*, for the respondent. The trial Judge did not apply his mind sufficiently to the antecedent facts and circumstances, but considered only whether the wife saw them in the act: *Matthews* v. *Matthews* (1); *Sampson* v. *Sampson* (2). If this Court will not uphold the decree, it should grant a new trial on the ground that fresh evidence has been discovered which, if given at the trial, would have affected the verdict: *Appellate Jurisdiction Act* 1911, secs. 3 and 8; *Taylor* v. *Taylor* (3); *Townsend* v. *Townsend* (4). There is a further ground for allowing a new trial, namely, that a witness who was ill at the trial was not allowed to refresh his memory from an affidavit made immediately after the event: *Jago* v. *Jago* (5); *Young* v. *Kershaw* (6).

Pilkington K.C., in reply. In applications for new trials the same rule applies in divorce as at common law: *Halsbury*, vol. XVI., p. 560; *Jago* v. *Jago* (5); *Pooley's Trustee* v. *Whetham* (7). It is submitted that the fresh evidence would not have affected the result if it had been given at the original hearing, and therefore that this Court should not grant a new trial: *Scott* v. *Scott* (8).

[BARTON J. referred to *Anderson* v. *Titmas* (9).]

Cur. adv. vult.

Nov. 2.

The judgment of the Court was read by

BARTON J. In view of the course which commends itself to the Court in this matter, it is not desirable to discuss the merits of the case beyond the point of mere necessity.

We do not think that either the dismissal or the allowance of the appeal would conduce to the ends of justice. Counsel for the wife, whose petition against the husband instituted these proceedings, has asked us either to dismiss the appeal or to grant a new trial, and as we have a discretion in the matter we think the latter is the order that we ought to make.

(1) 17 C.L.R., 8, at p. 28.
(2) 13 C.L.R., 338.
(3) 68 L.J. P., 116.
(4) 10 S.R. (N.S.W.), 126.
(5) 7 L.T. (N.S.), 645.
(6) 81 L.T., 531.
(7) 28 Ch. D., 38.
(8) 3 Sw. & Tr., 319, at pp. 322, 326.
(9) 36 L.T., 711.

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The grounds which were put forward in the Full Court for such an order as alternative to the wife's appeal (which, however, was there granted) have been again urged before us. The grounds are not such as would impel the grant of a new trial in a Court of common law. But the provisions of the *Appellate Jurisdiction Act* 1911 (No. 4 of 1912) give the matter a different complexion. The 3rd section of that Act gives the Supreme Court "in the exercise of its appellate jurisdiction" a discretion to grant a new trial in any matrimonial cause in which there has been a trial with or without a jury. Sec. 4 makes an exception, prohibiting the reviewing or setting aside of a finding of fact by a jury in such a case, except in accordance with the Supreme Court rules relating to the findings of juries in civil cases. But the finding here was by the learned trial Judge. Sec. 5 gives the Full Court a discretion in exercising its appellate jurisdiction, to affirm, reverse or modify the judgment, decree or order appealed from, and to give such judgment or make such decree or order as ought to have been given or made in the first instance. The *Judiciary Act* 1903, sec. 37, gives this Court in its appeal jurisdiction the like power to give such judgment as ought to have been given in the first instance.

After considering the authorities cited at the Bar and the arguments upon them on both sides, we think that the Statute warrants such an exercise of discretion as we now propose to make, and there will therefore be a new trial. That is the order which we think should have been made by the Full Court.

We fully realize, as Mr. *Pilkington* pointed out to us, the danger of opening the door to the admission of evidence to supply deficiencies in the proof of the case by an unsuccessful litigant. But it appears to us that it may be against the interests of justice to refuse to allow the new evidence of Stocker and the evidence of Daniel Connor and R. A. Magg to be offered and tested in a second trial, which of course will be conducted under all proper safeguards. We should mention, too, that an important part of the evidence mentioned in the affidavits filed in the Supreme Court upon the appellate proceedings is contained in a sworn statement truly or falsely made by the witness Stocker two days after the occurrences from which the petitioner seeks

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to have adultery inferred. That portion of the proposed evidence does not seem to be subject to the danger pointed out by Mr. *Pilkington*, if the statement on oath was really given at the time alleged.

The order of the learned trial Judge and that appealed from, except so far as the latter relates to costs, are set aside, and a new trial must be had.

Order of trial Judge and order appealed from set aside save so far as the order appealed from relates to costs. New trial to be had.

Solicitors, for appellant, *Penny & Hill.*
Solicitor, for respondent, *Walter Dwyer.*

A. L. C.

[HIGH COURT OF AUSTRALIA.]

THE SCOTTISH COLLIERIES LTD. . . APPELLANTS; DEFENDANTS,

AND

HUTCHINSON . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1914.

PERTH, *Nov.* 2, 3.

Barton, Gavan Duffy and Rich JJ.

APPEAL from the Supreme Court of Western Australia.

The appeal turned solely on the evidence.

Haynes K.C. and *Alcock*, for appellants.

H. P. Downing, for respondent.

THE COURT dismissed the appeal with costs.

Appeal dismissed with costs.

Solicitors, for appellants, *Alcock & Daintrey.*
Solicitors, for respondent, *Downing & Downing.*

A. L. C.