[HIGH COURT OF AUSTRALIA.]

HANSON . . . . . APPELLANT;
RESPONDENT,

AND

HANSON . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 27, 28, 29; *Oct.* 8.

Latham C.J., Dixon and McTiernan JJ.

Divorce—Collusion—Proceedings instituted at request of respondent—Agreement for payment of alimony—Decree nisi—No application by petitioner for decree absolute—Right of respondent—Statutory discretion—Supreme Court Act 1935 (*W.A.*) (*No.* 36 *of* 1935), *secs.* 75, 84 (2), (3).

A endeavoured to induce his wife to petition for a divorce from him, but she was unwilling to do so and at first refused. At length, however, an arrangement was entered into by which he was to pay her a sum of £150 on the granting of the decree nisi, and on the decree being made absolute a further sum of £230, and also alimony at the rate of £4 per week. Her solicitor, who had been consulted, demanded that A should maintain his wife, and then agreed to hold the money in escrow to be paid to the wife on the conditions being fulfilled. A proposed to provide evidence of his past misconduct, but this offer was refused by the solicitor, who said he preferred to obtain evidence independently. The solicitor thereupon engaged an inquiry agent to watch A, and on the next night the inquiry agent, accompanied by A's wife, saw A commit an act of adultery. On the following day a petition was filed on behalf of the wife for a divorce on the ground of adultery. During the proceedings her solicitor offered to place all the circumstances before the court, but the presiding judge did not consider it necessary to go into those circumstances. The decree nisi was granted, and the £150, which had been deposited with the solicitor, was paid over to the wife; the weekly payments of £4 agreed to be paid under the arrangement, however,

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became very irregular, and the wife did not apply to have the decree made absolute. The husband applied to the Supreme Court under sec. 84 (3) of the *Supreme Court Act* 1935 (W.A.) to have the decree made absolute, but this was refused on the ground that the parties had made a collusive agreement.

Held, by *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting), that the arrangement between the parties amounted to collusion, and the husband's application was rightly refused.

Observations on the effect of sec. 84 (3) of the *Supreme Court Act* 1935 (W.A.).

Decision of the Supreme Court of Western Australia (*Dwyer* J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

John Baden Thornton Hanson suggested to his wife, Minnie Jessie Hanson, that she should divorce him. He promised to pay her £150 on her obtaining the decree nisi and a further sum of £230 when it was made absolute, and also to pay her permanent alimony at the rate of £4 per week. This arrangement was entered into by them at the office of her solicitor, to whom he paid the sum of £380 to be held in escrow ; at the same time he promised to give her evidence of his past adultery. This latter promise was refused, the solicitor stating that he would get that evidence himself. The solicitor employed a private inquiry agent, and on the following night the husband was caught in the act of adultery by the agent and Mrs. Hanson. On the following day the wife, who, when the suggestion for divorce was first made by her husband, had refused to accede to it, petitioned for a divorce on the ground of adultery, and a decree nisi was granted. The sum of £150 held by her solicitor was then paid to her. The weekly payments became irregular, and the wife did not apply to have the decree nisi made absolute. The husband served notice of motion on the wife that he was applying under sec. 84 (3) of the *Supreme Court Act* 1935 (W.A.) to have the decree made absolute. *Dwyer* J. refused the application on the ground that there was a collusive agreement.

From this decision the husband appealed to the High Court.

F. Leake and *W. Unmack*, for the appellant. By sec. 84 (3) of the *Supreme Court Act* 1935 (W.A.) a respondent can apply for a decree absolute (See also *Matrimonial Causes Rules*, rules 91, 92).

The application under sec. 84 (3) could only be opposed if costs were not paid. [Counsel referred to *Fitts* v. *Fitts* (1); *Stoate* v. *Stoate* (2).]

[DIXON J. referred to *Stubbs* v. *Stubbs* (3).]

The affidavit filed by the petitioner on the application under sec. 84 (3) is wrongly before the court. It is merely a series of complaints and does not show a collusive agreement. The Minister for Justice refused to intervene after making the necessary inquiries, and apparently found no collusion. The Supreme Court had no legal right to direct the Solicitor-General to appear and argue collusion —the court cannot compel intervention. Sec. 82 (1), on which the Supreme Court acted, does not apply; it applies only when the petition is before the court and the judge wants assistance. The proceedings are irregular. [Counsel referred to *Rayden and Mortimer* on *Divorce*, 3rd ed. (1932), p. 336; *Gaskill* v. *Gaskill* (4).] The agreement was made in the petitioner's solicitor's office and the solicitor conducted the negotiations (See sec. 96 of the *Supreme Court Act*). There is nothing wrong in doing something which the court could compel the parties to do (*Churchward* v. *Churchward* (5)). No material facts were kept back (*Livingstone* v. *Livingstone* (6); *Scott* v. *Scott* (7); *Brine* v. *Brine* (8); *Wyatt* v. *Wyatt* (9)). After respondent had been caught committing adultery he agreed to make the same payments as before. There is no evidence to show that he made any arrangement to commit adultery.

Seaton, for the respondent. The learned judge should have rescinded the decree nisi and dismissed the petition. If collusion is established on an application under sec. 84 (3), the duty of the court is to apply sec. 75.

[McTIERNAN J. referred to *Jobson* v. *Jobson* (10).]

Sec. 75 entitled the court to dismiss the petition (*Prole* v. *Soady* (11); *Halsbury's Laws of England*, 2nd ed., vol. 10, p. 831). [Counsel also referred to *Rutter* v. *Rutter* [*No.* 2] (12).]

(1) (1894) 20 V.L.R. 401; 16 A.L.T. 83.
(2) (1861) 2 Sw. & Tr. 384; 164 E.R. 1045.
(3) (1929) 46 W.N. (N.S.W.) 62.
(4) (1921) P. 425.
(5) (1895) P. 7, at pp. 21, 23, 29.
(6) (1902) 21 N.Z.L.R. 626.
(7) (1913) P. 52.
(8) (1924) S.A.S.R. 433.
(9) (1937) 3 All E.R. 885.
(10) (1910) 30 N.Z.L.R. 48.
(11) (1868) 3 Ch. App. 220, at p. 225.
(12) (1921) P. 421, at p. 423.

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[DIXON J. referred to *Sinclair* v. *Fell* (1).]

After the decree nisi delay is a discretionary bar to taking out the decree absolute (*Halsbury's Laws of England*, 2nd ed., vol. 10, p. 770; *Chalmers* v. *Chalmers* (2)). There is no discretion in the court to uphold or suspend a decree until payment of costs. The discretion is to refuse or grant the application (*Interpretation Act* 1918 (W.A.), sec. 32; *Dimery* v. *Dimery* (3)).

W. Unmack, in reply.

Cur. adv. vult.

The following judgments were delivered :—

LATHAM C.J. The *Supreme Court Act* 1935 of Western Australia, sec. 84 (3), provides that if, after a decree nisi for the dissolution of marriage, the petitioner does not within a specified time apply to have the decree made absolute, the court may, on the application of the respondent and on notice to the petitioner, make the decree absolute. The section also provides that the court may refuse to grant the application if any costs awarded against the respondent or the co-respondent have not been paid. The appellant was respondent in divorce proceedings instituted by his wife. A decree nisi was pronounced on the ground of adultery. The wife, the respondent to this appeal, did not apply to have the decree made absolute within the time specified in sec. 84, and the respondent made an application under that section. The application was refused by *Dwyer* J. on the ground of collusion, and an appeal from his decision is now brought to this court.

It is contended on behalf of the appellant that the learned judge did not have jurisdiction to consider the question of collusion at the stage in the proceedings which had been reached, and, alternatively, that, if he had such jurisdiction, the finding of collusion was not supported by the evidence and ought to be set aside. The respondent to the appeal has not submitted argument with respect to the latter ground of appeal, but has contended that the learned judge had

(1) (1913) 1 Ch. 155, at p. 160.
(2) (1930) P. 154.
(3) (1934) N.Z.L.R. 732.

jurisdiction to consider the question of collusion. She has also taken the preliminary objection that an agreement made between the parties after the husband's application was refused operates to prevent any appeal from his decision.

The course of proceedings was unusual. The wife petitioned for divorce on the ground of adultery. On 22nd December 1933 *Draper* J. pronounced a decree nisi for dissolution of the marriage on the ground alleged. In November 1933 the husband had made an agreement (in the negotiations for which the solicitor for the respondent took part) under which he promised to pay £4 a week to his wife as alimony pendente lite and thereafter permanently while she remained unmarried, and to pay certain sums upon the granting of a decree nisi and upon the granting of a decree absolute. At that time only a petitioner could apply for an order nisi to be made absolute, and, unless the Attorney-General intervened under sec. 82 of the Act or some person showed cause why the decree should not be made absolute under sec. 84, the application would be granted as of course—as is shown by the provisions of the rules (91 and 92) which regulate the procedure in matrimonial causes. The wife did not apply for the decree nisi to be made absolute, and the husband, after complaining of her inaction, ceased to make any payments by way of alimony. On 3rd April 1936 sec. 84 (3) came into operation. The husband made an application under that section for the decree nisi to be made absolute. In the affidavit which he filed in support of his application he set forth the making of the petition, the order nisi, his repeated requests to the petitioner to have the decree nisi made absolute, and her failure to do so. The wife filed an affidavit in reply in which she referred to the agreement for the payment of alimony and other sums, and complained of the failure of the husband to perform the agreement. The husband replied in a further affidavit in which he alleged that, owing to a diminution in his income, he had been unable to make the agreed payment, but said that he was willing to pay such amount for maintenance as a court might order. The application came before the learned Chief Justice, who, under the provisions of sec. 82 of the Act, directed the papers to be sent to the Minister for Justice with a view to his intervention in the suit on the ground of collusion between the

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parties. The Minister for Justice (who performs the functions of the Attorney-General under the Act) examined the question and refused to intervene in the suit.

The husband's application then came before *Dwyer* J., who gave a direction that the Minister should instruct counsel to attend the hearing and to argue the question of collusion and generally as to the effect of sec. 84 (3) of the *Supreme Court Act* 1935. In pursuance of this direction counsel attended but did not confine himself to arguing the question. He cross-examined the husband and wife upon their affidavits, and also argued that the facts showed collusion. *Dwyer* J. found that there was collusion and, on that ground, refused to make the decree absolute, but he did not reverse the decree nisi.

Before stating the further relevant facts it is desirable to refer to sec. 84 (2), which provides that after the pronouncing of the decree nisi and before the decree is made absolute any person may in the prescribed manner show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court. Where this procedure is followed the court is empowered to make the decree absolute, to reverse it, to require further inquiry, or otherwise to deal with the cause as the court thinks fit. The rules contain precise provisions the effect of which is to require the person showing cause to plead to the petition so that the parties may know exactly what issue is to be tried. No action was taken by any person under sec. 84 (2).

After *Dwyer* J. made the order refusing to make the decree absolute on the application of the husband, the husband issued a writ seeking the repayment of the moneys which the wife's solicitors held as stakeholders to be paid to her upon the granting of the decree nisi and the decree absolute. He claimed these moneys on the ground that the wife had refused to have the decree nisi made absolute and that his application to that effect had been refused. The wife obtained an order nisi attaching the sum of £230 which was in the hands of the solicitors. The husband took out a summons for rescission or variation of an order for alimony which had been made by consent. The differences between the parties were adjusted by an agreement under which the action, the garnishee proceedings

and the application to rescind the order for alimony were settled. The wife accepted a sum of £230 in full satisfaction of arrears of alimony, which then amounted to about £460, the order for alimony being discharged except as to the said sum of £230, without prejudice to the petitioner making a further application for alimony, and the action and garnishee proceedings were discontinued. The sum of £230 was applied in accordance with the provisions of the agreement.

Upon these facts the wife founds a preliminary objection that the husband is precluded by his agreement from prosecuting any appeal against the order of *Dwyer* J., including the appeal to this court. The objection is based upon the contention that the agreement really involves an undertaking by the appellant not to appeal from the order of *Dwyer* J. I am unable to take this view of the agreement. Any undertaking not to appeal is conspicuously absent from the agreement, and, as the parties could not have failed to have the possibility of such an appeal present to their minds, such an undertaking should not be introduced save by necessary implication. There is, in my opinion, no basis for such implication. The parties were adjusting their rights in relation to the obligations which the husband had undertaken in exchange for the actual making of a decree nisi and a decree absolute which, at the time when the original agreement was made, could be procured only by his wife. She had refused to apply for the decree absolute. All the terms of the agreement are completely intelligible without making any assumption that the husband undertook not to appeal from the decision of *Dwyer* J. In my opinion the preliminary objection is not sustained.

It is therefore necessary to consider the functions and powers of the court where an application is made under sec. 84 (3) by a respondent, who *ex hypothesi* has been guilty of a matrimonial offence, to have a decree nisi made absolute. The decree nisi was necessarily pronounced upon the petition of the petitioner. A respondent who applies under the section cannot be in a better position than if the petitioner had made the application. The application of the respondent may therefore be refused upon any ground upon which an identical application by the petitioner might properly have been refused. Such an application by a respondent should not be regarded as if the respondent were himself (or herself) a person originally

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applying for matrimonial relief. The position contemplated by sec. 84 (3) arises only where the respondent has been guilty of a matrimonial offence and where a decree for dissolution of the marriage has been made upon that ground. The fact of matrimonial misconduct on the part of the respondent cannot be relied upon as an answer to his application. If the contrary were the case the section would be completely inoperative. In the present case, for example, the wife's petition succeeded upon the ground of adultery by the respondent. Such adultery could have been relied upon by the wife in answer to any proceedings for divorce initiated by the guilty husband. But such adultery (and any other matrimonial offence committed by the husband) must be irrelevant upon an application by the husband under sec. 84 (3). Thus, an application by the respondent under sec. 84 (3) should be regarded as if it were an application by the petitioner, liable to be defeated upon the same grounds, but only upon the same grounds, as if the petitioner had herself made the application—with one exception. The proviso to sec. 84 (3) adds a ground upon which the respondent's application may be refused, namely, the non-payment of costs awarded against the respondent or a co-respondent. No question as to such costs arises in the present case. Upon the husband's application in the present suit the position therefore was that any matter which would have been an answer to an identical application by the petitioner could properly be considered by the learned judge.

Sec. 84 (3) provides that the respondent is to make his application upon notice to the petitioner. The petitioner is, therefore, given an opportunity of bringing relevant facts to the notice of the court. If, for example, the decree had been obtained by collusion which had been concealed from the court, it would be open to a repentant petitioner, upon the respondent making an application under sec. 84 (3), to bring the facts before the court in order to prevent the decree being made absolute. It is contended in effect that this was done in the present case, though inadvertently. The petitioner filed an affidavit which showed that she relied upon the respondent's failure to pay alimony as a ground for the court refusing the respondent's application. The respondent replied to the allegations made by the petitioner, and both parties were cross-examined upon their

affidavits. The failure of the respondent to pay alimony was not a ground upon which the Supreme Court could properly refuse to make a decree absolute. Such a matter should be dealt with upon an application for maintenance under sec. 96 or the following sections or upon proceedings to enforce the order for alimony. The learned judge, however, did not refuse to make the decree absolute for the reasons suggested by the wife. His refusal was based upon the conclusion as to collusion which he drew from the affidavits filed by the parties and the evidence given upon their cross-examination. He found that collusion was established by the evidence.

It is important to observe that sec. 75 of the *Supreme Court Act* provides that if the court finds that a petition for dissolution is presented or prosecuted in collusion the court shall dismiss the petition. Before the court exercises this power it must find, that is, must be affirmatively satisfied, that there is collusion. The court would not be justified by the section in dismissing a petition upon the ground that the court was not satisfied that there was not collusion. The same principle should be applied wherever the court has to consider the question of collusion at whatever stage in the proceedings, whether upon the hearing of the petition, upon an intervention by the Attorney-General, upon showing cause by another person, or upon an application by either party to have the decree made absolute. I therefore proceed to consider, not the question whether there was ground to suspect collusion between husband and wife, but whether the evidence given, if accepted, established collusion. Collusion is regarded as a very serious matrimonial offence, and it should not readily be presumed.

The law has provided that, in certain events, it is proper that a marriage should be dissolved. But the change in policy which is introduced by the statutes regulating divorce is accompanied by the provision with reference to collusion to which I have referred. It can no longer be said in the courts that it is a suspicious and disgraceful thing for a married person to desire to obtain relief to which the law says he or she is entitled upon honest proof of the necessary facts. It is no answer to a petition for divorce that the petitioner desires to obtain a divorce. It is no answer to such a petition that the respondent also desires a divorce. But the law

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still frowns, in a growingly indefinite manner, upon any agreement that a divorce should be obtained. A mere concurrence of desire for a divorce is not fatal, but I am constrained by the law to hold that an agreement that a divorce should be obtained by one party, with the consent of the other, however honest and creditable to both parties the agreement may be, is a bar to either of them obtaining matrimonial relief. In such a case the law insists that they shall remain married. *Scott* v. *Scott* (1) is a case which shows indications of a view which I regard as more generous and justifiable. In that case it was held that, where a wife institutes proceedings for divorce at the instigation of her husband (as in this case), the husband agreeing (as in this case) to supply the necessary information, and agreeing (as in this case) to pay an amount by way of maintenance upon the making of a decree for divorce (as in this case), these facts do not in themselves necessarily establish the existence of collusion. But it must still be admitted that the vague term collusion, which no legislature (as far as I am aware) and few judges have ventured to attempt to define, includes any actual agreement for the initiation or conduct or a suit for the dissolution of marriage by the parties or their agents. *Churchward* v. *Churchward* (2) is still a case of authority. If in the present case I found that there was actual evidence of, instead of grounds for suspecting the existence of, such an agreement, I would without hesitation, though without any satisfaction, apply the relevant principle of law. In my opinion, however, there was no such evidence of such an agreement as entitled the court positively to find that there was collusion in fact. It is only on this question that I have the misfortune to differ from my learned brethren.

The evidence showed that the husband and wife were living unhappily and that the husband ceased sending money to his wife, who was in Victoria, and that she accordingly returned to Western Australia. Negotiations took place, and ultimately, on 15th November 1933, they had an interview at the office of the wife's solicitors. The husband said that he wished his wife to take proceedings for divorce, stated that he had committed adultery, offered to pay £4 a week alimony and permanent maintenance, and also to pay

(1) (1913) P. 52. (2) (1895) P. 7.

specified sums upon the decree nisi and the decree absolute being obtained. The solicitors were not prepared to act upon the admission of adultery without independent evidence, which the husband was unable to provide. The result was that no agreement was then made between the parties. The wife's solicitors said that they would take the necessary steps to procure evidence to support a petition at their own time in their own way and without reference to the respondent. The solicitor who swore an affidavit in the terms just stated was not cross-examined upon it. The solicitors arranged to have the respondent watched, and on the next night, 16th November, the respondent was discovered in an act of adultery. The petition was lodged on 17th November. The actual evidence is that it was after the filing of the petition that the husband made the agreement to pay the moneys mentioned. No facts were concealed from the court when the petition was heard. Counsel for the petitioner endeavoured to state and to prove the facts mentioned, but he was stopped by the learned trial judge. It is true that the husband wanted a divorce, but that fact does not establish collusion. The wife was originally reluctant to take proceedings, but her reluctance was overcome and she became willing to take proceedings when what she regarded as fair financial provision was agreed to be made for her by her husband. Her change of mind did not constitute collusion. Collusion is not established by a husband acting with elementary decency in making provision for a woman whom he has married. Neither is collusion established by the fact that a wife agrees to accept such a provision from her husband, with or without reference to the obtaining of a decree for divorce. She is entitled to be maintained by her husband, and there is no rule of law and no rule of policy recognized as a rule of law which prevents her from agreeing to the amount of the payments to be made for maintenance or even to agreeing to make the payment of an increased amount conditional upon a decree for dissolution of marriage being made (*Scott* v. *Scott* (1)).

In the present case the parties were unhappy and were joined in an association which had become intolerable to both of them, the continuance of which produced neither personal nor social benefit.

(1) (1913) P. 52.

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Possibly the husband committed adultery on 16th November in order to be caught in the act. But, even if he did so, that fact would not establish collusion. Collusion cannot be unilateral. As I have already stated, there was no suppression of facts from the court; there was no presentation of false evidence to the court; there is no evidence that it was agreed that the husband should commit or appear to commit adultery. If the evidence of the wife's solicitor, which was not challenged, is accepted as honest, it displaces any contrary view. Disbelief of the evidence given would not justify the necessary positive finding that the suggested agreement was made. All the facts are consistent with a desire of the husband for divorce, a corresponding desire of the wife after she was satisfied with the proposed provision for her maintenance, independent but willing action by the husband in committing adultery, the adultery being discovered, and easily discovered, by action taken by the wife's solicitors without any reference to the husband. As it is necessary to establish by evidence not merely a suspicion of collusion, but the fact of collusion, the result is that, in my opinion, the judgment of the learned judge was wrong on the facts and that the appeal should be allowed. It is true that the order of the learned judge is interlocutory in form, but it is final in effect, being based upon a finding of collusion which, if maintained, is an absolute bar to a decree for dissolution of marriage. I would therefore grant leave to appeal and allow the appeal, the husband bearing his own costs and paying his wife's costs of all the proceedings.

DIXON J. Under the law of Western Australia, like that of New South Wales and of New Zealand, a respondent to a petition in divorce against whom a decree nisi for dissolution has been pronounced may himself move the decree absolute if the petitioner fails to do so upon the expiration of the time stated in the decree. Sec. 84 (3) of the *Supreme Court Act* 1935 (W.A.) provides that, if, after a decree nisi for dissolution or nullity, the petitioner does not on the expiration of six months or within two months of any shorter period fixed by the decree nisi apply to have the decree made absolute, the court may, on the application of the respondent, on such notice to the petitioner as the registrar directs or such substituted notice

as the court allows, make such decree absolute, and shall have on, or in respect of, such application, the same powers as if the application were made by the petitioner. There is a proviso that the court may refuse to grant or may adjourn consideration of the application if any costs awarded against the respondent or the co-respondent in the suit have not been paid. This provision reverses the principle laid down at an early stage of the administration of the divorce legislation by Lord *Hannen*. In *Ousey* v. *Ousey* (1) a respondent complained that the petitioner refused to move absolute the decree nisi for dissolution, and, in order to terminate alike the suit and the marriage, he applied for the decree absolute himself. Lord *Hannen* said :—" There is . . . one paramount reason specially applicable to proceedings for dissolution of marriage, which leads me, although reluctantly, to the conclusion that I must refuse this application, and it is this : that it appears from the several Acts relating to the Divorce Court, that the dissolution of a marriage is to be granted only on the petition of a person who comes within the description repeatedly used in the Acts of an innocent party, and solely as a relief to such a person on proof of adultery committed by the opposite party, with or without other offences, according to the sex of the accused. That this is the case under the Act of 1857 appears to me obvious. There was then no decree nisi ; how, then, could a respondent ask for a decree dissolving the marriage, there being no charge against the petitioner on which a claim against him to have the marriage dissolved could be based ? The only course which would then have been open to the respondent would have been to ask that the petition should be dismissed for want of prosecution. The subsequent legislation, by which the decree of dissolution was divided into two parts, was not intended to give the respondent any greater advantage, or in any way to alter her position, but to give time for the Queen's Proctor and other parties to bring to the knowledge of the court any facts which would deprive the petitioner of his inchoate right to have the decree made absolute. . . . To make more manifest the anomaly of such a proceeding, let it be supposed that the respondent is entitled, as the case now stands, to succeed, but that it could be shown by the Queen's Proctor that

(1) (1875) 1 P.D. 56.

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the petitioner had been guilty of adultery since the time expired for making the decree absolute, the respondent would be in this position: she was entitled to have her marriage dissolved on the ground of her own adultery, and she might be deprived of this right by the guilt of her husband. Having regard to these consequences, and for the reasons I have given, I am constrained to hold that the respondent is not entitled to succeed on her present application" (1).

One result of the rule that a respondent against whom a decree nisi was made could not apply to have it made absolute was that suits have been kept alive in order that all the advantages of the existence of a decree nisi and sometimes of interlocutory orders might be enjoyed by the petitioner without giving to the respondent his freedom from the marriage. It was always open to the respondent to apply on the ground of want of prosecution for an order rescinding or discharging the decree nisi and dismissing the suit. But, short of that, there was no means of terminating the proceedings against him if the petitioner desired to keep them open. Doubtless the purpose of the enactment embodied in sec. 84 (3) of the *Supreme Court Act* 1935 is to give authority to the court to relieve a respondent from such a situation. It is expressed in terms apt to confer a discretion, and apparently it does not intend to invest a respondent with an unqualified right to a decree absolute. A similar provision in New Zealand has been construed as giving the court a discretionary power (*Dimery* v. *Dimery* (2); cf. sec. 32 of the *Interpretation Act* 1918 (W.A.)). The difficulty, however, is to discover the grounds upon which it is intended that the court should act in exercising its discretion to grant or withhold a decree absolute when it is applied for by a respondent against whom the decree nisi has been pronounced. The proviso does not, I think, define the only grounds upon which the court may proceed. On the contrary, it appears to me to assume the existence of a discretion, into the ambit of which it brings the question of payment of costs. Where a discretion is conferred by statute but the grounds upon which it is to be exercised are not expressed, they can only be discovered from the scope and purpose of the enactment and from considering the nature of the evil or grievance it is designed to remedy. The evident purpose of the

(1) (1875) 1 P.D., at pp. 63, 64.

(2) (1934) N.Z.L.R. 732.

provision now in question is to afford relief to a guilty respondent from the unfairness arising from keeping on foot indefinitely both the status of marriage and a decree nisi for its dissolution. It cannot be treated as a provision recognizing in a guilty party any independent right or title to the dissolution of the marriage. But it enables him to take the initiative in bringing before the court the question whether the petitioner's decree should be made absolute. The right, if any, to have it made absolute remains the petitioner's and does not pass to the respondent. Up to the expiration of the time stated in the decree nisi, the petitioner who has obtained it may apply as formerly to have that decree rescinded and the suit dismissed. It is unnecessary in the present case to consider how far the provision contained in sec. 84 (3) may be regarded as affecting such an application on the part of the petitioner if made after the expiration of six months from the pronouncement of the decree nisi or after two months from the expiration of the earlier time named therein. It may be that the existence of the provision may be taken into account as a matter affecting the court's discretion to rescind the decree nisi at the instance of the petitioner. On the other hand, at least such an application may result in relieving the respondent from the hardship for the removal of which sec. 84 (3) was enacted. But, if the petitioner desires to maintain the decree nisi, then, unless circumstances exist making it proper to allow the completion of the process of dissolving the marriage to stand over, the policy of the legislature appears to be that prima facie, at least, the decree absolute should be pronounced on the application of the respondent, assuming always that the petitioner is entitled then and there to a decree absolute. Obviously the petitioner has no such right, if appropriate steps have been taken under sec. 82 (2) or sec. 84 (2), until the issues so raised have been disposed of in favour of the petition. But, without actually seeking the rescission of the decree nisi, the petitioner may oppose the making of it absolute. The petitioner may do so on grounds often going only to withholding for the time being the decree absolute. But it is conceivable that the petitioner may, in opposing the respondent's application for a decree absolute, set up or disclose facts which show that no decree absolute ought ever to be made. If such facts appear, the discretion

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conferred by sec. 84 (3) would, I think, be well exercised by refusing the respondent's application. Further, if in the course of investigating an issue raised by the petitioner for the purpose of defeating the respondent's application under sec. 84 (3), the court is satisfied by the evidence before it that the petition was presented or prosecuted in collusion with the respondent, I see no reason why the court should not discharge the decree nisi and dismiss the petition. Sec. 75 is not expressed in such a way as to apply only to the hearing of the petition. I do not see why it should not extend to an application under sec. 84 (3). It must be remembered that sec. 84 (3) introduces a new step or proceeding in a jurisdiction the exercise of which is governed by sec. 75. Moreover, it is a step or proceeding not at all unlikely to lead to disclosures of collusion which otherwise would never appear. Unless, therefore, some clear reason arose upon the terms of the statute for restricting the power of the court to dismiss a suit for collusion, the authority to do so as a result of an application under sec. 84 (3) ought not to be denied.

The present case arises out of a wife's suit on the ground of adultery. The respondent applied to have the decree made absolute two years and five months after it had been pronounced in favour of the petitioner. The respondent opposed the making of the decree absolute on grounds which, briefly stated, meant that she had instituted the suit at his request and that he had agreed to pay lump sums of money on the making of the decree nisi and of the decree absolute and alimony pendente lite, which latter he failed and refused regularly to do. The facts disclosed by the evidence amounted to collusion, in the opinion of the learned judge who heard the application. He accordingly refused to make the decree nisi absolute. On the view he took of the facts, it appears to me that this course was correct. But I see no reason why he should not have gone further and at once discharged the decree absolute and dismissed the suit. I do not think the power of the court to take such measures is limited to a proceeding under sec. 84 (2). No doubt it is true that after decree nisi the duty or authority of the court to deal with collusion could, apart from such a provision as sec. 84 (3), seldom or never arise except as a result of an appearance by the King's Proctor or some other person. The court is neither

called upon nor empowered to institute *ex mero motu* an inquiry into the existence of collusion. But it is quite another thing to say that, when in the course of a proceeding after decree nisi collusion is proved to the satisfaction of the court by evidence before it, the court is nevertheless powerless to give effect to the principles laid down by the legislation in sec. 75 and dismiss the suit.

The appeal by the respondent to the petition, therefore, appears to me to depend in the first instance upon the correctness of the finding that collusion existed. The material facts upon which this finding is based are scarcely in dispute. The wife had been absent from Perth for some months before 18th October 1937. On that date, she returned in consequence of some pressure exerted by her husband. He then told her that he would not live with her and desired her to divorce him. She refused to do so, and from beginning to end she remained unwilling or reluctant to petition. After some discussions or negotiations with her which ended on 9th November 1933, he offered or promised that, if she would petition, he would pay to her an allowance of £4 a week, that is to say for alimony pendente lite and permanent maintenance, and also pay her a lump sum of £380. Of this sum, £150 was to be paid on decree nisi and £230 on decree absolute. At some stage she consulted her solicitors, and they, after first demanding that her husband should maintain his wife, listened to his proposals. He informed them that he would supply them with evidence of his own past misconduct to support his wife's petition. The solicitors, who appear to have shown every desire to avoid any collusion on the part of their client, said that they would themselves obtain whatever evidence was necessary to support a petition. But the husband made clear what he was willing to do financially, if his wife would only agree to petition. After an interview of this description with the husband on 15th November 1933, the wife's solicitors instructed a private inquiry agent to watch the husband with a view of obtaining evidence of adultery. This makes it sufficiently clear that, in the distinction between evidence which he desired to supply of past adultery and evidence to be independently obtained, full reliance was placed on the husband's again committing adultery. In the event, the private inquiry agent encountered no difficulty. On the following evening, he

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found himself in a position to invite the wife to accompany him while he followed her husband and a strange girl to a place where they committed adultery. He watched the couple, and the husband was duly identified. Next day the petition was filed, and shortly afterwards the husband paid £380 to his wife's solicitors, £230 of which they were to hold as stakeholders until the decree absolute was pronounced.

On the hearing of the petition, an attempt was made by the wife's counsel to state to the court and to prove by evidence what had taken place between the wife and her solicitors, on the one side, and the husband on the other, but the learned judge who heard the petition did not, it is said, think it necessary to inquire into the matter. Notwithstanding this candour on the part of the wife's counsel, I think the arrangement between the parties did amount to collusion. No doubt, courts have in recent times taken a much less strict view than formerly was adopted and many arrangements and agreements between the parties to a suit for dissolution are now considered permissible which, at one time, would probably have been condemned as collusive. This is exemplified by the decisions in *Scott* v. *Scott* (1) and *Malley* v. *Malley* (2), although the latter decision is disapproved by *McCardie* J. in *Laidler* v. *Laidler* (3). The modern latitude is also illustrated by the very recent case of *Wyatt* v. *Wyatt* (4). But, in the present case, there are some features which, in my opinion, bring it within the narrowest conception of collusion. It is not a case where alimony, costs and the like are arranged with a wife who is respondent to a petition. Nor is it a case where a wife desirous of petitioning makes terms with a guilty husband upon such questions. It is a case where a husband presses a wife to petition although she is unwilling to do so. In other words, the project proceeds entirely from the guilty spouse and the petition is only induced by his promises of a lump sum and of permanent maintenance. In the next place, it is a plain inference that the husband, anxious as he was for a divorce, must have felt that further adultery had become indispensable to his object. There is no direct evidence, it is true, that the private inquiry agent had any informa-

(1) (1913) P. 52.
(2) (1909) 25 T.L.R. 662.
(3) (1920) 123 L.T. 208.
(4) (1937) 3 All E.R. 885.

tion from the husband himself as to when and where he should go in order to see him commit adultery. But the inquiry agent's immediate success in detection suggests, at least, that the husband was proceeding with much openness and in the hope of supplying the needed evidence.

The learned judge from whom the appeal comes took the view that adultery would not have been committed on 16th November 1933 but for the arrangement. It is sufficient to say that it certainly would not have been committed so as to be discovered and witnessed.

In my opinion collusion is the proper inference from the undisputed facts. It follows that the appeal should be dismissed.

A preliminary objection to the competence of the appeal was taken on the ground that the appellant had precluded himself from appealing from the order by acting on the assumption that it was valid and effectual. In the view I have taken of the case, it is unnecessary to deal with the objection but it is, perhaps, desirable to point out that the order under appeal is interlocutory in form and no leave to appeal was obtained.

In my opinion the appeal should be dismissed.

McTiernan J. Upon the petition of the appellant's wife, who is the present respondent, a decree nisi was made by the Supreme Court in an undefended suit for the dissolution of her marriage with the appellant on the ground of adultery. The wife declined to apply to make the decree nisi absolute, and after the lapse of the period mentioned in sec. 84 (3) of the *Supreme Court Act* 1935, which is in the part of the Act relating to matrimonial causes and matters, the appellant applied under those provisions to make the decree absolute. Sec. 84 (3) provides :—" If after a decree nisi for the dissolution of marriage or for the nullity of marriage (pronounced before or after the commencement of this Act) the petitioner does not, on the expiration of six months from the pronouncement thereof, or within two months from the expiration of any shorter period fixed by the decree nisi, apply to have such decree made absolute, the court may, on the application of the respondent, on such notice to the petitioner as the registrar directs, or such substituted notice as the court allows, make the decree absolute,

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and shall have on, or in respect of such application, the same powers as if the application were made by the petitioner: Provided that the court may refuse to grant or may adjourn consideration of the application if any costs awarded against the respondent or the co-respondent in the suit have not been paid."

The appellant's application was made by notice of motion which was served on the wife and was supported by the affidavit of a law clerk who deposed that no proceedings attacking the decree nisi were pending, and by the appellant's affidavit in which he deposed that despite repeated requests to the petitioner no steps had been taken by her to apply to have the decree nisi made absolute. Nothing had been disclosed up to the time of the appellant's application which would have disentitled his wife to a decree absolute for the dissolution of the marriage. But, upon the whole of the evidence given at the hearing of the application, consisting of the above-mentioned affidavits, affidavits of his wife and her solicitor, a further affidavit of the appellant and the judge's notes of evidence at the hearing of the petition, *Dwyer* J. found that a collusive arrangement had been entered into to obtain a decree dissolving the marriage and refused the application.

The question for decision is whether, when a respondent in a suit applies under sec. 84 (3) to make a decree nisi absolute, the court may find that the petition for dissolution was presented or prosecuted in collusion with the respondent, and, if it so finds, whether the court has a discretion to refuse the application.

Part VI. of the Act, which is the part relating to matrimonial causes and matters, contains the usual provisions for the dissolution of marriage by two stages, decree nisi and decree absolute. Until decree absolute the dissolution is inchoate but the matrimonial bond remains. Where the petitioner is the only party who may move to make the decree nisi absolute and declines, the respondent is in a dilemma. The respondent must suffer under an inchoate decree or take action which would result in the complete restoration of the matrimonial bond. The respondent's remedy was to move to dismiss the suit for want of prosecution. The object of sec. 84 (3) is to save a respondent from that dilemma by enabling him to have the inchoate dissolution perfected as it would have been if the

petitioner had not halted on the road to dissolution of the marriage at the stage of the decree nisi. The effect of sec. 84 (3) is to give the carriage of the suit to the respondent if the petitioner has for the specified period delayed to prosecute it beyond decree nisi. But the right to relief, which is given to the respondent, is not clear of the obstacles which would have been in the petitioner's way. Anything that would have been a bar to the dissolution of the marriage if the petitioner had applied to make the decree nisi absolute will also be a bar if the respondent applies to make it absolute. Delay and collusion are instances of bars to a petition for dissolution (secs. 77, 75). A petitioner's application to make a decree nisi absolute is liable to be defeated by a bar which the statute sets up against relief by way of dissolution of marriage. In *Hunter* v. *Hunter* (1) a petitioner applying to make absolute a decree nisi was met with the objection that there was unreasonable delay in prosecuting the suit since the decree nisi. The court has under sec. 84 (3) a judicial discretion. Sec. 32 of the *Interpretation Act* 1918 (W.A.) leaves no doubt that it was intended to invest the court with discretionary power. This discretion is to be exercised according to justice and regulated by the principles of the Act. Where, upon an application by a respondent to make a decree absolute, the petitioner brings before the court facts which establish the existence of a bar to the dissolution of the marriage the jurisdiction of the court to refuse the application is no less certain than if the petitioner had been the moving party and those facts were before the court. The operation of sec. 75, which is aimed at collusion, is not exhausted when the decree nisi has been made, and if, when it is sought to make the decree nisi absolute, the court finds upon the material before it that the petition was presented or prosecuted under a collusive arrangement between the parties it is the duty of the court to dismiss the petition whether the moving party is the petitioner or the respondent. Cf. *Hyman* v. *Hyman* (2).

Upon the material before him the learned judge made the following finding of fact :—" In this application for divorce by the wife, there was a prior agreement between the husband and the wife to secure a decree, and, on that being obtained, the wife would be paid

(1) (1934) P. 92. (2) (1929) P. 28.

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a sum of money. I do not think there was any other real reason for the payment by the husband to the wife of £380 except that the wife would institute proceedings for divorce. Whether there was a good defence or a bad defence to the action is immaterial but I am satisfied that under the conditions here the husband was not intended to defend the application. It would be ridiculous to think otherwise as he was the party who had instigated the proceedings. Whether he had committed misconduct at the time is beside the point; no evidence to that effect was produced that could be regarded as satisfactory. I am very definitely of opinion that no adultery would have been committed on the 16th November unless there had been prior collusion. I do not say that the wife knew that the husband was proposing to commit adultery, but I do say that the husband had made a certain agreement with his wife and was not then merely following his own inclinations for misconduct, but acting simply for the purpose of ensuring the wife's obtaining a decree." This finding is amply supported by the evidence and, in my opinion, is right. In *Carmichael* v. *Carmichael* (1) Lord *Merrivale* said: "Suppose that a party comes into court and says 'I have arranged with the other party that we shall be divorced'; the answer of the court would be 'You cannot make any such arrangement, and the court cannot grant you a decree.'" Parties may agree about alimony or maintenance without involving themselves in a collusive arrangement. But here the proper inference from the evidence is that the parties agreed that their marriage should end and that the court should be used as an instrument to effectuate the agreement, and it was in pursuance of that agreement that the wife presented the petition and prosecuted the suit to decree nisi and the husband did not defend it. To make the decree nisi absolute in the face of that agreement would, in my opinion, be to disregard the injunction imposed on the court by sec. 75.

It should be observed that at the hearing of the petition the petitioner's counsel offered to place all the circumstances before the court, and at the hearing of the application to make the decree nisi absolute fully exposed the whole arrangement.

(1) (1925) 42 T.L.R. 133.

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In the view which I have taken it is unnecessary to decide the preliminary objection that the appellant was estopped from bringing the appeal or to say whether the appeal was competent without an order granting leave to appeal.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Unmack & Unmack.*

Solicitor for the respondent, *L. D. Seaton.*

[HIGH COURT OF AUSTRALIA.]

HENDERSON . . . . . APPELLANT;
APPLICANT,

AND

THE COMMISSIONER OF RAILWAYS (WESTERN AUSTRALIA) . . . } RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1937. PERTH, *Sept.* 29, 30. SYDNEY, *Dec.* 10. Latham C.J., Dixon and McTiernan JJ.

Workers' Compensation—Injury by accident—"In the course of the employment"—Accident on employer's premises during meal time—Railway employee crossing line to reach camp provided by employer—Prohibited act—Workers' Compensation Act 1912-1924 (*W.A.*) (*No.* 69 *of* 1912—*No.* 40 *of* 1924), *sec.* 6 (1).*

A railway ganger, who was in charge of men erecting fences near a railway station close to which their camp was situated, was killed by a train during the luncheon hour while crossing the line on his way to the camp. Instead of getting on to the rails in order to cross the line, the deceased could have used a level crossing near the scene of his work or an overhead bridge leading from the station platform along which he had walked before proceeding to cross the line. A regulation, which had the force of law, and of which the

* Sec. 6 (1) of the *Workers' Compensation Act* 1912-1924 (W.A.) provides: "If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under his employer's instructions, is caused to a worker, his employer shall . . . be liable to pay compensation."