[HIGH COURT OF AUSTRALIA.]

MAIN . . . . . APPELLANT;
PETITIONER,

AND

MAIN . . . . . RESPONDENT.
RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1949.

PERTH, *Sept.* 8, 9, 15.

Latham C.J., Rich, Dixon and McTiernan JJ.

Divorce—Petition by wife—Husband a chronic invalid confined to a home—Whether husband and wife had lived "separately and apart"—Whether wife entitled to relief—Principles of exercise of discretion—Supreme Court Act 1935-1947 *(W.A.) (No.* 36 *of* 1935—*No.* 9 *of* 1947), *ss.* 69 (6), 69A.*

The parties were married in the year 1935. In June 1943 the respondent husband became completely paralysed and was admitted to a public hospital. He recovered sufficiently to return home but after a few days he collapsed and returned to hospital. This took place several times. On 15th September 1943 he was admitted to a home as a patient and he remained there until January 1945 when he was transferred to another similar institution. From this date he lived there continuously and it was unlikely that he would ever be discharged. On these facts the wife, on 19th October 1948, petitioned for divorce on the ground set out in s. 69 (6) of the *Supreme Court Act* 1935-

* Section 69 (6) of the *Supreme Court Act* 1935-1947 (W.A.) provides:—"Any married person domiciled in Western Australia may present a petition to the Court praying that his or her marriage may be dissolved, and it shall be competent subject to the next succeeding section for the Court to decree a dissolution thereof, in the case where the husband and wife have lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition and it is unlikely that cohabitation will be resumed.

In computing the period of separation for the purpose of this subsection separation before the enactment hereof may be taken into account.

Provided that the Court in its absolute discretion may refuse to decree a dissolution of the marriage and shall refuse a decree unless and until provision is made for such maintenance, as in the circumstances the Court thinks proper, of the respondent and any children and the custody and care of any such children.

Provided further that if the petitioner at the time of the presentation

1947 (W.A.) namely, that she and her husband had lived separately and apart for a period of five years immediately prior to the presentation of the petition and that it was unlikely that cohabitation would be resumed. The trial judge dismissed the petition, being of the opinion that as a matter of law the ground had not been established. This decision was affirmed by the Full Court.

H. C. OF A. 1949. MAIN v. MAIN.

Held: (1) That the two words "separately and apart" show that there must be a physical separation and also a destruction of the *consortium vitae* or matrimonial relationship; (2) That the wife had established both these facts and her case fell within the provisions; (3) The discretion given by sub-s. (6) is not a discretion to grant but to refuse a decree for dissolution and that means (unless there are other grounds for refusal) that once facts are proved bringing a case within sub-s. (6) a decree for dissolution should be pronounced unless the court thinks on discretionary grounds it should be refused; (4) That the absolute discretion entrusted to the court by the section was a discretion to be exercised judicially; there were no grounds for withholding relief from the wife in this case and the appeal should be allowed.

Evans v. *Bartlam* ((1937) A.C. 473, at p. 488); *Blunt* v. *Blunt* ((1943) A.C. 517) and *Osenton* v. *Johnston* ((1942) A.C. 130) applied.

Decision of the Supreme Court of Western Australia (Full Court) reversed.

APPEAL from the Supreme Court of Western Australia.

By petition filed on 19th October 1948, Tessie Rhoda Main sought of the Supreme Court of Western Australia a decree that her marriage with James Main be dissolved upon the grounds set out in s. 69 (6) of the *Supreme Court Act* 1935-1947 (W.A.).

The parties were married in 1935. The petitioner, at the time of the hearing, was thirty-eight years of age and the respondent forty-three. There was one child of the marriage—a son, who was born in 1936. Both parties were domiciled in Western Australia.

of the petition is in default in respect of maintenance payable under any antecedent Court Order or under any agreement for the payment of maintenance to the respondent for herself or any child of the marriage, a decree for dissolution of the marriage shall not be granted." Section 69A of the Act provides:—

"If upon any petition for dissolution of marriage on the ground set out in subsection (6) of the last preceding section it shall appear to the Court that the Petitioner has at any time during the period of five years immediately preceding the presentation of the petition been guilty of such conduct as would have enabled the respondent, had he or she so desired, to present a petition for dissolution of marriage on any ground other than the ground set out in subsection (6) of the last preceding section the Court shall dismiss the petition, excepting that in every case where the ground on which the respondent might have presented a petition is one of those specified in paragraph (*a*) of subsection (3) or subsection (4) of section sixty-nine of this Act, and the petitioner has proved his or her case, it shall be competent for the Court to decree dissolution of the marriage as provided by subsection (6) of the last preceding section."

H. C. OF A. 1949. MAIN v. MAIN.

In June 1943 the respondent suffered a paralytic stroke and after spending some time in hospital he returned home, but his condition was such that he had to return to hospital after he had suffered another seizure. From September 1943 until January 1945 the respondent was an inmate of the Home of Peace, Subiaco. He was later transferred to the Old Men's Home, Dalkeith as an institutional case and, although he could not be classed as mentally deranged he was unable to face the world and there was no likelihood of his condition ever improving.

The trial judge (*Wolff* J.) held that as a matter of law the statute only applied to cases where the matrimonial relationship was voluntarily broken off by both parties or where one party deliberately did something intended to sever such relationship. He held that such circumstances had not been established and dismissed the petition.

On appeal, this decision was affirmed by the Full Court; by *Dwyer* C.J. for the reasons given by the trial judge and by *Walker* J. on the ground that the Act gave the trial judge untrammelled authority to refuse a decree without giving any reasons and that the trial judge had exercised a discretion which should not be disturbed.

From this decision the petitioner appealed to the High Court.

C. B. Gibson (with him *A. C. Gibson*) for the appellant. Where the parties have in fact lived separately and apart the section applied. Living separately and apart is a question of fact to be decided objectively. If a case is brought within the literal meaning of the section it is not proper to consider the circumstances under which the Act was passed. The trial judge did not exercise a discretion. The section is clear and unambiguous and there is no need to consider external circumstances. The facts show the parties had lived separately and apart for five years immediately prior to the presentation of the petition. It is not proper to refuse to grant divorce to persons of a particular class.

Nevile for the Attorney-General, as *amicus curiae*.

There must be some rift in the matrimonial relationship. The word " apart " must be given some meaning different from the word " separately." Parties can live separately but not apart and apart but not separately. On the facts of this case the parties were not

living "apart." (*Nugent-Head* v. *Jacob* (*Inspector of Taxes*) (1)). There must be either a unilateral or a bilateral repudiation of the marriage bond (*Nugent-Head* v. *Jacob* (*Inspector of Taxes*) (2)). The question of separation arises in *R.* v. *Creamer* (3). Separation implies something more than mere physical absence. It means cessation of conjugal rights.

C. B. Gibson in reply.

Cur. adv. vult.

Sept. 15.

The following written judgments were delivered:—

LATHAM C.J., RICH and DIXON JJ. This is an appeal from an order of the Full Court of the Supreme Court of Western Australia affirming an order of *Wolff* J. by which his Honour dismissed a wife's petition for dissolution of marriage. The ground of the petition was that the petitioner and the respondent had lived separately and apart for a period of five years immediately prior to the presentation of the petition and it was unlikely that cohabitation would be resumed. By the *Supreme Court Act Amendment Act* 1945 (W.A.) this has been made a ground on which it is competent for the Supreme Court to dissolve a marriage subject to a discretion to refuse the relief. The question for decision is whether upon the proper interpretation of the provision the facts of the case fall within it and if so whether as a matter of discretion relief should be refused.

The parties were married in Fremantle in 1935, the petitioner then being a spinster aged twenty-five years and the respondent a bachelor aged thirty-one years. The domicile of both was and still is in Western Australia. There is one child of the marriage, a son born on 20th October 1936. In June 1943 the respondent became completely paralysed. He was admitted to a public hospital. He recovered sufficiently to return home, but after a few days he collapsed. This took place several times. At length on 15th September 1943 he was admitted into a Home as an invalid or patient. There he remained until 9th January 1945 when he was transferred into another such home. He has lived there ever since and is unlikely ever to leave it. He is badly afflicted. He is paralysed. His speech is affected. His mental condition is not bright, but he is rational. He could not take a place in the community. The petitioner has earned her living and besides keeping herself and her boy has contributed a weekly sum, at first £1 and

(1) (1948) A.C. 321.
(2) (1947) 1 K.B. 17.
(3) (1919) 1 K.B. 564.

H. C. OF A. 1949. MAIN v. MAIN. Latham C.J. Rich J. Dixon J.

then 17s. 6d., for the support of her husband at the Home. This contribution, so it is said, represents maintenance fees prescribed by the rules of the Western Australian Government for patients at the Home, which is a government institution. As we read the judgment of *Wolff* J., his Honour was of opinion that upon the foregoing facts the case did not fall within the provision as a matter of law. In the Full Court, however, *Walker* J. treated the case as one in which the primary judge had exercised a discretion which ought not to be reviewed, while *Dwyer* C.J. considered that an exercise of the discretion in favour of the petitioner would mean an extension of the ground of divorce beyond the original purpose of the amendment, which, his Honour was convinced, was to cover cases in which it was definitely agreed by both parties to the marriage to separate or live apart or in which one had broken the matrimonial relationship.

The provisions of the law of Western Australia relating to matrimonial causes are contained in Part VI. of the *Supreme Court Act* 1935-1947 (W.A.). The grounds for dissolution of marriage are set out in s. 69. Before the amendment now in question, they included among other familiar but less relevant grounds, desertion by the respondent for three years and upwards, imprisonment of the respondent for specified periods or aggregate terms in certain conditions, confinement of the respondent as a lunatic in any asylum or other institution for a period or periods in the aggregate of five years, if the respondent is unlikely to recover, and, on the wife's suit, separation under a judicial decree or order or by agreement, if the husband is ordered or agrees to pay alimony or maintenance periodically for the support of his wife or a child of the marriage and makes default either altogether or repeatedly and habitually. Failure to comply with a decree for restitution of conjugal rights is equivalent to desertion, but before the petition is presented three years must elapse.

The *Supreme Court Act Amendment Act* 1945 added to s. 69 a further sub-section making five years' separation a ground of divorce. It is sub-s. (6). The Amendment Act also added a new section, s. 69A, which contains certain qualifications of a petitioner's right to avail himself or herself of that ground. Sub-section (6) begins by requiring that the petitioner shall be domiciled in Western Australia. It then provides that, subject to s. 69A, it shall be competent for the Supreme Court to decree a dissolution of the marriage, in the case where the husband and wife have lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition and it is unlikely that

cohabitation will be resumed. There is a proviso that the court in its absolute discretion may refuse a decree of dissolution. The same proviso goes on to require the court to refuse a decree unless and until provision is made for such maintenance, as in the circumstances the court thinks proper, of the respondent and any children and the custody and care of any such children. It is to be noticed that this condition is not confined to a husband's petition. But the words " as in the circumstances the Court thinks proper " make it clear that it applies only when the court considers that a provision for the maintenance of the respondent or children of the marriage should be made or for the custody and care of such children. It is not to be inferred that the legislature contemplated a provision for the maintenance of a husband as ordinarily proper, when it is a wife who petitions under sub-s. (6). There is a further proviso dealing with default on the part of the petitioner in the payment of maintenance antecedently ordered or agreed in respect of the respondent or a child. If at the time of the presentation of the petition the petitioner is so in default a decree for the dissolution of the marriage is not to be granted. This proviso happens to use the pronoun " herself " and so to make it fairly clear that it can apply, as might be supposed, only in favour of a wife.

Section 69A disqualifies a petitioner from relief under sub-s. (6) if during the period of five years before the petition he or she has been guilty of conduct affording the respondent a ground for divorce. But from this principle desertion by the petitioner and failure to comply with a decree for restitution are excepted. It is therefore clear that sub-s. (6) goes beyond cases of separation by mutual consent and covers cases of desertion, whether the deserting party is the petitioner or the respondent.

The introduction in the State of Western Australia of this ground of divorce is of course a notable extension of the previous law. It is remarkable too in placing the question whether the marriage should be dissolved so entirely in the discretion of the court. But these are not reasons for giving to the provision a more limited operation than the words in which it is expressed, according to their legal meaning, appear to intend. The critical words are " where the husband and wife have lived separately and apart for a period of not less than five years." No doubt a consecutive period of five years is intended. The two words " separately and apart " show that physical separation is necessary and that it is not enough that there has been a destruction of the *consortium vitae* or matrimonial relationship while the spouses dwell under the

H. C. OF A. 1949. MAIN v. MAIN. Latham C.J. Rich J. Dixon J.

same roof. In matrimonial law the expressions like "live separately", "separated" and "separation" are commonly used to indicate that the conjugal relation no longer exists between the parties to the marriage. Although usually the existence of the conjugal or matrimonial relationship or *consortium vitae* means that the spouses share a common home and live in the closest association, it is not inconsistent with absences one from another, even for very long periods of time. It rests rather on a real mutual recognition by husband and wife that the marital relationship continues to subsist and a definite intention to resume the closer association of a common life as soon as the occasion or exigency has passed which has led to an interruption regarded by both as temporary.

"In deciding whether there was at any specified date an existing matrimonial relationship, it is, I think, right to say that such a relationship does not end so long as both the spouses *bona fide* recognize it as subsisting, and in particular it does not end by reason of a separation brought about by the pressure of external circumstances such as absence on professional or business pursuits, or in search of health, or, it may be, even of pleasure. Marital intercourse, the dwelling under the same roof, society and protection, support, recognition in public and in private, correspondence during separation, making up as a whole the *consortium vitae*, which the old writers distinguish from the *divortium a mensa et thoro*, may be regarded separately as different elements, the presence or absence of which go to show more or less conclusively that the matrimonial relationship does or does not exist. The weight of each of these elements varies with the health, position in life, and all the other circumstances of the parties" (per *Cussen* J., *Tulk* v. *Tulk* (1)). The word "separate" should, it seems, be interpreted as importing the negation of such a matrimonial relationship. This conclusion is supported by the final words of sub-s. (6), namely "and it is unlikely that cohabitation will be resumed." "Cohabitation" is used in many senses but here it seems to mean a re-establishment of the ordinary relationship of husband and wife. It follows that there may be absences from one another, relinquishment of a matrimonial home and physical separations of long duration caused by circumstances and yet, if these conditions are treated as temporary by the parties themselves, it may be true that they are not living separately although they are living apart. But five years is a long time, and only in very exceptional circumstances will husband and wife live apart for so long and yet maintain a matrimonial relationship. If they do manage to maintain the relationship for so great

(1) (1907) V.L.R. 64, at p. 65.

a period, it will almost certainly be true that the resumption of cohabitation is likely and for that reason sub-s. (6) will not apply.

In the present case the permanent state of physical incapacity of the husband, the hopelessness of his condition and the situation in which the parties found themselves make it an almost inevitable inference that for many years all conjugal relationship had been abandoned. Both must have known that the resumption of a common home, of a marital association, was out of the question. There was no prospect of its ever being possible. The contribution by the wife may mean that she recognized a legal or moral obligation. It does not mean that she recognized the subsistence of a conjugal relation and treated the suspension of a common life as only temporary. These are reasons for the conclusion that the case falls within the provision.

The only remaining question concerns the discretion which sub-s. (6) confers upon the court to refuse a decree of dissolution. *Wolff* J. seems, clearly enough, to have decided the case upon the interpretation of the provision without any exercise of discretion. It cannot be said that the decision of the Full Court by which the judgment of *Wolff* J. was affirmed proceeded upon an independent exercise by that court of the discretion conferred by sub-s. (6). In these circumstances the conclusion that the case falls within the provision involves the consequence that the discretion should be exercised in this Court. It would of course be open to this Court to remit the question to the Supreme Court, if, because further materials were found necessary or for any other reason, that course appeared desirable. But all the materials were placed before the Court and the better course appears to be to decide the question at once. It is to be observed that in form the discretion is not a discretion to grant, but to refuse, a decree for dissolution. That means that once facts are proved bringing the case within sub-s. (6) a decree for dissolution should be pronounced unless the court thinks on discretionary grounds that a decree ought to be refused. In other words the burden is not on the petitioner to show that special grounds exist justifying the use of a discretion to grant a decree. Once he or she comes within sub-s. (6) the presumption is in his favour.

The absolute discretion entrusted to the court is a discretion which is not to be fettered by rules prescribed by any court (*Evans* v. *Bartlam* (1)), but it must be exercised judicially and not on grounds unconnected with the subject-matter of the proceedings between the parties: *Blunt* v. *Blunt* (2); *Osenton* v. *Johnston* (3). In

(1) (1937) A.C. 473. (2) (1943) A.C. 517. (3) (1942) A.C. 130.

H. C. OF A. 1949. MAIN v. MAIN. Latham C.J. Rich J. Dixon J.

exercising this discretion it is proper to have regard not only to the matrimonial life, behaviour and circumstances of the parties, but also to the institution of marriage.

In the present case no ground appears for withholding relief. The petitioner's husband has no doubt suffered a great misfortune. But on her side it has resulted in the destruction of her marriage. Her situation has been and, if a decree were refused, must always remain, that of a wife whose ties to her husband can depend only on memory of the past, pity for his condition and on a sense of obligation. While he lives there is no prospect of relief. She is free from all fault or blame. It is difficult to suggest any reason, once it is held that the provision applies, for excluding her on discretionary grounds from the benefit of its operation. As she is a woman dependent on her own earnings it would not be right to impose a condition that she makes a provision for the maintenance of her husband. The continuance of the payment of maintenance fees to the Home is a matter for herself and for the hospital authorities.

The appeal should be allowed and an order made accordingly.

McTIERNAN J. The object of s. 69 (6) of the *Supreme Court Act* 1935-1947 (W.A.) is to provide a new ground of divorce. The sub-section applies to any married person domiciled in Western Australia and it is a ground upon which either husband or wife may petition for dissolution of marriage. This new ground for a petition is that " the husband and wife have lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition and that it is unlikely that cohabitation will be resumed." There are two conditions ; namely, that the spouses have lived separately and apart for the specified period and a resumption of cohabitation is unlikely. The first condition is expressed as a double condition (living separately and apart). Reading the first condition with the second (the unlikelihood of the resumption of cohabitation), the first condition means that the parties are not only living " apart " but " separately," that is that cohabitation has ceased. The sub-section does not require that this state of affairs—living apart and separately—should be by mutual consent or the result of the repudiation of the marriage bond by either party or wilful conduct. This ground of divorce is novel but it appears in an Act providing for dissolution of marriage on various grounds. It would be classed as a remedial provision. The novelty of a provision in an Act of this kind is no reason for narrowing its scope by interpretation. That is governed

by the language of the provision. The language of the provision does not restrict its operation to cases where the separation is due to any particular causes. In my opinion if husband and wife live separately and apart for the prescribed period (and cohabitation is unlikely to be resumed), even for the cause proved in the present case, the circumstances are within the provision. The court is given a discretion in any case to refuse a decree. The discretion is expressed to be an absolute one yet it is a judicial discretion. The ground upon which a decree was refused in the present case was that the sub-section does not extend to this case, not that, having regard to the circumstances, the court ought not in the exercise of its discretion to grant the petition. The present case is in my opinion within the provision. It does not appear to me, having regard to the principle of the sub-section and the circumstances of the case, that there are any tenable grounds for refusing a decree.

In my opinion the appeal should be allowed.

Appeal allowed. Orders of the Full Court and of Wolff J. discharged. Decree nisi for dissolution of marriage—decree not to be made absolute until after the expiration of six months from the pronouncing of this judgment. Order that the petitioner do lodge an office copy of the order of this Court with the Registrar of the Supreme Court of Western Australia.

Solicitors for the appellant: *Hardwick, Slattery & Gibson.*

Solicitor for the Attorney-General: *R. V. Nevile,* Crown Solicitor for Western Australia.

F. T. P. B.