[HIGH COURT OF AUSTRALIA.]

PEARLOW . . . . . APPELLANT;
PLAINTIFF,

AND

PEARLOW . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 21;

SYDNEY, *Nov.* 20.

Dixon C.J., Webb and Taylor JJ.

Divorce—Action by husband—Separation for five years with no reasonable likelihood of cohabitation being resumed—Absolute discretion of court—Refusal of decree because of doubts as to veracity of plaintiff—Review on appeal of exercise of discretion—Matrimonial Causes and Personal Status Code 1948 (*W.A.*) (*No.* 73 *of* 1948), *ss.* 15 (*j*), 25 (1), 28 (3).

Section 15 (j) of the *Matrimonial Causes and Personal Status Code* 1948 (W.A.) provides: "Subject to the absolute and discretionary bars hereinafter set out the Court may grant any married person an order for dissolution of his or her marriage on any of the following grounds . . . (j) Separation of the parties to the marriage for a continuous period of not less than five years immediately preceding the commencement of the action where there is no reasonable likelihood of cohabitation being resumed". Section 25 (1) provides that "In an action for dissolution of marriage on the ground that the parties have lived apart for a period of not less than five years immediately preceding the commencement of the action and are not likely to resume cohabitation the Court may in its absolute discretion grant or refuse relief except where the Court is precluded from granting relief by reason of any absolute bar: provided that in every case before granting an order nisi the Court is required to see that provision is made for such maintenance of the defendant and any children and the care and custody of any such children as in the circumstances the Court thinks proper".

Held that if the constituent elements of the ground discussed in par. (j) of s. 15 are made out and no more appears an order or decree of dissolution should be pronounced. If additional facts appear, or in a defended suit are proved by or on behalf of the other spouse and they are relevant to the purpose and policy of the provision and form adequate materials for the exercise of the discretion, it then becomes a question of the judge's discretion to grant

or refuse relief. If the separation has been caused by wrongful conduct of the party seeking relief that may be taken into account and weighed with the other elements of the case and considered with the public interest.

Lodden v. *Lodden* (1921) N.Z.L.R. 876, and *Mason* v. *Mason* (1921) N.Z.L.R. 955, applied.

Held further, that the fact that the personal credibility of a man is low is not in itself a reason why his marriage should not be dissolved. Nor is it enough by itself that once before he was divorced. The general considerations upon which an exercise of the discretion should proceed remain the same. In ascertaining the facts to which these considerations apply the credibility of the party as a witness must of course be weighed, but it is only when the court concludes that an inquiry into the truth has failed because of his evasions or dissemblings as a witness that it really becomes material to the exercise of the discretion.

Circumstances in which an appellate court will interfere with the exercise of discretion by a primary judge, discussed.

Decision of the Supreme Court of Western Australia (*Wolff* J.) reversed.

APPEAL from the Supreme Court of Western Australia.

By writ issued on 18th October 1951 Isaac Pearlow sought of the Supreme Court of Western Australia a decree that his marriage with Sarah Pearlow be dissolved upon the grounds set out in s. 15 (j) of the *Matrimonial Causes and Personal Status Code* 1948 (W.A.).

The parties were married in 1930 and they separated in 1946. The appellant (the plaintiff) gave evidence which satisfied the trial judge that he and his wife had lived apart for a continuous period of not less than five years immediately preceding the commencement of the action and that there was no likelihood of resumption of cohabitation.

In answer to the trial judge the appellant stated that he had been married before, that his previous wife had divorced him and that he could not tell what the grounds were. The judge reserved his decision pending consideration of the previous divorce, the circumstances of the divorce and generally. He later made the following note :—" Previous record searched and letter from Mr. *Curran* placed before me. I refuse the exercise of my discretion, firstly because—I cannot attach any credit to the plaintiff generally and it is necessary for me to feel that I have the whole truth from him before I can exercise my discretion ; secondly, even if I accepted his story I would not be prepared to grant him a dissolution in view of the circumstances of the first divorce ".

The relevant portion of the text of the letter from Mr. *Curran*, who was the appellant's counsel, was as follows :—" On the 5th

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day of October 1928 a Petition No. 152 of 1928 was issued out of this Honourable Court on behalf of Rachael Pearlow for non payment of maintenance. The Decree Nisi was made before the then Chief Justice Sir Robert Furze McMillan on the 28th day of February 1929 and the said Decree was made absolute on the 3rd day of December 1929 ".

The formal order dismissing the action recited that the judge had found that the appellant had sufficiently proved that since the celebration of the marriage the parties had lived separately and apart for a continuous period of not less than five years immediately preceding the commencement of the action and that there was no likelihood of resumption of cohabitation, and continued as follows: " But in view of the fact that the plaintiff had been divorced previously on the ground of failure to comply with a maintenance order and that the plaintiff had stated to the judge at the hearing that he did not know the ground on which he was divorced and the judge doubting the plaintiff's veracity generally the judge in the exercise of the court's discretion ordered that the plaintiff's claim be dismissed ".

It was uncertain, in the appeal proceedings, whether *Wolff* J. saw the record or court file in the earlier suit. That record disclosed that while the decree nisi was pronounced on the ground of failure to pay maintenance, the decree absolute was pronounced on the ground of desertion and also that, at the time of the marriage in July 1922 to which the proceedings related, the appellant gave his condition as divorced and added the notation: " Berlin 30/4/22."

Fred Curran (with him *H. N. Walker*), for the appellant. The only facts relevant to the exercise by the trial judge of the discretion conferred on him by s. 25 (1) of the *Matrimonial Causes and Personal Status Code* are facts which have occurred after the marriage the subject of the action. If not so confined, the discretion is exercised on grounds unconnected with the subject matter of the proceedings between the parties and is not exercised judicially (*Main* v. *Main* (1); *Evans* v. *Bartlam* (2)). The fact that the judge doubted the appellant's veracity was based on inadequate material, especially having regard to the confusion in the record of the prior divorce. In any event a doubt as to veracity would be an insufficient basis for the exercise of a judicial discretion. This ground for divorce is a statutory recognition of the public policy referred to in *Blunt*

(1) (1949) 78 C.L.R. 636.

(2) (1937) A.C. 473.

v. *Blunt* (1), namely, that marriages which have hopelessly broken down should be dissolved. This Court has now all the facts before it and this Court should exercise its discretion in lieu of that exercised by the trial judge.

There was no appearance for the respondent.

R. V. Nevile, for the Attorney-General. The formal order made by the trial judge indicates quite clearly that he exercised the discretion vested in him by s. 25 (1). There is a significant difference between the wording of s. 2 of The *Supreme Court Act Amendment Act* 1945 (W.A.)—upon which *Main* v. *Main* (2) was based—and s. 25 (1) of *The Matrimonial Causes and Personal Status Code* 1948 (W.A.). The discretion is no longer a discretion " to refuse to decree a dissolution ". It is now a discretion " to grant or refuse relief ". Where a statute purports to confer an unfettered discretion formal rules laid down judicially and purporting to govern its exercise are apt to be misleading, and the tribunal intrusted with the discretion must be free to exercise it as it thinks fit in the light of all relevant circumstances (*Industrial Assets Ltd.* v. *Allingham* (3) ; *Donald Campbell & Co. Ltd.* v. *Pollak* (4)). The trial judge is entitled to and should consider the reasons for the parties separating and the general matrimonial conduct of the plaintiff (*Lodder* v. *Lodder* (5) ; *Mason* v. *Mason* (6)). He did so in this case. The trial judge was of the opinion that all the facts bearing on these matters had not been placed before him and he was in the best position to form such an opinion (*Thomas* v. *Thomas* (7)).

Cur. adv. vult.

Nov. 20, 1953.

The following written judgments were delivered :—

DIXON C.J. This is an appeal from a decision of *Wolff* J. refusing to grant an order for the dissolution of the appellant's marriage with the respondent. The appellant sought the order for dissolution on the ground provided by s. 15 (j) of the *Matrimonial Causes and Personal Status Code* 1948 (W.A.), namely, the ground of the separation of the parties to the marriage for a continuous period of not less than five years immediately preceding the commencement of the action where there is no reasonable likelihood of cohabitation being resumed. The action was undefended.

(1) (1943) A.C. 517.
(2) (1949) 78 C.L.R. 636.
(3) (1953) N.Z.L.R. 679.
(4) (1927) A.C. 732.
(5) (1921) N.Z.L.R. 876.
(6) (1921) N.Z.L.R. 955.
(7) (1947) A.C. 484.

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The learned judge found that the constituent elements of this ground were made out but, in the words of his Honour's formal order, " in view of the fact that the plaintiff (the appellant) had been divorced previously on the ground of failure to comply with a maintenance order and that the plaintiff had stated to the judge at the hearing that he did not know the ground on which he was divorced and the judge doubting the plaintiff's veracity generally the judge in the exercise of the court's discretion ordered that the plaintiff's claim be dismissed ".

The discretion to which the order refers is conferred by s. 25 (1) of the Code which is in the following terms :—" (1) In an action for dissolution of marriage on the ground that the parties have lived apart for a period of not less than five years immediately preceding the commencement of the action and are not likely to resume cohabitation the court may in its absolute discretion grant or refuse relief except where the court is precluded from granting relief by reason of any absolute bar : provided that in every case before granting an order nisi the court is required to see that provision is made for such maintenance of the defendant and any children and the care and custody of any such children as in the circumstances the court thinks proper ".

The appeal to this Court is based upon the contention that, having regard to the matters mentioned in the order, the discretion conferred upon the court was not properly exercised.

The marriage of which a dissolution is sought was celebrated in Perth according to the Jewish faith on 10th August 1930. The appellant then gave his age as forty-one years, his place of birth as Charsom, Russia, and his condition as divorced. The respondent gave her age as forty-five years, her place of birth as Jerusalem, Palestine, and her condition as that of a widow. Apparently she was illiterate, for she made her mark and did not sign the marriage register. The appellant said in evidence that he had lived in Western Australia for forty years. He and the respondent lived together from the time of their marriage until 15th October 1946 when they separated. He left to live in another dwelling. " My married life was not happy ", he swore, " My wife kept late hours and neglected her duties, and her attitude towards me was unbearable. She wanted me to get out ". On 7th September 1948 they executed a deed which was put in evidence. It recited that unhappy differences had arisen between them and that for the purposes of settling such differences he had agreed to pay to a trustee £440 in full settlement and discharge of all claims which his wife might then or thereafter have against him for her maintenance and support. The operative

part of the deed, to which the trustee was also a party, provided for the payment by the trustee out of the money of certain ophthalmological expenses and then a sum of £5 5s. 0d. a fortnight *dum casta*. If the respondent decided to go to Palestine the deed provided that the trustee should pay the reasonable cost of her passage and reasonable expenses and remit to her in Palestine any balance of the fund. In fact she sailed in December 1948 for Palestine, where she now is. These are in effect all the material facts which were proved on behalf of the appellant.

In answer to the learned judge, as his Honour's notes record, the appellant said: "I have been divorced before. My previous wife divorced me. I cannot tell what the grounds were". At the conclusion of the hearing his Honour made a note that he reserved the matter for consideration of the previous divorce case, the circumstances of the divorce and generally. What afterwards occurred appears from the following note made by the learned judge: "Previous divorce record searched and letter from Mr. *Curran* placed before me. I refuse to exercise my discretion, firstly because I cannot attach any credit to the plaintiff generally and it is necessary for me to feel that I have the whole truth from him before I can exercise my discretion; and secondly, even if I accepted his story I would not be prepared to grant him a dissolution in view of the circumstances of the first divorce".

The letter from Mr. *Curran*, who was the appellant's counsel, stated that on 5th October 1928, the appellant's then wife had petitioned on the ground of non-payment of maintenance and that a decree nisi was made on 28th February 1929 and a decree absolute on 30th December 1929. It seems uncertain whether *Wolff* J. himself saw the record or court file in that suit. If his Honour did so, it must have disclosed to him one or two curious facts. One is that while the decree nisi was pronounced on the ground now expressed in s. 15 (f) of the Code, namely, failure during a period of three years to make periodical payments of maintenance under an order of a competent court, yet the decree absolute was pronounced on the ground of desertion, a course of procedure of which the appellant may have been unaware, but which would otherwise be well calculated to leave him at a loss to say why he was divorced. Another fact disclosed by the file is that when on 27th July 1922 the appellant's previous marriage was solemnized at Perth, he then gave his condition as divorced and added the notation: "Berlin 30/4/22". How he came to be divorced in Berlin two months before his marriage in Perth does not of course appear. The age

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he gave, thirty-six years, makes him three years older than that given on the occasion of his later marriage.

None of these, however, are matters to which *Wolff* J. refers.

The respondent was not represented at the hearing of this appeal but on behalf of the Attorney-General, who, under s. 28 (3) or s. 29 (3) of the Code, may intervene or be represented in the Supreme Court, counsel appeared to assist this Court. He pointed out how strong is the language of s. 25 (1) in conferring a discretion upon the Supreme Court—" the Court may in its absolute discretion grant or refuse relief ". This meant that an exercise of such a discretion could not, counsel said, be made the subject of appeal unless because in some way it had miscarried, that is to say it had proceeded on inadmissible grounds.

" The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred " (*House* v. *The King* (1)). Whatever may be the case under particular statutes, it is not possible to maintain the truth as a general proposition of the view expressed by *Jordan* C.J. in *Thompson* v. *Thompson* (2) " that if an appeal lies from the exercise of a discretion which is determinative of substantive legal rights, the appellate court must exercise its own discretion " (3). But while an appellate court will not set aside the exercise of a discretion by a primary judge on the ground that it disagrees with him, it is a mistake to limit the power of the court of appeal to cases where the judge has acted on some erroneous principle of law.

(1) (1936) 55 C.L.R. 499, at pp. 504-505.

(2) (1942) 59 W.N. (N.S.W.) 219.

(3) (1942) 59 W.N. (N.S.W.), at p. 220.

" Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it " (*Evans* v. *Bartlam* (1)).

" The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified " (per Viscount *Simon* L.C., *Charles Osenton & Co.* v. *Johnston* (2)).

" If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court's discretion will have been exercised on wrong or inadequate materials " (per Viscount *Simon* L.C., *Blunt* v. *Blunt* (3); cf. *Davis* v. *Davis* (4)).

Although s. 25 (1) gives an absolute discretion, it is a judicial discretion and one depending upon considerations affecting the justice or injustice, the desirability or undesirability, the expediency or inexpediency, of maintaining the marriage union between the parties or in some other way relevant to the propriety of granting or withholding in the proceeding before the court the relief sought. In *Gardner* v. *Jay* (5) *Bowen* L.J. asked the rhetorical question— " when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so ? " (6). But while the court cannot and should

(1) (1937) A.C. 473, at p. 480.
(2) (1942) A.C. 130, at p. 138.
(3) (1943) A.C. 517, at p. 526.
(4) (1950) N.Z.L.R. 115.
(5) (1885) 29 Ch. D. 50.
(6) (1885) 29 Ch. D., at p. 58.

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not confine the discretion to "grooves" the court must from the general scope and policy of the enactment determine the purpose and subject matter to which the legislature intended that the discretion should be directed. The grounds upon which the discretion is exercisable must be limited to what is relevant to that purpose and subject matter.

Separation for a period of years became a ground of dissolution of marriage first in New Zealand. There, too, it became a ground qualified by a complete discretion in the court to refuse relief. By s. 4 of the *Divorce and Matrimonial Causes Amendment Act* 1920 of New Zealand it was enacted in substance that when a husband and wife have been separated for three years or more under a decree of judicial separation, or under a separation order made by a magistrate, or under a deed or agreement of separation, or even by mere mutual consent, either party may petition for a dissolution of the marriage, and the court may, if it thinks fit, decree a dissolution accordingly, and may as incidental to that decree exercise the same powers as if no such prior decree, order, deed, or agreement has been made or entered into. In the year following the passing of this statute Sir *John Salmond*, sitting as a primary judge, explained the policy of the provision and the purpose of the legislature in conferring the discretion. Notwithstanding the length of the passage it is desirable to quote it. The learned judge said :—" The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court as *primâ facie* a good ground for divorce. When the matrimonial relation has for that period ceased to exist *de facto*, it should, unless there are special reasons to the contrary, cease to exist *de jure* also. In general it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous. The Legislature has recognized, however, that this general principle is subject to exceptions and qualifications, and that these are so dependent on the special circumstances of the individual case that they are not capable of formulation as definite rules of law, the only resource being to leave the matter to the discretion of the Court.

In exercising this discretion the Court is to consider whether there is any special circumstance in the particular case which would render a decree of dissolution inconsistent with the public interest.

What, then, is the public danger which the Legislature intended to guard against in thus refusing to make separation for three years a ground of divorce as of right ? Clearly this : that divorce granted as of right on such a ground would tend to produce and aggravate the very evils which it was designed to cure. A system of divorce which conferred on each party to a marriage the right to transform separation by mutual consent into divorce a *vinculo matrimonii* would offer temptations sufficient to destroy many marriages which would otherwise have been happy and successful. The harmony of married life is largely due to the fact that marriage is a permanent tie which can be dissolved only for grave cause and only at the cost of public discredit to one at least of the parties. All divorce is a good thing so far as it frees the parties from an obligation which is no longer based on that mutual affection and esteem in which it had or ought to have had its origin, and restores to them the right to live their own lives and to seek happiness in the way of honour. But all divorce possesses at the same time the possibility of public mischief, inasmuch as it tends to lessen the sense of responsibility with which men and women enter into marriage, and the fidelity and contentment with which they accept and obey the obligations resulting from it. It is for this Court, in the exercise of the discretionary authority which the Legislature has seen fit to entrust to it, to weigh this private benefit to the parties against this possibility of public mischief, and to grant or refuse a dissolution accordingly.

This being so, the chief elements for consideration are the reasons for the separation between the parties and the duration of that separation. Where separation has been based on grave and sufficient grounds there will commonly be no reason of public policy for refusing a divorce. In such a case the marriage has irremediably come to an end *de facto*, and its purposes have permanently failed. It is otherwise, however, where the separation has been unjustified, being the outcome of mere levity and the wanton disregard by the parties of the obligations of the matrimonial state, or being a mere device to secure a dissolution of their marriage by mutual consent. In such a case a decree may be properly refused altogether or granted only after a period of separation substantially in excess of the minimum period of three years established by the Legislature. The longer the duration of the separation the less is the danger of public mischief ensuing from such divorce, inasmuch as the necessary delay reduces the temptation to separate for insufficient reasons or for the purpose of procuring a dissolution of the marriage " (*Lodder* v. *Lodder* (1)).

(1) (1921) N.Z.L.R. 876, at pp. 877-879.

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Sir *John Salmond* went on to consider how far the court should go in refusing a dissolution because the conduct of the party seeking relief was found to be the cause of the separation and expressed the opinion that the court should so act only in exceptional cases where the conduct or character of the petitioner was so bad that in the public interest he should not be permitted to claim a dissolution of marriage with its resulting freedom of remarriage.

In *Mason* v. *Mason* (1), Sir *John Salmond* delivered a judgment for the Court of Appeal in New Zealand in which the foregoing explanation of the statutory provisions was again expressed. The judgment reversed a decision of *Herdman* J. which had proceeded upon the ground that " the Court should not view with favour an application made by one whose misconduct has produced a state of affairs upon which he founds his application for the Court's assistance " (2). With reference to this subsidiary doctrine the legislature intervened in the following year. By s. 2 (1) of the *Divorce and Matrimonial Causes Amendment Act* 1921-1922 the following proviso was added to s. 4 of the earlier Act : " Provided that if upon the hearing of a petition under this section the respondent opposes the making of a decree of dissolution, and it is proved to the satisfaction of the court that the separation was due to the wrongful act or conduct of the petitioner, the court shall not make upon such petition a decree of dissolution of the marriage ".

The words " wrongful act or conduct " are construed in New Zealand as not confined to definite or recognized matrimonial offences but as extending to conduct which the moral standard of the community regards as blameworthy as between husband and wife : *Schlager* v. *Schlager* (3).

The Legislature in Western Australia has not seen fit to adopt the provision making wrongful conduct causing the separation an absolute bar to relief on the ground of prolonged separation. But it may be assumed, notwithstanding the views expressed by Sir *John Salmond*, that in exercising the discretion conferred by s. 25 (1) the fact that the separation has been caused by such wrongful conduct may be taken into account, weighing it with the other material elements in the case and considering it with reference to the public interest : cf. *Glasgow* v. *Glasgow* (4), where but for the imperative nature of the proviso a decree would have been made.

In other respects the explanation given by Sir *John Salmond* of the policy of the provision and the purpose of the discretion seem

(1) (1921) N.Z.L.R. 955.
(2) (1921) N.Z.L.R., at p. 957.
(3) (1924) N.Z.L.R. 1011.
(4) (1948) N.Z.L.R. 810.

to supply the general considerations upon which, under the Western Australian provision, an exercise of the discretion should proceed. But any attempt to state exhaustively the factors which may prove relevant or decisive is unlikely to escape the challenge of some unexpected combination of facts. For example, in *Thomson* v. *Thomson* (1), a case arose where obviously the most important factor was the right of the wife, if the marriage stood, to claim on her husband's death an order under the *Family Protection Act* 1908 of New Zealand for maintenance out of his estate. The husband had married her when she was seventeen years of age and he fifty-four. They had several children. At the age of seventy-four he petitioned on the ground of three years' separation, she then being thirty-seven years of age. A dissolution was refused: cf. *Southee* v. *Southee* (2).

In *Main* v. *Main* (3), which was decided shortly after the Code received the Royal assent, but upon the corresponding previous provisions, this Court briefly discussed the scope of the discretion in a passage which remains applicable in spite of the verbal differences between the Code and the previous provision. The Court said: "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* (4)), but it must be exercised judicially and not on grounds unconnected with the subject-matter of the proceedings between the parties: *Blunt* v. *Blunt* (5); *Osenton* v. *Johnston* (6). In 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" (7).

On the form of the previous provisions, the Court decided in that case that the burden was not on the party seeking a dissolution on the ground of a prolonged separation to show that special grounds exist justifying the use of a discretion to grant a decree, but that once the facts are proved bringing the case within the prescribed conditions constituting that ground of divorce then subject to any other bar a decree for dissolution should be pronounced unless the court affirmatively concluded on discretionary grounds that a decree ought to be refused.

In s. 15 (j) and s. 25 (1) of the Code the form of the legislation is somewhat different. The discretion is not given by means of a proviso. But the result seems to be substantially the same. Section

(1) (1946) N.Z.L.R. 265.
(2) (1947) N.Z.L.R. 378.
(3) (1949) 78 C.L.R. 636.
(4) (1937) A.C. 473.
(5) (1943) A.C. 517.
(6) (1942) A.C. 130.
(7) (1949) 78 C.L.R., at pp. 643-644.

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15 begins "Subject to the absolute and discretionary bars hereinafter set out the court may grant any married person an order for dissolution of his or her marriage on any of the following grounds". One of the grounds then enumerated is five years' separation as defined in par. (j). Section 25 (1) as part of an independent section then confers the discretion.

It seems to follow that if the constituent elements of the ground described in par. (j) of s. 15 are made out and no more appears, an order or decree of dissolution should be pronounced. When relief under s. 15 (j) is sought it is to the facts constituting that ground that ss. 31 and 34 apply. If additional facts appear or, in a defended suit, are proved by or on behalf of the other spouse, and are relevant to the policy or purpose of the provision and form adequate materials for the exercise of the discretion (cf. per Lord *Simon*, *Blunt* v. *Blunt* (1)) it then becomes a question of the judge's discretion to grant or refuse relief. If the judge is dissatisfied with the information disclosed to him, it is of course open to him to inquire into the facts by every means the judicial process permits. If in the end he is satisfied that material facts are still being withheld or that such facts are not being truly or fully stated, this may be enough ground for his exercising his discretion against the party seeking relief under s. 15 (j). But there is a great risk of injustice if relief is refused because of doubts or suspicions about the candour or credibility of the party, although an inquiry into the facts with a view of clearing them up has not been pursued to a conclusion.

In the present case it is easy to understand the difficulty which the learned judge felt in depending upon the plaintiff's veracity. But as the record before him stood at the end of the case the materials for his exercising his discretion against granting relief were very slender. Indeed it is perhaps not entirely without significance that his Honour speaks of its being necessary to feel that he has the whole truth from the plaintiff *before* he exercises discretion and of his not being *prepared*, in view of the circumstances of the first divorce, *to grant* him a dissolution. His Honour does not say *totidem in verbis* that he exercises, positively, a discretion to refuse a dissolution. The fact that the personal credibility of a man is low whether because of his natural character or his past conduct is not in itself a reason why his marriage should not be dissolved. Nor is it enough by itself that once before he was divorced. The general considerations upon which an exercise of the discretion should proceed remain the same. In ascertaining the facts to which

(1) (1943) A.C., at p. 526.

these considerations apply the credibility of the party as a witness must of course be weighed, but it is only when the court concludes that an inquiry into the truth has failed because of his evasions or dissemblings as a witness that it really becomes material to the exercise of the discretion.

Here the elucidation of the facts relating to the breakdown of the marriage of which dissolution is sought and of the relations between the parties before its breakdown does not seem to have been carried very far. The inquiry into the matrimonial history of the appellant before that marriage seems to have been limited to the single question of the ground of his divorce. The materials for exercising a discretion to refuse a dissolution as the case was left were indeed scanty and an appreciable risk existed of its being unjust to the appellant to do so. This in short is a case of the kind described by Lord *Simon* in the passage already quoted from his opinion in *Blunt* v. *Blunt* (1), namely one where the discretion seems to have been exercised on inadequate materials. It is a case where the appellate court sees that the decision may result in injustice being done. Lord *Atkin* in that part of his opinion in *Evans* v. *Bartlam* (2) to which reference has been made, speaks of cases where the court sees that on other grounds than grounds of law, the decision will result in injustice. But to justify an order for a new and further investigation of the case it must be enough that it can be seen that on the inadequate materials before the court it may so result. This is not a case where this Court ought without more to proceed to exercise a discretion of its own in lieu of that exercised by the learned judge. The case is one for a fresh investigation carried further into the possible grounds for a discretionary refusal of a dissolution.

The proper remedy is a new trial or rehearing of the action The order will be that the appeal be allowed, that the order of *Wolff* J. be discharged, and that a new trial of the action be had. The order will include a direction that the appellant do cause an office copy of this order to be served on the respondent by prepaid air mail letter sent to her at her last known address in Palestine or care of her legal adviser at his address in Palestine.

WEBB J. I would order a new trial for the reasons given by the Chief Justice.

Counsel for the appellant husband submitted that a judge in the exercise of the absolute discretion given by s. 25 (1) of the Western Australian *Matrimonial Causes and Personal Status Code*

(1) (1943) A.C., at p. 526. (2) (1937) A.C. 473.

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1948 is limited to a consideration of matters which are required by the rules of procedure made by the judges under s. 62 of the Act to be included in the affidavit verifying the petition. But this statutory discretion cannot be so limited as it is not expressed to be subject to such rules.

As stated by *Salmond* J. in *Lodder* v. *Lodder* (1) and approved by the New Zealand Court of Appeal in *Mason* v. *Mason* (2), a chief element for consideration in determining whether to grant or refuse a dissolution of marriage under s. 15 (j) of the Act is the reason for the separation. I venture to say, with respect, that *Wolff* J. did not overlook this element. It was no doubt recognized by his Honour that for the purpose of the proper exercise of his discretion under s. 25 he should ascertain whether and to what extent the appellant was responsible for the separation. If responsible that would not necessarily conclude the matter, as there might still be circumstances which would render it proper that the divorce should be granted, e.g., if the appellant was responsible for the separation but the respondent wife showed no great desire that the separation should terminate. Now if the appellant had proved to be unworthy of credence in these undefended divorce proceedings, the learned judge would naturally have found it impossible to be satisfied as to the respective parts played by the husband and wife in bringing about the separation and in its continuance, and for that reason might properly exercise his discretion against granting a divorce.

But I am not satisfied that the appellant was untruthful because he told his Honour that he could not tell what were the grounds of his divorce in 1929. As stated by the Chief Justice, the decree nisi was pronounced on one ground and the decree absolute on another ground in that divorce. So that what appeared to *Wolff* J. to be an untruthful answer would have proved on investigation not to have been necessarily so.

It appears then that *Wolff* J., not having read the two orders of the court in the earlier divorce proceedings, was prematurely satisfied that the appellant was untruthful and that this made it useless to pursue further the investigation necessary to secure the facts required for the proper exercise of the discretion given by s. 25 and thus prevented his Honour from granting a divorce.

In the result then *Wolff* J. exercised his discretion without having sufficient materials before him. As it cannot be said, at this stage at all events, that this was due to the appellant's fault the only course open seems to be to order a new trial.

(1) (1921) N.Z.L.R. 876, at p. 878. (2) (1921) N.Z.L.R. 955.

TAYLOR J. For the reasons given by the Chief Justice, with which I entirely agree, I am of the opinion that there must be a new trial in this matter.

Appeal allowed. Discharge the judgment or order appealed from. Order that a new trial of the action be had. Direct that this order be drawn up forthwith and that within fourteen days of its being passed and entered the plaintiff-appellant do cause an office copy thereof to be despatched by air mail letter directed to the respondent at her last known address in Palestine or care of her legal adviser at his address in Palestine as appearing from his correspondence with the appellant's solicitor.

Solicitor for the appellant, *Fred Curran.*

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

F. T. P. B.