[HIGH COURT OF AUSTRALIA.]

RIEBE . . . . . APPELLANT;
DEFENDANT,

AND

RIEBE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1957.

PERTH, *Sept.* 17, 18;

MELBOURNE, *Oct.* 15.

Dixon C.J., Webb and Taylor JJ.

Matrimonial causes—Appeal from decision dismissing claim for dissolution of marriage—Jurisdiction—Dissolution of marriage—Adultery—Appeal—Interference by Full Court with finding of fact made by trial judge—Matrimonial Causes and Personal Status Code 1948-1954 (*W.A.*), *ss.* 3 (*i*), 51—*Supreme Court Act* 1935 (*W.A.*), *ss.* 16 (2), 58 (1), 59 (1), 60 (1).

Section 51 of the *Matrimonial Causes and Personal Status Code* 1948 (W.A.) provides:—"(1) Every order for dissolution of marriage or nullity of marriage or judicial separation or any other order made in any intervention proceeding or by way of ancilliary relief in any action may be appealed against on grounds of fact or law or both by any party bound by the order within three calendar months of the date of the order provided that there shall be no appeal from any final dissolution of marriage by any party who failed to appeal against any order nisi on which such order was founded unless such failure was due to such party having had no knowledge that the action had been taken, or, if the fact that the action having been taken did come to his knowledge, he did not have reasonable opportunity of appealing and defending his rights or contesting any fact in issue raised against him."

Held, that the right of appeal conferred by the sub-section is limited to one against an order granting relief, and, accordingly, no appeal lies against an order dismissing an action for dissolution of marriage except in so far as such an order may be made in intervention proceedings.

As a result of the passing of the *Matrimonial Causes and Personal Status Code* 1948 (W.A.) no appellate jurisdiction in matrimonial causes now remains vested in the Supreme Court of Western Australia under the *Supreme Court Act* 1935 (W.A.).

The history of the appellate jurisdiction of the Supreme Court of Western Australia in matrimonial causes, reviewed.

The position of an appellate court in relation to the review of findings of fact made by a primary judge, considered.

Paterson v. *Paterson* (1953) 89 C.L.R. 212; *Benmax* v. *Austin Motor Co. Ltd.* (1955) A.C. 370 and *S.S. Hontestroom* v. *S.S. Sagaporack* (1927) A.C. 37, referred to.

Decision of the Supreme Court of Western Australia (Full Court) (1957) 58 W.A.L.R. 69, reversed.

APPEAL from the Supreme Court of Western Australia.

Charles Frederick Riebe issued a writ dated 6th August 1956 out of the Supreme Court of Western Australia claiming dissolution of his marriage with Beryl Davide Power Riebe on the ground that she had committed adultery with George Wilson. The action which was defended by both the defendant and the co-defendant, was heard by *Jackson* J. who dismissed it.

From this decision the plaintiff appealed to the Full Court of the Supreme Court of Western Australia (*Dwyer* C.J., *Wolff* S.P.J., and *Virtue* J.). On the hearing of this appeal both the defendant and the co-defendant appeared and as a primary point submitted that the Full Court had no jurisdiction on appeal from an order dismissing a claim for dissolution of marriage. This submission failed. The Full Court (*Dwyer* C.J. dissenting) drew inferences of fact in favour of the plaintiff and allowed the appeal and made an order nisi for a dissolution of marriage.

From this decision the defendant appealed to the High Court. The co-defendant did not appeal.

The material facts appear in the judgment hereunder.

H. T. Stables (with him *J. C. Martin*) for the appellant. The Full Court had no jurisdiction to make the order under appeal. The Full Court had no jurisdiction on appeal from "decrees" in matrimonial causes prior to the *Appellate Jurisdiction Act* 1911: see *Anderson* v. *Anderson* (1); *Thompson* v. *Thompson* (2). The provisions of that Act were repealed and substantially re-enacted in Pt. VI (ss. 111-115) of the *Supreme Court Act* 1935 (W.A.). Part VI of the *Supreme Court Act* was in turn repealed by s. 3 of the *Matrimonial Causes and Personal Status Code* 1948-1954 (W.A.). There is now no statutory basis for any appellate jurisdiction in the Full Court in matrimonial causes. The *Matrimonial Causes and Personal Status Code* is, as its name implies, a codification of

(1) (1903) 6 W.A.L.R. 8. (2) (1909) 11 W.A.L.R. 137.

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the law of Western Australia relative to matrimonial causes and it contains in Pt. V new restricted and exhaustive provisions relating to the jurisdiction of the Full Court on appeal from orders made under it. Section 51 of the Code gives no right of appeal from an order dismissing a claim for dissolution of marriage. The failure to re-enact provisions similar to s. 115 of the *Supreme Court Act* and s. 8 of the *Appellate Jurisdiction Act* 1911 (W.A.) was deliberate. The words contained in s. 51 (1) of the Code are unambiguous and effect must be given to them notwithstanding that some incongruities may result. Part V of the *Supreme Court Act* does not confer jurisdiction. The Part is only concerned with the distribution of business. The majority of the Full Court in disagreeing with the primary judge purported to draw inferences from facts which which had not been established in the court of appeal. The trial judge's decision is largely based upon his assessment of the parties as witnesses. He was not satisfied (as he is required to be by s. 25 (3) of the Code) that the plaintiff did prove the ground upon which relief was sought and his decision should not be interfered with. [He referred to *Paterson* v. *Paterson* (1).]

F. T. P. Burt (with him *R. C. Witcombe*), for the respondent. Section 51 of the *Matrimonial Causes and Personal Status Code* 1948-1954 (W.A.) is not an exhaustive statement of the jurisdiction of the Full Court of the Supreme Court on appeal from orders made thereunder. Were it so the Full Court would have no jurisdiction on appeal from declarations as to personal status made under Pt. II (6) of the Code or from orders made under claims joined with a claim for dissolution of marriage under s. 12 of the Code. Part IV of the *Supreme Court Act* 1935 was in no way affected by the Code. This Part is not only concerned with the distribution of court business. By s. 58 of that Act the Full Court is given jurisdiction to " hear and determine . . . " appeals from a judge whether sitting in court or in chambers. This involves a grant of jurisdiction : cf. s. 26 of the *Supreme Court of Judicature (Consolidation) Act* 1925 (Imp.) ; *Latey* on *Divorce*, 13th ed. (1945), p. 306. Section 59 of the *Supreme Court Act* is also jurisdictional and by it the Supreme Court has jurisdiction to set aside or vary a verdict given by a judge " in any cause " or " matter ". These words are defined in s. 4 of the *Supreme Court Act* and they are sufficiently wide to embrace an action for dissolution of marriage. It is significant that s. 60 (1) (f) (iv) of the *Supreme Court Act* was not repealed by the Code and this section assumes jurisdiction in the Full Court to hear appeals from a

(1) (1953) 89 C.L.R. 212.

judgment or order granting or refusing a decree nisi in matrimonial causes. Notwithstanding the repeal by s. 3 of the *Supreme Court Act* of the *Appellate Jurisdiction Act* 1911 the provisions . . . of that Act have been preserved to confer jurisdiction on the Full Court in appeals in matrimonial causes. Section 16 (2) of the *Supreme Court Act* must be read with s. 21 (1) of that Act. The latter section contemplates the future exercise by the Full Court of appellate jurisdiction vested in that court by an Act repealed by the *Supreme Court Act*. To enable this section to be read with s. 16 the words " is not repealed " must be read as meaning " immediately before the commencement of this Act is not repealed ". If the section is not interpreted in this way it has nothing upon which to operate because all Acts conferring in general terms appellate jurisdiction on the Full Court were repealed by s. 3 of the *Supreme Court Act* and in so far as any Act conferring such jurisdiction in a particular case was then in existence and not repealed the section would not be necessary. The majority of the Full Court drew inferences from the proved or admitted facts. The inferences so drawn were the only inferences which could be drawn and the conclusion that the relationship between the defendant and the co-defendant was an adulterous one should not be interfered with. [He referred to *Dearman* v. *Dearman* (1); *Paterson* v. *Paterson* (2); *London Bank of Australia Ltd.* v. *Kendall* (3); *Scott* v. *Pauly* (4); *Coghlan* v. *Cumberland* (5); *Benmax* v. *Austin Motor Co. Ltd.* (6); *Watt* v. *Thomas* (7).]

H. T. Stables, in reply.

Cur. adv. vult.

Oct. 15.

THE COURT delivered the following written judgment :—

This is an appeal from an order of the Full Court of the Supreme Court of Western Australia reversing a judgment of *Jackson* J. which dismissed an action for dissolution of marriage. Before the Full Court of the Supreme Court an objection was taken that under the law of Western Australia no appeal lies from a judgment dismissing an action for dissolution of marriage. The law of Western Australia relating to divorce and matrimonial causes is now embodied in the *Matrimonial Causes and Personal Status Code* 1948 (No. 73 of 1948). The long title of this statute is " An Act to amend and codify the law relating to matrimonial causes and to declarations

(1) (1908) 7 C.L.R. 549.
(2) (1953) 89 C.L.R. 212.
(3) (1920) 28 C.L.R. 401.
(4) (1917) 24 C.L.R. 274.
(5) (1898) 1 Ch. 704.
(6) (1955) A.C. 370.
(7) (1947) A.C. 484.

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of personal status and for other purposes incidental thereto". Part V of that Act is headed "Right of appeal, rehearing and new trial". The Part begins with s. 51 (1). That section provides that every order for dissolution of marriage or nullity of marriage or judicial separation or any other order made in any intervention proceeding or by way of ancillary relief in any action may be appealed against on grounds of fact or law or both by any party bound by the order within three calendar months of the date of the order. The sub-section goes on to enact a proviso that there shall be no appeal from any final dissolution of marriage by any party who failed to appeal against any order nisi on which such order was founded unless such failure be due to such party having had no knowledge that the action had been taken, or, if the fact of the action having been taken did come to his knowledge, he did not have reasonable opportunity of appealing and defending his rights or contesting any fact in issue raised against him. Sub-section (2) of s. 51 deals with procedure and principles affecting the appeal. Section 52 states the power of the Full Court in exercising its appellate jurisdiction. It will be seen that this provision does not extend to orders or judgments refusing relief by way of dissolution or nullity of marriage except in so far as they may be made in intervention proceedings. As the statute is a code it was contended that the provisions relating to appeals which it contained were exhaustive and that it was impossible to look elsewhere to find such a right of appeal. Before the passing of the *Matrimonial Causes and Personal Status Code* 1948 (W.A.) the jurisdiction of the Supreme Court in Matrimonial Causes was contained in Pt. VI of the *Supreme Court Act* 1935 (W.A.). That statute was itself an Act to consolidate and amend the law relating to the Supreme Court. Part VI, Div. 5, contained provisions for appeals in matrimonial causes. Section 111, which is the first section of that division, provided that subject to rules of court, and as thereinafter provided, the Full Court should have jurisdiction to hear and determine an appeal from every judgment, decree, and order made by the judge in a matrimonial cause, whether in court or in chambers. Other sections of the division provide for new trials, for the powers of the court to be exercised on appeal, and for the making of rules of court imposing conditions and restrictions in relation thereto. Section 114 provides that no appeal from an order absolute for dissolution or nullity of marriage shall lie in favour of any person who, having had time and opportunity to appeal to the Full Court from the decree nisi on which such order may be founded, shall not have appealed therefrom. As will be seen, that is the precursor of the proviso

to s. 51 of the *Matrimonial Causes and Personal Status Code* 1948 (W.A.). It will be observed that s. 111 accorded full right of appeal to either party in a matrimonial cause. That is to say an appeal lay against the grant of relief and an appeal lay against the refusal of relief. *Prima facie* the repeal of Pt. VI of the *Supreme Court Act* and its replacement only by s. 51 of the *Matrimonial Causes and Personal Status Code* 1948 would seem to mean that the right of appeal against the refusal of relief had gone. But to avoid this result reliance has been placed upon other provisions of the *Supreme Court Act*.

Section 58 (1) of the *Supreme Court Act* 1935 (W.A.) provides that subject as otherwise provided in the Act and to rules of court, the Full Court shall hear and determine certain matters which the section proceeds to specify. The section forms portion of Pt. IV which is headed " Sittings and distribution of business ". Included in the list in s. 58 (1) under par. (b) are appeals from a judge whether sitting in court or in chambers. Section 59 (1) provides that in any cause or matter in which a verdict has been found by a jury, or by a judge without a jury, or by referees, or by a judge sitting with assessors, the Full Court may order a new trial or reference, or vary or set aside such verdict, or reduce the damages awarded. Section 60 (1) provides that no appeal shall lie to the Full Court in certain matters which are enumerated in the sub-section. Paragraph (f) of the enumeration includes interlocutory orders or judgments given by a judge and provides that there shall be no such appeal without the leave of the judge or the Full Court. The paragraph then proceeds to except from this limitation a list of matters, one of which is, " (iv) the granting or refusal of a decree nisi in matrimonial cause " (*sic*). Section 19 of the *Supreme Court Act* provides that, subject to the provisions of Pt. VI of the Act, the Supreme Court shall have in Western Australia, stated briefly, the same jurisdiction as that conferred on the Court for Divorce and Matrimonial Causes in England under the *Matrimonial Causes Act* of 1857. The section concludes by providing that the Supreme Court shall have all such jurisdiction in relation to divorce and other matrimonial causes as before the commencement of that Act was vested in or capable of being exercised by the Supreme Court and as enacted in Pt. VI of the Act. Paragraph (e) of sub-s. (1) of s. 16 invested the Supreme Court with all the jurisdictions which were vested in or capable of being exercised by the Supreme Court of Western Australia, and the Court for Divorce and Matrimonial Causes, at the commencement of the *Supreme Court Act* 1880. By s. 3 of the *Matrimonial Causes and Personal*

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Status Code 1948 (W.A.) the provisions of par. (e) of sub-s. (1) of s. 16, s. 19 and the whole of Pt. VI were repealed, but the provisions of ss. 58, 59 and 60 were left untouched. Also left untouched were the provisions of s. 16 (2). That sub-section provides that there shall be vested in the Supreme Court and the judges thereof all original and appellate jurisdiction which under and by virtue of any statute which came into force in Western Australia after the commencement of the *Supreme Court Act* 1880, and is not repealed, was immediately before the commencement of this Act vested in or capable of being exercised by the court or a judge thereof, and such other jurisdiction as by and under this Act or any subsequent statute is conferred on or vested in the court and the judges thereof. Under this provision and the provisions of s. 58 (1) (b), assisted by s. 60 (1) (f) (iv), it was argued that notwithstanding the provisions of s. 51 of the *Matrimonial Causes and Personal Status Code* 1948 (W.A.) and the repeal by s. 3 of that Act of Pt. VI of the *Supreme Court Act* as well as of s. 16 (1) (e) and s. 19, a general power of appeal continued to exist which suffices to support the right of appeal to the Full Court from the refusal by *Jackson* J. of relief in the action. The three judges of the Full Supreme Court accepted this contention.

In support of the appeal from the judgment of the Full Court reversing that of *Jackson* J. the objection to the jurisdiction of the Full Court was renewed before us. Before dealing with the argument based upon ss. 58 (1) (b), 59 (1) and 60 (1) (f) (iv) and s. 16 (2) it is desirable briefly to state the history in Western Australia of appeals in matrimonial causes. This necessitates some reference to the history of the general right of appeal. The Supreme Court of Western Australia was established by the *Supreme Court Ordinance* 1861. At that time it was to be constituted by one judge, namely the Chief Justice: s. 4. By s. 30 the Governor in Executive Council was required from time to time to hold a court to be called the Court of Appeal of Western Australia. That court was to have power, in all such cases as might under an immediately preceding provision be made the subject of appeals to the Privy Council, to receive and hear appeals from final judgments, decrees and orders of a civil nature of the Supreme Court. Section 30 went on to make further incidental provisions in relation to the appeals. This provision, it will be observed, is analogous to that which existed in South Australia, a provision which was to some extent discussed in *Miller* v. *Teale* (1). No jurisdiction in divorce existed until there was passed the *Administration of Justice (Divorce*

(1) (1954) 92 C.L.R. 406, at p. 412.

and Matrimonial Causes) Ordinance 1863 (27 Vict. No. 19). Section 1 of that Ordinance conferred upon a new court thereby established to be called a Court of Divorce and Matrimonial Causes, the same jurisdiction as that exercisable by the Court of Divorce and Matrimonial Causes in England constituted under 20 & 21 Vict., c. 85. It will be seen that that is the original provision repeated in the *Supreme Court Act* 1935 (W.A.) by s. 19, a section which was repealed, as has been already stated, by the *Matrimonial Causes and Personal Status Code* 1948. By s. 3 of the Ordinance the Chief Justice of Western Australia was made the judge of the court. By s. 61 of the Ordinance either party dissatisfied with the decision of the court on any petition for the dissolution of marriage or any petition for nullity of marriage might, within three months after the pronouncement thereof, appeal to the Court of Appeal of Western Australia established under the provisions of the *Supreme Court Ordinance* 1861 (*scil.* by s. 30). By the *Supreme Court Act* 1880 (44 Vict. No. 10) the Supreme Court and the Court of Divorce and Matrimonial Causes were united in the Supreme Court (s. 3). The Supreme Court was to possess the jurisdiction of both courts (s. 5). There was to be one judge of the Supreme Court but other judges might thereafter be appointed by the Queen. Section 15 provided that all business of the said court which according to the law or practice then existing would have been proper to be transacted or disposed of by the Chief Justice sitting *in banco* should continue to be so transacted, subject to any rules of court, until the number of judges of the said court should be increased, and thereafter such business should be transacted or disposed of by any two or more judges of the said court; and the Chief Justice or the judges of the Supreme Court so sitting *in banco* should be designated as "the full Court". It may be remarked that the *Supreme Court Act* 1880 contained the provisions of the *Judicature Act* 1873 of the United Kingdom. Then followed the *Supreme Court Act* 1886, the purpose of which appeared from the preamble which recited that by the *Supreme Court Act* 1880 due provision had not been made for the purpose of facilitating appeals in bankruptcy and other matters to the Full Court. The Act provided that the Full Court as constituted by the *Supreme Court Act* 1880 should be a court of appeal and should have jurisdiction and power to hear and determine appeals from any judgment or order of the Supreme Court or of any judges or judge thereof, subject to the provisions of the said Act and to such rules and orders of the court now in force for regulating the terms and conditions on which appeals should be allowed or as might from time to time be made

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in accordance with the provisions of the said Act. It will be noticed that under this provision the appellate jurisdiction of the Full Court is described as relating to "any judgment or order of the Supreme Court or of any judge or judges thereof". These words do not, according to their legal meaning, include a decree in divorce. This was referred to by Sir *Robert McMillan* J. in *Anderson* v. *Anderson* (1). His Honour said: "I can find no words in any of the local Acts which enable this Court to sit as a Court of Appeal in divorce matters excepting in s. 61 of the *Divorce Act*, 1863" (2). It is not very material, but it should be pointed out that the exception is not quite accurately stated by his Honour. For s. 61 did not confer appellate jurisdiction on the Supreme Court but only on the Court of Appeal of Western Australia consisting of the Governor in Council. The same point was developed in *Thompson* v. *Thompson* (3), a decision of the Full Court. Sir *Robert McMillan* J., who gave the judgment of the court said: "There is no reference to be found to decrees, and we should have to say that in the absence of the proper word for the result of a divorce petition the Legislature still intended to bring divorce cases in under these general words, 'all other matters'. I think that the Legislature had no such intention. In all probability this point was overlooked" (4). As a consequence of these decisions the *Appellate Jurisdiction Act* 1911 (No. 4 of 1912) was passed. By s. 2 of this Act it was provided that the Full Court shall, subject to this Act and rules of court, have jurisdiction to hear and determine an appeal from every judgment, decree, and order, final or interlocutory, hereafter, or within three months before the commencement of this Act, given or made by a judge in a matrimonial cause, whether in court or in chambers. The succeeding sections of the Act provided for the granting of new trials, setting aside of verdicts of juries and the powers which the Full Court may exercise in its appellate jurisdiction. The Court of Appeal of Western Australia consisting of the Governor in Council was abolished. Section 7 repealed s. 30 of the *Supreme Court Ordinance* 1861 and s. 61 of the Act of 27 Vict. (No. 19). It will be seen that this Act is the origin of Pt. VI, Div. 5 of the *Supreme Court Act* 1935. But a consideration of its history makes it clear enough that jurisdiction depended upon s. 111 of the *Supreme Court Act*. In the enactment of s. 58 (1) (b) of the *Supreme Court Act* it seems reasonably clear that no more was intended than to provide for the distribution of business, as the heading of the Part in which the section stands

(1) (1903) 6 W.A.L.R. 8.
(2) (1903) 6 W.A.L.R., at p. 9.
(3) (1909) 11 W.A.L.R. 137.
(4) (1909) 11 W.A.L.R., at p. 140.

seems to show. It seems clear too that the exception contained in s. 60 (1) (f) (iv) was intended to take into account the existence of the jurisdiction given by s. 111 and to make it clear that orders nisi were not to be treated as interlocutory so that leave to appeal would be necessary. It can go no further. Section 59 (1) may be put aside. For in terms it relates only to verdicts found by a jury or by a judge sitting without a jury and does not extend to decrees. It is true that in the *Supreme Court Act* 1935 there is no difficulty, where the word " judgment " occurs, in giving it a meaning which includes " decree "; for s. 4 defines " judgment " to include " decree ". But the difficulty is deeper than that. It is that neither s. 58 nor s. 60 is concerned with conferring jurisdiction in matrimonial causes. That was done by Div. 5 of Pt. VI. Subsection (2) of s. 16 seems to have been introduced into the *Supreme Court Act* 1935 by analogy from the *Supreme Court of Judicature (Consolidation) Act* 1925 (Imp.), s. 18 (2) (*b*) and (*c*). It is not easily construed but it would seem that the words " is not repealed " mean " is not repealed by this Act or by some previous Act ". If that is its meaning it has no relevance, for all the provisions on which Div. 5 of Pt. VI is founded were repealed by the *Supreme Court Act*. In short it would appear that in drafting s. 51 of the *Matrimonial Causes and Personal Status Code* 1948, appeal was limited, whether advisedly or not, to decrees granting relief. To disregard the repeal of Div. 5 of Pt. VI and find in the provisions of ss. 16 (2), 58 (1) (b), 59 (1) and 60 (1) (f) (iv) a general right of appeal is to give these provisions a new construction which they did not bear in the Act as passed and to disregard the special nature of the code.

It follows that the order made by the Full Court of the Supreme Court of Western Australia reversing the order of *Jackson* J. cannot stand. An appeal however lay directly to this Court from the order of *Jackson* J. under s. 35 (1) (*a*) (3) of the *Judiciary Act* 1903-1955 and it would now be open to us if we thought fit to grant special leave to appeal to the present respondent who, mistakenly as it turns out, appealed to the Full Supreme Court. We heard a full argument on the facts and if we thought that justice required it we are in a position to grant special leave and treat the hearing as the hearing of an appeal pursuant to such special leave.

The Full Court by a majority (*Wolff* S.P.J. and *Virtue* J., *Dwyer* C.J. dissenting) reversed the judgment of *Jackson* J. dismissing the action not because their Honours considered that the judgment of *Jackson* J. was based upon any error of law but on the ground that the evidence satisfactorily established the truth of the plaintiff's

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main case and that the learned judge should have found accordingly. It is a husband's suit and his main case was that the defendant, his wife, had been living in adultery with the co-defendant. Their answer was that though she and her children lived in the co-defendant's house she simply kept house for him and had no guilty relation with him. *Jackson* J. was not satisfied that the relation was a guilty one. The majority of the Full Court held that he ought so to have been satisfied.

From the reversal of the judgment of *Jackson* J. by which she was acquitted of adultery the defendant wife now appeals to us. Her appeal is supported on the ground that, the learned judge having had the advantage of seeing and hearing the witnesses and having duly applied his mind to the question whether an inference of guilt should be drawn, his conclusion that such a finding ought not to be made was one with which it was wrong for a court of appeal to interfere. It will be seen therefore that the case is another example of the ever-recurring question how far a court of appeal is justified in going in reviewing a finding of fact made on oral evidence. It will not be necessary to state more than the general circumstances of the case and the nature of the inculpatory evidence. It appears that the plaintiff and the defendant were married on 4th March 1948. He was thirty-one years of age; she was thirty. He is described as a bachelor. But she had been a party to a previous marriage which had been dissolved. By her former marriage she had a son who was born on 27th February 1940 and was thus sixteen years of age at the time of the trial. But after that she had two illegitimate children, daughters, one said to have been born on 11th February 1944 and the other on 15th October 1944. These children the plaintiff and defendant adopted by adoption orders made two years after they had married. Of the marriage there were two children, a daughter born on 14th October 1948 and a son born on 14th January 1951.

The material events may be taken to begin about the end of August 1955. It would seem that until the events to be mentioned, the plaintiff, whose occupation is given as civil servant, maintained in one or another suburb of Perth a family dwelling where they all lived. In August 1955 after a quarrel about some not very important matter, the defendant threatened that she would leave her husband. Needless to say there had been difficulties between them. In the discussion that followed she said she did not want to depend on her husband for her keep and she wanted to take some one as a boarder who would pay her rent and give her some independence. Her brother was mentioned and then she suggested that

the co-defendant Wilson might come. He was described as an "old" or "elderly" man. He had boarded with her mother but they had last seen him earlier in the year. He had left Perth in July to visit the eastern States. While there he had written letters to both of them. The plaintiff had seen the letters and they contained nothing to take exception to. Apparently they knew that Wilson was returning from his visit. The upshot was that the defendant wrote asking Wilson if he would agree to such an arrangement and on 9th September 1955 he arrived in Perth to live with them. He slept in the same room as the defendant's eldest son. According to the plaintiff's case the defendant displayed too much interest in Wilson. She went to meet Wilson on his arrival although it was in the small hours of the morning. She made much of him, embraced him, reclined on his bed, and behaved familiarly. In evidence the defendant and Wilson met these incidents with denials or innocent explanations. The plaintiff however remonstrated with them and told Wilson to go. On the following day, 14th October 1955, he left. On the same day the defendant betook herself and her children, except her eldest boy, to a neighbour and refused to return. Wilson seems to have proposed a little earlier to both of them that he should start a business (he was a french polisher) and that the defendant should keep house for him and answer the telephone when it was installed. She says that she now asked Wilson if the offer still stood and that she accepted it. He took a house (which later he left for another) and there the defendant established herself and her four children.

Wilson's account of the arrangement is as follows—"I told Mrs. Riebe (the defendant) I was leaving (i.e. the plaintiff's house) and asked her what she was going to do. . . . Mrs. Riebe said she was taking the children. I said, 'How are you going to earn a living?' I then said I would look round for a house, that I was going to engage a housekeeper and that she could have the job if she wanted it. I said I would supply all the money for housekeeping purposes. I wanted someone to answer the phone when I was taking private business and out on jobs. . . . I told Riebe I was taking the house and he knew his wife was leaving him. He made no objection to her coming as housekeeper to me. At first he used to visit us and stay to tea." It appears that the plaintiff helped in moving his wife's furniture into the house and again when it was moved to another house and he concedes that he did visit Wilson's house and that he had meals with his wife and with Wilson there. In December 1955 the defendant proposed to the plaintiff that he should obtain a divorce from her and offered to give him grounds for a divorce.

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That evening he wrote her a letter beginning "From your hurry to get a divorce I gather I am no further use to you other than a source of income so I will not enter your house again." The reference is to a weekly payment of £15 he made for the children. His letter goes on to speak about her promising that the children might come to him when he wanted them; to express resentment at his being treated as a convenience to be cast aside and to say that he was inclined to let her wait her turn and do her own dirty work, presumably meaning that he eventually could apply for a divorce on the ground of desertion.

To this she wrote a long reply dealing at length with each point in his letter. She denied hurrying for a divorce but in effect said that as the marriage had not worked it should be dissolved. She said that only at his insistence had she accepted maintenance for the children and because they needed clothing when she had left, and so on. As to the party to move for a divorce, she wrote in effect that her husband and his mother had given her such a bad character that she would have little to lose. Accordingly she was prepared to adopt the course of spreading the whole issue for public viewing. She had offered, she wrote, "to keep the dirt on myself by letting you do it undefended by myself". That apparently she would no longer agree to do. The letter goes on to blame him for the separation and trace the causes. He replied on 12th January 1956 saying in substance that he knew reconciliation was impossible and he would try for a divorce as soon as he could. He would reduce the maintenance to £10 a week. Matters apparently went on thus until June 1956. On 20th June the defendant wrote the plaintiff a long letter telling him that she had seen a magistrate about the children and their maintenance and that he had advised her to issue a summons seeking custody and maintenance which she had done. The letter then goes over their mutual relations. Moved apparently by the issue of this summons, the plaintiff engaged a private inquiry agent who proceeded to watch the house. On the night of 9th July 1956 the agent with the plaintiff entered the house shortly after half-past eleven. There was of course a scene and at the trial contradictory evidence was given of what was said and done. *Jackson* J. was quite satisfied that adultery did not take place on that night. After stating that he accepted without hesitation the evidence of certain witnesses supporting the conclusion including that of Wilson, *Jackson* J. said—"Some of the wife's actions on that occasion were equivocal and I am inclined to believe that at that stage she was prepared to allow the co-defendant to be implicated, contrary to the truth,

in order that she might be divorced from her husband. I think it true that she later repented and decided to contest the allegations against her and the co-defendant."

His Honour then dealt with the general circumstances of the case as they related to the allegation that the defendant and co-defendant were living in adultery. He recognised the opportunity, of course, and mentioned the plaintiff's reliance upon evidence of some affection. He discounted however as greatly magnified the evidence of acts of familiarity between them before they left the plaintiff's house and remarked on the absence of evidence of similar incidents afterwards. Neither the plaintiff's mother who visited Wilson's house on a number of occasions nor the next-door neighbour who gave evidence observed any signs of illicit affection. " It is not inherently improbable ", his Honour said, " that the defendant is no more to the co-defendant than he and she assert, namely a housekeeper. I will not say that there is no ground for suspicion, but that is not enough to warrant an affirmative finding of adultery. I consider that the plaintiff has failed to establish his case."

It is not easy to reduce to a brief statement in a categorical list the grounds which induced the majority of the judges of the Full Court to hold that this conclusion was wrong and that the plaintiff had established his case. Fully to appreciate then it is necessary to read the reasons given by *Wolff* S.P.J. Here they must be briefly noted. First and foremost of course were the general circumstances in which Wilson left the plaintiff's house and then set up with the defendant as his housekeeper. Added to that was the fact that Wilson did not pay her wages, did not actually obtain a telephone or leave his employment to set up an independent business and according to his own account slept and lived in conditions which appeared to involve some discomfort and inconvenience. Then some of the incidents of the night of 9th July 1956 to which certain of the witnesses deposed were relied upon as arousing suspicion. To this was added the course of events before the defendant left her husband and the plaintiff's account of what he saw and what was said as compared with the defendant's version. In the same way a point was made of the evidence of the two or three acts of familiarity and that evidence was compared with the explanations given. Again the plaintiff's evidence of statements the defendant made to him when she sent for him in December are compared with her version. She did not of course come as a woman of unblemished character and the significance of her past was not overlooked. Then on the co-defendant's own showing he exhibited solicitude about the defendant at the time when she broke with her husband.

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"All these circumstances", *Wolff* S.P.J. said, "combined with his extremely solicitous attitude in the unfortunate differences between the plaintiff and the defendant—so far, that is, as the defendant was concerned—clearly point, in my opinion, to the conclusion that there was an adulterous relationship, between him and the defendant. I refuse to believe that he was putting up with the inconvenience which the evidence of the two defendants would suggest. In my opinion he had taken the plaintiff's place."

We are unable to agree in the course taken by the Full Court in setting aside the finding of the primary judge. The admitted circumstances did not point unequivocally to guilt and to add to them the impression created by a comparison of the contradictory versions of disputed incidents will not safely carry them any further. In such a case as the present the primary judge's estimate of the parties as witnesses seems of very special importance. It gives him an advantage not only in gauging the reliability of their testimony but also in interpreting and evaluating their explanations and motives and placing the correct significance on equivocal facts which in evidence they were called upon to meet and explain. To judge of the present case and come to a clear conclusion as to the facts it is indispensably necessary to see and listen to Wilson and that no doubt applies also to the defendant. That is an advantage which the learned judge possessed and the Full Court did not. Further, it seems reasonably clear that in the case of not a few of the circumstances upon which some reliance was placed in the judgment of *Wolff* S.P.J., the learned primary judge was not prepared to accept the testimony upon which proof of them rests.

The rules of practice governing the exercise by a court of appeal of its power to set aside findings of fact by a judge who has tried the case on oral evidence have been dealt with in this Court comparatively recently in *Paterson* v. *Paterson* (1) and since then the House of Lords has referred to them in *Benmax* v. *Austin Motor Co. Ltd.* (2). The present case seems to us to fall substantially within the language of Lord *Sumner* in *S.S. Hontestroom* v. *S.S. Sagaporack* (3) to which reference is made in *Paterson* v. *Paterson* (4). After saying that there is jurisdiction in a court of appeal to retry a case on the shorthand note Lord *Sumner* said—"None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility

(1) (1953) 89 C.L.R. 212.
(2) (1955) A.C. 370.
(3) (1927) A.C. 37.
(4) (1953) 89 C.L.R., at p. 223.

of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone " (1).

We think that it was completely within the province of the learned judge to refuse to find the defendant and co-defendant guilty of adultery and that his finding ought not to be set aside. It follows that we ought not to intervene by granting the defendant respondent special leave to appeal from the judgment of *Jackson* J. from which an appeal was mistakenly, as we think, taken to the Full Court.

The appeal to this Court should be allowed with costs, the order of the Full Court set aside and in lieu thereof the appeal to the Full Court dismissed with costs.

The judgment of *Jackson* J. should be restored.

Appeal allowed. Order of the Full Court of the Supreme Court of Western Australia discharged. In lieu thereof order that the appeal to the Supreme Court be dismissed with costs. Restore the judgment of Jackson J. The appellant's costs of the appeal to this Court to be paid by the respondent Riebe.

Solicitors for the appellant, *H. T. Stables & Martin.*
Solicitors for the respondent, *Drake-Brockman & Co.*

F. T. P. B.

(1) (1927) A.C., at p. 47.