A

TOUSRAP BALESAGA

v.

MANUELI BALESAGA

B [COURT OF APPEAL, 1970 (Gould V.P., Marsack J.A., Tompkins J.A.), 13th, 27th July]

Civil Jurisdiction

New Hebrides—constitutional law—laws in force—English statutes of general application in force on 1st January, 1961—Matrimonial Causes Act 1950 such a statute—whether in force in New Hebrides in view of proviso to section 15 (1) of Western
C *Pacific (Courts) Order in Council 1961—no person appointed as Queen's Proctor or Attorney-General—power of High Court to remedy deficiency—Western Pacific (Courts) Order in Council 1961 (S. I. 1961 No. 1506) ss. 1 (2), 2, 2 (2), 15 (1) (2) (3), 19, 22—Pacific Order in Council 1893—Court of Appeal Rules (No. 2) 1956—New Hebrides Order in Council 1922 (S.I. 1922, No. 717) ss. 2, 6, 10 & Schedule—Matrimonial Causes Act 1950 (14 Geo. 6, c. 25) (Imp.) ss. 4, 4 (1), 10, 10 (1) (2), 12 (2)—*
D *Matrimonial Causes Rules 1957 (Imp.) r. 38—Matrimonial Causes Ordinance (Fiji—Cap. 40)—Matrimonial Proceedings Act 1963 (New Zealand)—Treasury Solicitors Act 1876 (39 & 40 Vict., c. 18) (Imp.)—Foreign Jurisdiction Act 1890 (53 & 54 Vict., c. 37) (Imp.) s. 4—Nullum Tempus Act (9 Geo. 3, c. 16) (Imp.)—Statute of Mortmain (1391—15 Ric. 2, c. 5)—Australian Courts Act 1828 (commonly called New South Wales Act) (9 Geo. 4, c. 83) (Imp.)—Lotteries Act 1823 (4 Geo. 4, c. 60) (Imp.).*

E By virtue of section 15 (1) of the Western Pacific (Courts) Order in Council, 1961, the jurisdiction of the High Court of the Western Pacific in the New Hebrides is to be exercised so far as circumstances admit upon the principles of and in conformity with (*inter alia*) the statutes of general application in force in England on the 1st day of January, 1961. The Matrimonial Causes Act, 1950, was in force in England on that date, and under its provisions proceedings for dissolution of marriage by the appellant against the respondent were brought in the High Court of the Western Pacific at Vila in the New Hebrides on the ground of adultery
F with a woman named. No evidence was taken but the trial Judge, having heard argument on the question of jurisdiction, held—

(*a*) That the Matrimonial Causes Act, 1950, was a statute of general application within the meaning of section 15 (1) (*a*) of the Western Pacific (Courts) Order in Council 1961.

(*b*) (i) That section 4 of the Matrimonial Causes Act, 1950, made it the duty
G of the court to inquire " as far as it reasonably can " into the facts alleged and whether there had been any connivance, condonation or collusion.

(ii) That the court had a discretion under section 10 (1) of the Act to obtain the assistance of the Queen's Proctor, and under section 10 (2) the Queen's Protor might act himself on information provided by any person.

H (*c*) In the New Hebrides the fact that there is no Queen's Proctor or Attorney-General renders sections 10 and 12 (2) of the Act completely inoperable and thereby frustrates the court in fulfilling its obligations under section 4.

(*d*) That the question of jurisdiction, and also earlier proceedings which had been brought by the respondent against the petitioner on the ground of constructive desertion (and which had been dismissed), rendered it desirable that the assistance of the Queen's Proctor should have been invoked in the present case.

(*e*) That notwithstanding the previous application of the Act, in the circumstances pertaining in the New Hebrides and the present case, the Act did not apply.

The petition was dismissed. The appellant appealed and the respondent cross appealed, both claiming the same relief.

Held: 1. The jurisdiction of the High Court as enacted by section 15 (1) (*a*) and (*b*) of the Western Pacific (Courts) Order in Council, 1961, is subject to the proviso " so far only as the circumstances of any particular territory and its inhabitants and the limits of Her Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary ". The Court of Appeal, in a case where no evidence has been given, is not in a position to take judicial notice of local circumstances, which may vary from territory to territory, though the judges of the High Court may be able to do so.

2. Whether or not the Matrimonial Causes Act, 1950, is in force in the New Hebrides cannot be determined by and for the purposes of a particular case; it is a question to be answered finally in the affirmative or negative.

3. It is to be assumed from the judgment under appeal that the trial Judge took judicial notice of the circumstances of the section of the population within his jurisdiction and concluded that the only impediment to the application of the Matrimonial Causes Act, 1950, was the lack of a Queen's Proctor. Upon this basis it is held that such a lack is not a factor of such moment as to render the Act inapplicable.

4. The situation is one intended to be covered or cured by the provisions of section 15 of the Order in Council under subsection (3) of which it was open to the trial Judge either to appoint a Queen's Proctor himself or to approach the appropriate Secretary of State to do so.

5. *Per Tompkins J. A.* (dissenting on this point) This court having removed the only impediment seen by the Judge in the court below to the full application of the Matrimonial Causes Act, 1950, should hold that the Act does apply.

Cases referred to:

Ruddick v. Weathered (1889) 7 N.Z.L.R. 491.
Attorney-General v. Stewart (1817) 2 Mer. 143; 35 E.R. 895.
Quan Yick v. Hinds (1905) 2 C.L.R. 345.
Attorney-General v. Love [1898] A.C. 679; 78 L.T. 601.
Watts v. Watts [1908] A.C. 573; 99 L.T. 744.
Walker v. Walker [1919] A.C. 947; 121 L.T. 618.

Appeal and cross appeal from a judgment of the High Court of the Western Pacific, at Vila, New Hebrides, dismissing a petition for dissolution of marriage.

K. C. Ramrakha and *H. M. Patel* for the appellant.
R. G. Kermode for the respondent.
The facts sufficiently appear from the judgment of Gould V.P.

The following judgments were read:

GOULD V.P.: [27th July, 1970]—

Unusual circumstances attend this appeal in that, in addition to the appeal, there is a cross appeal by the opposite party asking for the same relief as that requested by the appellant on similar or at least interlocking grounds.

The appeal is brought from a judgment of the High Court of the Western Pacific sitting at Vila in the New Hebrides. That Court is constituted, or rather re-constituted, under the Western Pacific (Courts) Order in Council, 1961 (S.I. 1961 No. 1506) and by virtue of section 19 of that Order an appeal lies " from a judgment of the High Court, whether in the exercise of original or appellate jurisdiction, in any civil or criminal cause or matter " to this Court. By section 2 " judgment " includes decree, order, sentence and decision. The appeal under section 19 lies " in accordance with rules of court made under section 22 of this Order "; so far as I am aware no such rules have been made, which entails that the previously existing rules, the Court of Appeal Rules (No. 2) 1956, made under article 101 of the Pacific Order in Council 1893, under which the High Court was earlier constituted, continue to apply *mutatis mutandis*. They contain, however, nothing which conflicts with the right of appeal conferred by section 19 above-mentioned. The present appeal has been brought against the dismissal by the High Court at Vila of a petition for dissolution of marriage and I have set out the foregoing provisions to show that appeal does lie to this Court, as, in my opinion, such dismissal must fall within the wide terms " judgment, decree, order and decision ".

In the High Court proceedings were commenced by the petitioner (Tousrap Balesaga) against the respondent (Manueli Balesaga) praying for dissolution of their marriage on the ground of the respondent's adultery with a woman named —one Litiana, a Fijian. It was alleged that the marriage took place at Fila Island, New Hebrides, and that the petitioner and respondent were domiciled in the New Hebrides, or alternatively that the parties were so domiciled before the respondent's desertion, and alternatively pleading three years' residence by the petitioner in Fila Island immediately preceding the presentation of the petition. Collusion and connivance were negatived and in the usual way the petition was verified by affidavit.

Appearances were filed by the respondent and the woman named. The respondent stated that he did not intend to defend, but wished to be heard on the questions of access to the children, maintenance, alimony and a secured provision. The appearance by Litiana indicated that she did not intend to defend the case by denying the charges of adultery or on any other ground. The request for entry of the appearances was signed in each case by Mr. H. W. Webb, Solicitor.

Precisely what procedure was adopted is not clear but on the 10th October, 1969, the record indicates that the following appeared before Mr. Justice Trainor:— the petitioner in person, Mr. Webb for the respondent and Mr. Treadwell (Legal Adviser to the British Administration) as *amicus curiae*. The notes of Counsel's submissions and the subsequent judgment of the learned Judge make it manifest that the question which was exercising the Judge's mind, and upon which he asked for Counsel's assistance, was whether the High Court of the Western Pacific, exercising jurisdiction in the New Hebrides, had jurisdiction in matters of divorce.

I trust I am interpreting the judgment correctly when I say that the learned Judge's doubts arose from one particular question and not from any general lack of jurisdiction arising from the constitution of the High Court. I quote from his judgment—

> " It might, perhaps, be useful to recall here the jurisdiction of the High Court of the Western Pacific in the New Hebrides and the law applicable.

The High Court of the Western Pacific was established by the Western Pacific (Courts) Order in Council, 1961 and by virtue of that Order and the Pacific Order in Council, 1893 the New Hebrides is a " territory " in which it has jurisdiction.

The 1961 Order in Council has in Section 15 set out how the jurisdiction of the Court will be exercised. The section reads:

' 15. (1) Subject to the provisions of this Order and any rules made thereunder and to any law for the time being in force in any territory, the civil and criminal jurisdiction of the High Court shall, so far as circumstances admit, be exercised upon the principles of and in conformity with—

(*a*) the statutes of general application in force in England on the 1st day of January, 1961, and

(*b*) the substance of the English common law and doctrines of equity, and with the powers vested in and according to the course of procedure and practice observed by and before Courts of Justice in England, according to their rsepective jurisdictions and authorities:

Provided that the said common law, doctrines of equity and statutes of general application shall be in force so far only as the circumstances of any particular territory and its inhabitants and the limits of Her Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary.

(2) .....

(3) For the purposes of facilitating the application of any statute, common law or doctrine of equity under the provisions of subsection (1) of this Section any provision may be construed or used with such alterations and adaptations as may be necessary and anything required to be done by or in relation to any Court, Judge, officer or authority, may be done by or in relation to the High Court, or a Judge, officer or authority having the like or analogous functions or

' by any officer designated by a Secretary of State or by the High Court (as the case may require) for that purpose, and the seal of the High Court may be substituted for any other seal; and in case any difficulty occurs in such application, a Secretary of State may direct by, and to whom, and in what manner anything is to be done, and such statute, common law or doctrine of equity shall be construed or applied accordingly.'

In the New Hebrides no legislation (which if it existed would be enacted under Section 6 of the New Hebrides Order in Council, 1922) dealing with divorce has been introduced, therefore if the High Court has jurisdiction at all in divorce, it can only arise from the Matrimonial Causes Act, 1950 exercised according to the Matrimonial Causes Rules, 1957."

The learned Judge said that the problem arose from the proviso to section 15 (1) (set out above) but it is also clear from his judgment that there was only one aspect of the matter which troubled him. He was satisfied that the Matrimonial Causes Act, 1950, was a statute of general application, but the difficulty was that its full implementation called for the availability of a Queen's Proctor and an Attorney-General, officers who were non-existent in the New Hebrides.

In this connection the learned Judge referred to section 4 of the Act of 1950, under which it was the duty of the court to inquire, " as far as it reasonably can " into the facts alleged and whether there has been any connivance, condonation or collusion. He then quoted section 10 of the Act which reads—

> " 10. In the case of any petition for divorce or for nullity of marriage—
>
> (1) the court may, if it thinks fit, direct all necessary papers in the matter to be sent to his Majesty's Proctor, who shall under the directions of the Attorney-General instruct Counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued, and His Majesty's Proctor shall be entitled to charge the costs of the proceedings as part of the expenses of his office;
>
> (2) any person may at any time during the progress of the proceedings or before the decree *nisi* is made absolute give information to His Majesty's Proctor of any matter material to the due decision of the case, and His Majesty's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient;
>
> (3) if in consequence of any such information or otherwise His Majesty's Proctor suspects that any parties to the petition are or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the Attorney-General, after obtaining the leave of the court, intervene and retain counsel and subpoena witnesses to prove the alleged collusion."

Finally, in relation to the 1950 Act, there was reference to section 12 (2) which, in brief, provides that any person may, after the pronouncing of the decree *nisi* and before the decree is made absolute, in the prescribed manner show cause why the decree should not be made absolute, on various grounds, including that of collusion.

The difficulty seen by the learned Judge was summarised by him in these words—

> " The problem in the New Hebrides arises from the fact that there is no Attorney-General or Queen's Proctor and, to a lesser extent, the Court lacks an adequate Registrar. The absence of an Attorney-General, or an equivalent law officer, and a Queen's Proctor renders completely inoperable Sections 10 and 12 (2) of the Matrimonial Causes Act, 1950 and, in addition, to a certain and may be considerable, extent, thereby frustrates the Court in fulfilling the obligations created by Section 4."

For a full understanding of the judgment under appeal it is necessary to make still further references to it. In the petition there was, as required, reference to previous proceedings between the parties in relation to the marriage. They included proceedings for dissolution of marriage brought by the present respondent against the present petitioner on the ground of constructive desertion: they were heard by the same learned Judge who at that time expressed his apprehension concerning the non-existence of a Queen's Proctor, should the court need his assistance. In the result, however, he dismissed the petition on the ground that constructive desertion had not been established. In the judgment under appeal he said—" In that case anything that the Queen's Proctor could have contributed, had he existed and been permitted to intervene, would only have been to the end which the court reached anyway". In that case, therefore, the learned Judge did assume jurisdiction under the Act.

It was some aspects of the evidence given in the earlier case, which are referred to in the judgment under appeal but which I will not repeat, which brought the learned Judge to the view that, had proceedings in the present case continued,

he would have needed the assistance of a Queen's Proctor. At the risk of tedious quotation I must endeavour to convey his approach by two further passages from his judgment—

> " Where, however, the granting of a decree of dissolution is likely, the Court is in a very different position. Even though the petition has been contested there is always the possibility that a member of the public is in possession of important evidence which he is concerned to produce but is unable to do so. It is this possibility that is specifically provided for in the Act. In such event the Court is unable fully to inquire into the matter. The relevant section of the Act says that the Court shall inquire " so far as it reasonably can " into the facts, but it is frustrated in this in that there may be facts of which it cannot become aware and therefore is unable to inquire into them.
>
> .....
>
> Were there a Queen's Proctor here I would have invoked his assistance under Section 10 (1) of the Matrimonial Causes Act on the question of the application of the Act, and he or his Counsel under the direction of the Attorney-General would have appeared. The Queen's Proctor would also have been referred to the previous judgment and given a copy of the documents and correspondence in this one. There is more than a possibility that the Attorney-General would have instructed the Queen's Proctor to seek leave to intervene. But this was not possible, and I find that there are facts into which I cannot inquire. The assistance which the statute places at the Court's disposition to enquire into the facts is not available."

I think I may now put in summary form the essence of the legal problem as the learned Judge saw it and the manner in which he answered it. He quoted the proviso to section 15 (1) of the Western Pacific (Courts) Order in Council (which is set out above) and said—

> " Does this mean that the principles or the raison d'etre of such statutes are to be applied to the extent that local circumstances will permit, or that if there is lacking in the territory the machinery created by the statute for the operation of some of the principles, the statute does not apply? "

The final passage of the judgment provides the answer—

> " Though far from satisfied, despite the previous application of the Act, that the Matrimonial Causes Act, 1956 applies here, nevertheless I confine myself to the position on the present case. I find that in the circumstances pertaining in the New Hebrides and the present case, the Act does not apply."

Before proceeding further I think it well to advert to an aspect of this case which has not been made the subject of argument before this Court but which may have considerable relevance to the extent and effect of any decision this Court may arrive at. The point at issue is the construction of the proviso which applies various laws " so far as the circumstances of any particular territory and its inhabitants and the limits of Her Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary". The Judges of the High Court of the Western Pacific may well be able to take judicial notice of the " circumstances " of the various territories from which appeal lies to this Court and of the circumstances of their inhabitants but this Court is not in a like position and such circumstances may well differ from territory to territory. The New Hebrides itself is in a special position in that it is a Condominium.

Its history, interesting though it may be, does not concern the court in this case, but the limits of Her Majesty's jurisdiction, and therefore of the jurisdiction of the High Court should be briefly noted. The present position is regulated by

the New Hebrides Order in Council, 1922 (1922 No. 717) (further Orders in Council No. 356 of 1923 and No. 553 of 1955 being not material for present purposes) which recites a Protocol between Great Britain and France signed on the 1st August, 1914 but not ratified until the 18th March, 1922. Section 2 of the Order provides that the Protocol shall have the force of law on all persons in the said Islands over whom His Majesty shall at any time have jurisdiction and the provisions of the Order in Council are to be construed subject to the terms of the Protocol. There is provision for a High Commissioner with power to make regulations for the peace, order and good government of British subjects or persons otherwise subject to the jurisdiction of His Majesty—subject to the approval of a Secretary of State he may also appoint as many fit persons as in the interests of His Majesty's service he may think necessary to be Deputy Commissioners, Residents, Judges, Magistrates, or other offices.

The Protocol, which appears as a Schedule to the Order is a detailed document but I will refer only to those provisions which have a bearing upon the jurisdiction of the High Court so far as the present case is concerned. The Group is to form a region of joint influence in which the subjects and citizens of the two Powers enjoy equal rights of residence etc. " each of the two Powers retaining sovereignty over its nationals . . . . . and neither exercising a separate authority over the Group ". It is provided further that subjects or citizens of other Powers shall enjoy the same rights and be subject to the same obligations as British subjects or French citizens but they must " opt " by means which are immaterial, for the legal system of one or other of the two Powers. Joint administration by High Commissioners and a joint court are provided for, the latter having in certain cases only jurisdiction over the British and French subjects and adherents.

By article 20 the two Governments undertook to establish courts in conformity with their own legal systems with jurisdiction over all civil cases other than those reserved to the Joint Court. Generally speaking civil jurisdiction between non-natives belonged to the national court having jurisdiction over the defendant, unless the action was based on a contract or thing originating entirely within the law of a signatory power. In criminal cases non-natives were to be justiciable by their own national courts. This obligation to set up a national court was implemented by section 10 of the New Hebrides Order in Council 1922, which provided that, subject to the provisions of the Protocol, the Pacific Order in Council 1893 (as amended) should apply to the New Hebrides and " shall be binding upon all persons over whom His Majesty has jurisdiction within the said Islands ". There is thus a limitation of jurisdiction to the classes of persons mentioned in the Protocol—British subjects and those nationals of other powers who opt for the British legal system. As has been seen, the court constituted by the Pacific Order in Council 1893, has now been re-constituted under the Western Pacific (Courts) Order in Council 1961. Section 10 of the New Hebrides Order in Council, 1922, to which reference has just been made, is specifically applied to the Western Pacific (Courts) Order in Council, 1961, by section 1 (2) thereof and the jurisdiction of the present High Court in the New Hebrides is, therefore, subject to the same limitation as is therein contained.

The purpose of this digression is to emphasize that particularly in a case such as the present, in which no evidence has been given, this Court is not in a position to make any pronouncement as to whether, under the proviso to section 15 (1) of the Order in Council of 1961, the Matrimonial Causes Act, 1950 of England is in force or not; i.e. whether the circumstances of the local inhabitants permit. An unofficial Year Book edited by Judy Tudor (10th Edition, 1968) refers to an attempted census in the New Hebrides in 1960 as showing a total population of 77,983 of which the British (including presumably those who had opted for the

British legal system) numbered 1,117; they included 75 Chinese, 175 Fijians and other Pacific Islanders, 212 Gilbertese and 34 Fiji Indians. I take no official notice of those figures but it is presumably some such section of the much larger total island population which are within the jurisdiction of the learned Judge in the High Court and were in his contemplation when he gave the judgment under appeal. It is to be assumed also that he took judicial notice of the circumstances of the section of the population within his jurisdiction (including such matters as personal law, religion and custom) and concluded that the only impediment to the application of the Matrimonial Causes Act, 1950 was the lack of a Queen's Proctor. Whether that was a valid conclusion is the only point which can be decided on this appeal.

There is no particular magic in the term Queen's Proctor. Historically, a Proctor was a person appointed by proxy who appeared before the Ecclesiastical Court—see the historical introduction to *Rayden on Divorce* (7th Edn.) p. 4. Mr. Ramrakha called our attention to the description of " Queen's Proctor " in the Dictionary of English Law by Earl Jowett, as " the solicitor or proctor representing the Crown in the Probate Divorce and Admiralty Division ". In some territories, functions similar to those performed by the Queen's Proctor under the Matrimonial Causes Act, 1950 have been allotted to other officers—for example in Fiji it is the Attorney-General (Matrimonial Causes Ordinance (Cap. 40)) and in New Zealand the Solicitor-General (Matrimonial Proceedings Act, 1963). Presumably the required functions could be performed by anybody designated for the purpose by the particular legislation. However, under the Matrimonial Causes Act, 1950, it is the Queen's Proctor, who, under present practice in England, is always the Treasury Solicitor who is a corporation sole (Treasury Solicitors Act, 1876—see *Halsbury's Laws of England* (3rd Edn.) Vol. 7 pp. 386-8.)

I will deal first with one aspect of the judgment under appeal which appears to me, with respect, to have little or no validity. It relates to the learned Judge's concern at the inability of the members of the public who may have relevant information, to place that material before the court. He said—

> " If there are no such officers how can a member of the public have put before the Court matters material to the due decision of the case ? He has of himself no right of audience. (Perhaps if the Court were aware of what he had to say it might call him as a witness, though I find it very hard to visualise a case where the Court would take such a step). The answer, of course, is that in the New Hebrides a member of the public can do nothing."

While it is true that a member of the public, wishing to give information before the decree *nisi* to the Queen's Proctor under section 15 (2) would not be able to do so, such a member could still act before any decree absolute was made under section 12 (2) which is mentioned at one stage of the judgment. That section provides, that after the pronouncing of the decree *nisi* and before the decree is made absolute, any person may, " in the prescribed manner " show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by means of material facts not having been brought before the court. The " prescribed manner " is to be found in rule 38 of the Matrimonial Causes Act Rules, 1957. All the member of the public has to do is to enter an appearance in the cause and within four days thereafter file an affidavit setting forth the facts upon which he relies. The subsequent procedure is then set out. This appears to me to give the public adequate protection, although at a later stage than might have been the case if the machinery of section 10 (2) could have been operated. This point, which appears an obvious one, was not raised by

Counsel and I therefore rely upon it with hesitation. I have not, however, been
A able to find any amendment to section 12 (2) or rule 38, prior to the 1st January, 1961, which would affect the matter, and if the point is a valid one it appears to me to deprive the argument of the learned Judge of much of its weight.

There remains, however, the fact that in the New Hebrides there is no Queen's Proctor and no Attorney-General within the British jurisdiction, and as a result, a judge could not, under section 10 (1) of the 1950 Act direct that the papers be
B sent to the Queen's Proctor. Mr. Ramrakha, for the appellant, directed our attention to *Ruddick v. Weathered* (1889) 7 N.Z.L.R. 491. The case concerned a gambling charge and the opening passage of the judgment (at pages 492–3) reads:—

> " It is clear that the game in question in this case is a game which in England would fall within the provisions of 13 George II., c. 19, s. 9, and by that be a lottery by dice within the meaning of the 12 George II., c. 28 period. At the argument we intimated our opinion on this; but the real question is whether those
> C statutes are in force in New Zealand. If and so far as these provisions are within the meaning of " The English Laws Act 1858 ", " applicable to the circumstances " of the Colony, they are in force. I can imagine no reason why a law prohibiting and punishing gaming with dice should not be applicable. The vice aimed at is not peculiar to England: the evil consequences are likely to be as much felt in New Zealand or any other colony as in England. There is nothing in the provisions which require for giving them effect
> D any machinery or procedure peculiar to England, which exists there and not here. The reasons, therefore, for which the Mortmain Act was held in *Attorney-General v. Stewart* to be peculiar to England and not applicable in a colony, do not exist with regard to a law aimed at gaming with dice, even if it creates a new offence, imposing a pecuniary penalty."

Perusal of the judgment in the case referred to, *Attorney-General v. Stewart* (1817) 2 Mer. 143; 35 E.R. 895 indicates that, while the court did refer to the absence
E in the colony of certain machinery, namely an " ancient office for the enrolment of deeds " its main reasoning was that the Statute of Mortmain was throughout local and thoroughly inapplicable to any other country than England.

Counsel next referred to *Quan Yick v. Hinds* (1905) 2 C.L.R. 345 a decision of the High Court of Australia. The Act there to be interpreted was the New South Wales Act (9 Geo. 4 c. 83) which applied in New South Wales all English law and Statutes then in force " so far as the same can be applied within the said
F colonies ". This case also involved gambling and the Imperial Act 4 Geo. 4 c. 60 which makes it an offence to sell tickets in an unauthorized lottery. Mr. Ramrakha cited a passage from the judgment of the Chief Justice at p. 362—

> " Sec. 21, however, does not stand alone. If it applied, it brought with it all the provisions as to punishment, including the right of a convicted offender to appeal to Quarter Sessions, and the declaration that he should be
> G chargeable to the parish in which he resides. Now, in 1828 there were no Courts of Quarter Sessions in New South Wales, although the establishment of such Courts was authorized by the same Act 9 Geo. IV. c. 83 ".

Again, I think that is one of a number of reasons relied upon by the Chief Justice. At p. 364 he referred to the case of *Attorney-General v. Love* (1898) A.C. 679 as establishing that if the general provision of a Statute were not unsuitable to the conditions of a colony, the mere fact that some minor or severable provisions
H could not come into operation owing to local circumstances is not a sufficient reason for denying the applicability of the Statute as a whole. In *Love's* case it was held that the Imperial Nullum Tempus Act (9 Geo. 3 c. 16) was in force in New

South Wales, enabling persons to show or acquire title by sixty years' possession. It was argued that the Nullum Tempus Act provided for exceptions in cases where the occupant of lands had been charged in the Crown's accounts with rents which had not been paid, and because there was no administration in the colony as involved the peculiar form of Crown accounting so described, the remedial operation of the Statute could not apply. The Privy Council rejected this argument, saying that the only result would be that there was nothing upon which the exception preserving the Crown's right could operate, but certainly the enacting part of the Statute would not be cut down, or rendered inconsistent with the laws of England.

I am inclined to agree with the learned Judge below that the cases of *Watts v. Watts* [1908] A.C. 573 and *Walker v. Walker* [1919] A.C. 947 do not provide assistance on the single point in issue in this case. Whether or not the functions of the Queen's Proctor were provided for in the then existing legislation the point was not raised, and in both cases the Privy Council referred with approval to judgments not available here. In *Watts v. Watts* (at p. 578) it is indicated that the Attorney-General for the Dominion of Canada was permitted to intervene, which demonstrates at least that, unlike the position in the New Hebrides, the requisite officers were available.

Counsel for the cross appellant adopted the arguments presented by Counsel for the appellant and submitted that the learned Judge's proper course of action would have been to take evidence and then consider whether he needed the services of a Queen's Proctor. If he did, he had the power to overcome the difficulty. I agree with the submission that the learned Judge should have taken the available evidence in the present case, before deciding upon the course which he would take. Relevant admissions previously made could then have been proved, but the learned Judge should not have merely relied upon his recollection of the earlier evidence.

In my view, once it is established or accepted that the Matrimonial Causes Act 1950, is an act of general application otherwise applicable in the circumstances of the New Hebrides (and I again stress that this Court is not in a position to determine that question in this case) the lack of a Queen's Proctor and Attorney-General is not a factor of such moment as to render the Act inapplicable. I am strengthened in that view by my opinion expressed above as to the rights of the public under section 12 (2) and rule 38. But I would in any event be of the opinion that the intention of the Order in Council is that such a situation is one which can and ought to be covered or cured by the provisions of section 15.

There are in the first place the widening words in the early part of section 15 of the Order in Council " so far as circumstances admit ". It may be difficult to put a precise meaning on that phrase but at least they indicate an intention that the law in question is not to be applied with rigidity, particularly in matters which are more of form than of principle. They could, I think, cover the absence of an opportunity, in the public to approach a Queen's Proctor, when they have a direct right of approach to the court at a later stage.

However that may be, section 15 (3) of the Order must have been specifically enacted to cover similar positions and problems to the one which has now arisen. If the learned Judge, having embarked upon the evidence, is satisfied that he is unable by his own inquiries under section 4 (1) of the 1957 Act*, to satisfy himself on the subject of collusion, connivance or condonation, and that it is essential that he should send the papers to the Queen's Proctor under section 10 (1), then under section 15 (3) of the Order in Council, he has two courses open to him. He

* The reference intended is the Act of 1950—Ed.

can appoint a Queen's Proctor himself—" anything required to be done by or in relation to any court . . . . may be done by any officer designated by the Secretary of State or by the High Court (as the case may require) for that purpose . . . " It would, I have no doubt, be a question of personnel—if there were a large legal staff there would be no difficulty. There is, apparently, at least one legal officer attached to the administration, to the burden of whose duties it might be surmised that those of Queen's Proctor would add little. Argument required under section 10 (1) would differ little in extent from that asked of an amicus curiae. It has been suggested that a responsible person without legal qualifications could be appointed—that would only be practicable for the purposes of section 10 (1) if he had available the services of a qualified Counsel, though he might be able to act in person under subsections (2) and (3). This would be essentially a question for the administration to resolve, but the point is that the power does lie in the Judge and he can exercise it if he deems it essential.

The second possible course under subsection (3) is for the learned Judge to approach a Secretary of State, no doubt through the proper channels, to make the required designation. This the Secretary of State has power to do either under the words quoted above from subsection (3) or under the concluding words of the subsection. There is ample precedent for such an approach by a court when it is desired to resolve questions of the recognition of foreign states, though that being an evidentiary matter is specifically authorised by section 4 of the Foreign Jurisdiction Act, 1890. Under subsection (3) of s. 15 of the Order in Council, where the authority to designate is placed alternatively in the court and a Secretary of State and the matter is merely administrative, I conceive that such an approach would be amply justified.

The exact procedural details are hardly matters for consideration by this Court and I do not suggest I have necessarily exhausted the possibilities of subsection 3. I would express my finding thus—Whether or not the Act is in force cannot be determined by and for the purposes of a particular case—it is a question to be answered finally in the affirmative or negative; if, as the learned Judge has found, the Matrimonial Causes Act, 1950 is an act of general application and not contrary to the circumstances of the territory and its inhabitants, it is not rendered inapplicable by the present lack of an appointed Queen's Proctor.

I would, therefore, allow the appeal and cross appeal, set aside the dismissal of the petition by the learned Judge, and remit the case to the High Court to be continued from the point it had reached prior to the judgment under appeal, subject of course to any adjournments rendered necessary by any course the learned Judge may decide to pursue. I would make no order for costs of the appeal or cross appeal. As all members of the Court are of the like opinion it will be so ordered.

MARSACK J.A.:

I have had the advantage of reading the judgment of the learned Vice-President in this case. I agree with it and have nothing to add.

TOMPKINS J.A.:

I have had the benefit of reading the judgment of the learned Vice-President. With respect, I agree with him that both appeal and cross appeal should be allowed, and with the other orders proposed by him. But I would like to add the following observations of my own.

The learned Judge in the court below in his judgment said:—

" The real question is: If the Matrimonial Causes Act, 1950 is a statute of general application, and I have no hesitation in holding it to be so, does the lack of a Queen's Proctor and an Attorney-General constitute circumstances which render the Act inapplicable here ? In considering this question I must bear in mind that this Court has already exercised jurisdiction by granting a decree of divorce and dismissing a petition. I am of the opinion that when the Court in the New Hebrides is satisfied that the presence of the Queen's Proctor could contribute nothing to the matter then it may properly hear and determine a petition."

Then in the last paragraph of his judgment he said:—

" Though far from satisfied, despite the previous application of the Act, that the Matrimonial Causes Act, 1950 applies here, nevertheless I confine myself to the position on the present case. I find that in the circumstances pertaining in the New Hebrides and the present case, the Act does not apply."

It seems to me that in considering whether the Matrimonial Causes Act, 1950, (which I shall hereafter call " the Act ") does or does not apply, it is necessary to consider the terms of section 15 of the Western Pacific (Courts) Order in Council 1961 and to determine, pursuant to that section, whether the Act applies or does not apply in the " territory " in which the High Court of the Western Pacific has jurisdiction in the New Hebrides. The test as to whether it has jurisdiction must be an objective and not a subjective one.

If the Act were not generally applied, the position would be entirely anomalous. No petitioner in divorce would know whether the court would accept jurisdiction until his case was part heard. Thus the court would, in commencing the hearing, have exercised jurisdiction in divorce and then, later, because the evidence might disclose a desirability for the intervention of the Queen's Proctor, decline it. I do not think the court could exercise jurisdiction in some cases and decline it in others.

If it be determined that this statute is of general application and that there is nothing " in the circumstances of any particular territory and its inhabitants and the limits of Her Majesty's jurisdiction " to prevent its application to the territory, then it must apply generally and not have an application limited by the circumstances of any particular case. In other words, the court must either have jurisdiction to apply the Act or not.

The next question is whether the Act applies in the " territory " of New Hebrides. The learned Judge in the court below, heard full argument upon the question of the court's jurisdiction, from Counsel for the petitioner and from Counsel who appeared as amicus curiae. The learned Judge held that the statute was a statute of general application, but that the only difficulty in applying it was that its full implementation called for the availability of a Queen's Proctor and an Attorney-General, officers who were non-existent in the New Hebrides.

I think, as the learned Vice President also thinks that we must assume that in arriving at that decision, the learned Judge must have decided that there were no other circumstances of the territory or its inhabitants which would prevent the application to it of the Act. My opinion is reinforced by his statement that the court had already exercised jurisdiction in two cases, by granting a decree and by dismissing a petition.

This Court has now removed the only impediment seen by the Judge in the court below, to the full application of the Act in the territory, by holding that the lack of
A a Queen's Proctor and Attorney-General is not a factor of such moment as to render the Act inapplicable.

I think, therefore, that this Court should now hold that the Act does apply, and that the High Court of the Western Pacific has jurisdiction in divorce in the " territory " of the New Hebrides. I think further that such a finding is a necessary one before this Court can direct the court below to exercise jurisdiction in divorce
B by continuing the hearing of the present petition.

Appeal and cross-appeal allowed.