Council) and two decisions of the Supreme Court of the United States of America, namely, *Massachusetts* v. *Mellon* (4) and *Ex p. Levitt* (3). All these authorities lay down what I consider to be a sound and sensible proposition of law (and, in fairness to Mr. Smythe, he did concede this in the course of his learned arguments). I have carefully perused the indorsement on the writ of summons and the amended statement of claim. Nowhere do I find any allegation which falls within this requirement. In my view the possible threat alleged in the amended statement of claim merely shows a likelihood of the plaintiffs-respondents suffering as a result of the executive acts complained of in some indefinite way in common with other people generally. This in law is insufficient to entitle the plaintiffs-respondents properly to invoke the jurisdiction of this court. I therefore hold in the circumstances that the purported invocation of the jurisdiction of the court under s.24 of the Constitution by the plaintiffs-respondents is wrong.

The rulings I have made in this decision substantially dispose of the main action. With regard to the first part of the motion, suffice it to say that there were substantial points of law involved requiring an interpretation of the Constitution.

The result is that the motion succeeds. The main action hereby stands dismissed. The plaintiffs-respondents are hereby ordered to pay to the defendants-applicants the costs of the motion and that of the main action, such costs to be taxed.

Order accordingly.

MACAULAY *v.* MACAULAY

SUPREME COURT (Cole, Ag. C.J.): January 4th, 1967
(Divorce Case No. 27/66)

[1] **Family Law—divorce—condonation—evidence—forgiveness, cohabitation and sexual intercourse:** Where a matrimonial offence is forgiven and remitted by the injured spouse and the parties cohabit and have sexual intercourse, the offence is condoned (page 18, lines 32–39).

[2] **Family Law—divorce—condonation—revival of condoned offence —cruelty revived by great unkindness:** Condoned cruelty may be revived by an act or acts of great unkindness (page 19, lines 9–10).

[3] **Family Law—divorce—condonation—revival of condoned offence—graver offences revived by slighter transgressions:** The graver the matrimonial offence that has been condoned, the slighter is the act required to revive it (page 19, lines 10–12).

[4] **Family Law—divorce—condonation—revival of condoned offence—revived by subsequent offence:** The condonation of a matrimonial offence by the reinstatement and forgiveness of the guilty spouse is subject to a condition implied by law that he or she shall commit no further matrimonial offence, and if a further matrimonial offence is committed the condonation is cancelled and the old cause of complaint is revived (page 18, line 41—page 19, line 4).

[5] **Family Law—divorce—cruelty—test of cruelty—danger or reasonable apprehension of danger to life or limb or health:** Cruelty as a ground for divorce is conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger (page 18, lines 12–15).

[6] **Family Law—divorce—cruelty—test of cruelty—kindness may co-exist with cruelty:** There may be cruelty sufficient to ground a divorce although the guilty spouse is not altogether unkindly disposed towards the injured spouse and has performed acts of kindness and generosity towards him or her (page 18, lines 26–31).

[7] **Family Law—divorce—decree—petition and cross-petition—decree on both where both parties guilty of matrimonial offences and to blame for breakdown of marriage:** Where the parties to a divorce petition and cross-petition have both been guilty of matrimonial offences and both are to blame to some extent (though not necessarily the same or nearly the same extent) for the breakdown of the marriage, the proper decree is a decree of divorce on both the petition and the cross-petition (page 24, lines 5–13).

[8] **Family Law—divorce—petitions—petition and cross-petition—both succeed where both parties guilty of matrimonial offences and to blame for breakdown of marriage:** See [7] above.

[9] **Family Law—maintenance—alimony pending suit—where alimony pending suit prayed, maintenance may be ordered from date petition filed:** On a decree for divorce upon a petition containing prayers for alimony pending suit and secured provision for the wife and the children of the marriage, the court may order maintenance for the wife and children to be paid from the date of filing of the petition (page 24, lines 22–24; page 25, lines 7–14).

[10] **Family Law—maintenance—children—children's maintenance may be ordered in divorce proceedings from date petition filed:** See [9] above.

[11] **Family Law—maintenance—may be ordered in divorce proceedings from date petition filed:** See [9] above.

The petitioner petitioned for a divorce on the ground of cruelty and prayed for alimony pending suit and maintenance for herself and the children of the marriage. The respondent by his answer prayed for a divorce on the ground of cruelty.

The parties had been married six years. There were three children of the marriage. The petitioner was sensitive and highly strung. A certain amount of social life was necessary to her happiness. She liked going to parties and was unable to forgo the company of her relatives and friends. The respondent's work and his ambitions took first place in his life. He worked late hours and did not like going to parties. His attitude towards the petitioner was extremely possessive and he was very reluctant to allow her out of his sight. He required her to remain at home, or to go out only in his company. In consequence, there were frequent quarrels between the petitioner and the respondent. When the petitioner disagreed with the respondent or disobeyed him, he would sulk or nag and she would be reduced to tears and sometimes to hysterical, frenzied or violent behaviour. She came under increasing nervous strain; her health was affected and she suffered from lack of sleep, depression, dizziness, headaches and generalised aches and pains and, eventually, more serious psychosomatic symptoms of an acute anxiety state. The respondent was aware of her condition and had been medically advised that he should humour and indulge her and avoid arguments. He nevertheless persisted in imposing his will on the petitioner and quarrels continued to take place.

In June 1966, the petitioner forgave and remitted the respondent's conduct towards her. She continued to cohabit with him, and sexual intercourse took place between them. At the beginning of July, the petitioner quarrelled with the respondent about a letter he had written to another woman. He made no attempt to apologise for this, or to reassure or mollify the petitioner. That evening she absented herself from home. When she returned she woke the respondent and provoked a fight, in which he beat her severely and she attacked him with a broken bottle. After this she slept in a separate room, but four days later she came to their room and began to dress to go out to a party. The respondent said that if she went out she should arrange to sleep elsewhere, because police would prevent her from returning to the house; and he made arrangements for armed police to be sent to the house. The petitioner spent the night at her parents' house, and removed her belongings and the children from the matrimonial home next day. The present proceedings ensued.

The petitioner contended that the respondent's conduct towards her up to June 1966 amounted to cruelty entitling her to a divorce. The respondent contended that if there had been cruelty on his part, which was denied, it had been condoned in that month. Each party contended that the other had been guilty of cruelty in July 1966, and the petitioner contended that the respondent's cruelty in July had revived his previous cruelty.

Cases referred to:

(1) *Beale* v. *Beale,* [1951] P. 48; [1950] 2 All E.R. 539.

(2) *O'Brien* v. *O'Brien,* [1950] W.N. 330; (1950), 94 Sol. Jo. 486, *dicta* of Denning, L.J. applied.

(3) *Richardson* v. *Richardson,* [1950] P. 16; [1949] 2 All E.R. 330.

Miss Wright for the petitioner;
Barlatt for the respondent.

COLE, Ag. C.J.:

This is a wife's petition for a dissolution of her marriage with the respondent on the ground of cruel treatment of her by the respondent since the celebration of the marriage. This marriage was celebrated on April 23rd, 1960 at St. Anthony's Church in the Parish of St. George in Freetown, Sierra Leone.

[The learned Acting Chief Justice reviewed the evidence relating to the period to June 1966 and stated his findings of fact, and continued:]

Before I deal with the incidents of July 5th and 9th, 1966, perhaps it is necessary for me at this stage to consider whether all these acts I have found proved, or one or other of them, in law amount to cruelty. I say this because in para. 42 of the respondent's answer he pleads as follows:

> "If, which is denied, the respondent has been guilty of the alleged or any cruelty, the petitioner with full knowledge of the facts alleged in paras. 10–34 condoned the same by co-habiting with him until July 5th, 1966, and by having sexual intercourse with him until the middle of June, 1966, with the intention of forgiving and remitting the alleged offences and each and every one of them."

The petitioner, on the other hand, pleads in para. 16 of her reply as follows:

"The petitioner will say in reply to para. 42 of the answer

that despite the cruelty alleged she had always tried to give the marriage a chance and make it work, especially as they had three young children, and that was the reason she cohabited with the respondent until June 1966 although her health had deteriorated considerably during the marriage and she was a bundle of nerves because of the respondent's cruelty to her as alleged. The petitioner will further say that, although she forgave and remitted the offences, the further cruelty recited in paras. 35 and 37 revived the condoned offences."

Paragraphs 35 and 37 of the petition relate to the incidents of July 5th and 9th, 1966, respectively.

The legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger. To establish legal cruelty two distinct elements must be clearly shown, namely first, the ill-treatment complained of, and secondly, the resultant danger or the apprehension thereof. The findings of fact I have already made, in my view, present the general picture of the imposition by the respondent of his will on the petitioner, and a persistence in his callous conduct although aware of its effect on the petitioner's health, resulting in the considerable deterioration of the health of the petitioner. I therefore hold that my findings come within the legal conception of cruelty. I find that since the celebration of their marriage and up to their last sexual intercourse in June 1966, the respondent treated the petitioner with cruelty. This finding, of course, does not mean that the respondent was not at all kindly disposed towards the petitioner. Indeed there is ample evidence of several acts of kindness and generosity on the part of the respondent towards the petitioner. On balance, however, the scales tilt heavily on the side of legal cruelty.

The petitioner admits having had sexual intercourse with the respondent in June 1966. She also admits having continued to cohabit with the respondent in spite of his cruelty towards her. She also admits that she forgave and remitted the offences hitherto complained of. In those circumstances, I find that although the respondent treated the petitioner with cruelty up to their last sexual intercourse in June this year, the petitioner has condoned such cruelty.

The question now arises, has there been a revival of this cruelty? It is settled law that the reinstatement and forgiveness of a guilty

spouse is subject to a condition implied by law that he or she shall commit no further matrimonial offence. If, therefore, a further matrimonial offence is committed, the condonation is cancelled and the old cause of complaint is revived. The plain reason and good sense of the implied condition is that the guilty spouse should not only abstain from the act or acts he has been guilty of, but should in future in every respect treat the other spouse with conjugal kindness. The cases of *Richardson* v. *Richardson* (3) and *Beale* v. *Beale* (1) lay down the proposition that an act or acts of great unkindness are capable of reviving condoned cruelty. There is authority for the proposition that the graver the initial offence the slighter is the act required to revive it. With these legal principles in mind, I shall now examine the evidence relating to the alleged incidents subsequent to the date condonation took place, which I have found to be some time in June 1966.

[The learned Acting Chief Justice read the relevant allegations in the petition, the answer and the reply, and continued:]

I shall deal first of all with the events of July 5th, 1966. They started off with the petitioner having discovered certain impressions on a page of a writing pad at the matrimonial home. The petitioner could see from the impressions that the respondent had used the pad. She thereupon proceeded to trace in ink in her own hand what had been written. It is in evidence and is marked Exhibit E. It turned out to be a part of a letter which had been written by the respondent to another woman. The respondent himself said so. The petitioner describes the letter as "highly emotional." This has not been denied. I have perused Exhibit E and given it the due consideration it deserves. I do not consider the description given it by the petitioner an exaggeration. Immediately the petitioner made her discovery, she telephoned the respondent, who was at work, to say that she wanted an interview with him in order to discuss with him something of a serious nature. The respondent there and then invited the petitioner to lunch with him in his office. She declined the invitation. According to the respondent, the petitioner "promised to call at his office to see him after lunch." There is no evidence that the respondent prevented the petitioner from coming to his office or said that he would rather see her at the matrimonial home at lunch-time or at another time. It should not be overlooked that, according to the respondent, the petitioner had already informed him "that she wanted to talk about something rather serious." In the circumstances I fail to appreciate the submission of Mr. Barlatt

that it was an act of provocation on the part of the petitioner to go to the office of the respondent to discuss Exhibit E. The evidence is that the respondent is a hard worker throughout the day as well as throughout the night. I therefore see nothing, in those circumstances, unusual in the petitioner's having requested the interview, and nothing provocative in her having gone to the respondent's office. The respondent, in my view, invited the petitioner there. On arrival, the petitioner faced the respondent with Exhibit E and asked for an explanation. He admitted having written it, but did not disclose the "lady fair" to whom the letter of which Exhibit E was part had been written; he said he would rather not say. The petitioner became upset and took off her wedding and engagement rings and put them on the respondent's side-table. She also picked up her photograph off his desk. She took Exhibit E from the respondent and put it inside her bag. She told the respondent she was going to tell her father and the respondent's mother. She then left the office in a rage.

I am satisfied on the evidence that the petitioner was upset by the discovery of Exhibit E, and became more upset by the rather callous way in which the respondent treated the whole matter at the interview. There is not a scintilla of evidence to show that the respondent in any way tried to pacify the petitioner for something so palpably wrong, which he, the respondent, had admitted having done. There is also not a scintilla of evidence to show that either at that interview or at any other time did the respondent try to make it up with the petitioner, or even to apologise to her for what I think any reasonable person would consider to be a wrongful act. In view of the existing background, with particular reference to the advice which the respondent's own doctor—Dr. Hunt—had given him, one would have expected more reasonable treatment of the petitioner by the respondent. Applying the legal yardstick I have already set out above, I find this treatment of the petitioner by the respondent by itself an act of great unkindness in the circumstances, which was not only capable of reviving but in fact did revive the condoned cruelty which I have already dealt with. On this ground alone, according to the legal authorities, the petitioner is bound to succeed.

There are certain incidents, however, that took place that same night, July 5th, 1966, at the matrimonial home on which both the petitioner (in her petition) and the respondent (in his cross-petition) rely in support of their respective prayers. I consider it appropriate

to dispose of them at once. They consisted of two fights that night between the petitioner and the respondent, in which the petitioner came off worse. I have carefully considered the evidence of both sides in this matter, including the pleadings and the letters tendered in evidence. My assessment of the evidence in this matter is this: The petitioner left the respondent's office that day very much upset (by what I have found on the evidence to be an act of great unkindness on the part of the respondent), and determined not only to annoy but also to upset the respondent. In other words, she was determined to have her own back on the respondent. She deliberately returned home at 10 p.m., which was a practice she already knew the respondent disliked. The respondent had already arrived home. He had had his meal, and probably in order to forget all about what had occurred during the day between himself and the petitioner, had taken sleeping tablets and gone to bed. The petitioner entered the bedroom and found the respondent in a stupor, and was determined at all costs to wake him up so as to have it out with him about Exhibit E. Not succeeding, she collected a bottle of icy cold water from the refrigerator and poured some of it on the respondent's face—"a well-tested and tried method of waking people up" as the petitioner described her act in Exhibit C4. Naturally, the respondent woke up most annoyed and started shouting. The petitioner continued her annoyance of the respondent by flicking her night dress into his face in an attempt to really upset him. After some altercation, a scuffle between the respondent and the petitioner ensued, which brought into their bedroom their two wards, Phillip and Jeneba. The petitioner and the respondent were separated. The respondent went back to bed, but the petitioner continued in her determination to really provoke the respondent by the use of hard words. This resulted in the petitioner receiving a good thrashing from the respondent, in the course of which their ward Phillip was injured whilst attempting to prevent the petitioner attacking the respondent with a broken bottle.

In my view, the petitioner had no justification whatsoever for pressing her demands for a discussion of Exhibit E with the respondent that night. When the petitioner left the respondent's office that day, his attitude towards her had made it quite clear what his stand in the matter was. There was absolutely no necessity for the subsequent action taken by the petitioner. In this regard I am of the opinion that she is guilty of an act of cruelty towards the respondent. She asked for what she got that night. On the other

hand, the respondent could have avoided the incidents of the fights—he being fully aware of the antecedent circumstances—by leaving the bedroom, or the house for that matter. There is no evidence that he made any attempt to do either.

Let me now turn to the incident of July 9th, 1966. It should be recalled that such was the walloping the petitioner got from the respondent on the night of July 5th, that I believe her when she said she was afraid to sleep with the respondent in the same bedroom. From that night to the night of July 8th she had been sleeping in a room downstairs occupied by her aunt, Seray by name. The relationship between the petitioner and the respondent was far from cordial. What I shall now relate is my finding on the evidence. It should be noted that both the petitioner and the respondent have given what I consider to be conflicting accounts of what happened that evening.

Some weeks before July 9th, the petitioner had been invited to a friend's wedding shower party. She told the respondent about it, adding that she would like to attend. During the morning of July 9th, the petitioner had arranged for her friends to collect her to go to the party. So just before 8 p.m. that day she went into the bedroom and started dressing. The respondent was then lying in bed. She did not speak to him. Seeing her dressing, he concluded that she was going out. He had told the petitioner that he did not like her to be out after 8 p.m. Furthermore, as has already emerged from the evidence, he did not like her going out on her own. And so, in an attempt to prevent her from going out, he told her that if she went out that night she had better make arrangements to sleep elsewhere because if she tried to get back she would be embarrassed, as the police would prevent her doing so. In order to impress upon the petitioner that he, the respondent, meant what he had told her, he telephoned the Commissioner of Police, Mr. Leslie William Leigh, asking him to send a detective and policemen, armed if possible, to his residence (meaning the matrimonial home), adding that he would let the Commissioner know the next day what it was all about. In this connection, I must say here and now that I accept the evidence of the Commissioner of Police in its entirety, and it is in some material particulars corroborated by Exhibit C3. The petitioner, realising that the respondent meant what he had told her, and being determined to go out that night, telephoned her parents and made arrangements to sleep with them that night, and in fact slept there. The Commissioner of Police gave evidence that

the instructions of the respondent were carried out. Great play was made of the allegation of riot police having surrounded the home of the respondent. I think this is making much ado about nothing. The fact is that there were armed policemen on guard at the respondent's residence that night.

Next morning the petitioner went to the matrimonial home and took her belongings and her children away. She has not since returned to the matrimonial home. In view of the advice the respondent's doctor had given him regarding the kind of treatment he should give to the petitioner, and also in view of what had happened both on the morning and on the night of July 5th, 1966, can it be said that the respondent in these circumstances treated the petitioner with kindness on the night of July 9th? My answer is in the negative. In my view, the respondent's conduct amounted to an act of great unkindness, and the petitioner was justified in not having returned home that night and also in having left the matrimonial home for good.

The respondent tried to get her back. The general picture or pattern of their marriage which the evidence as a whole presents is such that the petitioner genuinely meant (and there were reasonable grounds to support it) what she wrote to the respondent in Exhibit C2:

> "Lastly I note your request that I should return home; but as mentioned earlier in this letter I am still frightened for my life and feel that if I did I would be virtually a prisoner in my home. I do not think that your request is genuine and so I am not prepared to return home."

Taking all the circumstances into consideration, I have come to the conclusion that the evidence discloses acts of great unkindness on the part of the respondent towards the petitioner, which revived the cruelty she had condoned. In the circumstances, the petitioner succeeds in her petition.

I now come to the cross-petition, which is based on alleged cruelty on the part of the petitioner towards the respondent. Let me say straight away that I find no substance in the allegations contained in paras. 59 and 61 of the answer. There is no doubt in my mind about the evidence that on occasions the petitioner used personal violence on the respondent and on occasions she used harsh and hurtful words which she knew would sting his pride. I have already found on the evidence that the petitioner acted with cruelty towards the respondent on the night of July 5th, 1966. I find

on the evidence as a whole that both parties have acted with cruelty to each other, although the greater blame rests on the respondent. The marriage has completely broken down. It is useless to both of them.

In those circumstances what is this court to do? The legal authorities lay down the proposition that where both parties have been guilty of matrimonial offences and both are to blame to some extent for the breakdown of the marriage (which is the position here) the proper decree is simply for the court, in the exercise of its discretion, to pronounce a decree of divorce on both the petition and the cross-petition. This form of decree is appropriate even though one party was more to blame than the other—and even much more to blame: see *O'Brien* v. *O'Brien* (2). That being so, the proper thing to do is for me to grant the petitioner as well as the respondent their respective prayers for a dissolution of their marriage, and I so do.

I grant custody of the children of the marriage to the petitioner. The respondent is to have reasonable access to them. The details in this connection are to be settled between the parties and their solicitors. In case of disagreement, I give liberty to apply to the court.

I shall now deal with the petitioner's prayer for alimony *pendente lite* and that for secured provision for herself and the children of the marriage, together. There is no evidence that the petitioner has any independent means of her own. The earning capacity of a wife is, however, a matter which may be taken into consideration in determining these matters. This, of course, depends on the facts of each case. The petitioner, although a trained secretary, has not worked since her marriage with the respondent. The position and financial resources of the respondent did not allow the petitioner to work. She has therefore gone stale. Although she is young, the petitioner has the children to look after. The children are young, the eldest being only six years old and the youngest just over a year old. The evidence, which I accept, is that her health at the moment is not of the best. It will take her some time to recoup. As I have already found on the evidence, responsibility for the present state of the petitioner's health rests squarely on the respondent. At the moment, the evidence is that the petitioner together with the children are living with the petitioner's parents. How long this state of affairs will last no one knows. During the marriage the petitioner had a separate car of her own, presumably provided for

her by the respondent. The evidence is that when she finally left the matrimonial home, on July 10th, 1966, she took the car with her. There is no evidence that the respondent ever demanded its return. The car would have to be run and maintained for the use of the respondent's children. In all those circumstances, it is my view that it will be unjust not to award the petitioner anything by way of maintenance. Taking all the circumstances into consideration, I think justice will be done if I award the petitioner maintenance for herself of Le50 a month to be paid by the respondent during the joint lives of the petitioner and the respondent from August 24th, 1966—the date of the filing of the petition—or until further order, and I so order. As regards the children, I order the respondent to pay the sum of Le60 a month for their maintenance, this order to be effective from August 24th, 1966 as well. I also grant liberty to apply.

The respondent is hereby ordered to pay the costs of the petition as well as those of the cross-petition, such costs to be taxed.

Order accordingly.

REGINA *v.* GARRICK, KAMARA, JACOBS and JOHN

SUPREME COURT (Browne-Marke, J.): January 9th, 1967
(Information No. 26/66)

[1] **Criminal Law—larceny—evidence—effect of recent possession—does not incriminate unless larceny proved and property identified:** Recent possession of property alleged to have been stolen does not incriminate unless larceny is proved and the property is identified (page 33, lines 32–34).

[2] **Criminal Law—larceny—evidence—taking may be proved circumstantially without direct evidence that property missing or of identity of property recovered:** Upon a charge of larceny, there must be proof that goods of the complainant have been taken or are missing, but this may be established by the circumstances of the case, although the witnesses for the prosecution cannot swear to the loss of the article said to be stolen, nor that the property found upon the accused and alleged to have been stolen is the complainant's (page 29, lines 15–20; page 32, lines 25–26).

[3] **Criminal Procedure—charges—conspiracy to commit offence—not proper to charge if actual offence will be proved:** Where the proof intended to be submitted to a court is proof of the actual commission of a crime, it is not proper to charge a conspiracy to commit it (page 34, lines 11–16).