CATHERINE H. BRYANT, Appellant, *v.* WILLIAM HENRY BRYANT, Appellee.

APPEAL FROM CIRCUIT COURT OF FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued January 22–24, 1935. Decided February 1, 1935.

1. A party is not bound by any act or omission of a counsel who voluntarily appears without the relation of attorney and client having previously been established between him and such party.
2. A cross-examiner is entitled as a matter of right to test the interest, motives, inclinations and prejudices of a witness, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, and the manner in which he has used those means.
3. A plea in confession and avoidance which does not give color is usually bad.
4. But an action of divorce, according to the statute laws of Liberia, is not bilateral but triangular, and otherwise *sui generis*.
5. Hence, although other contracts may be modified, restricted, enlarged or released upon the consent of the parties, it is not so with a marital contract in the maintenance of which, in its purity, the public is deeply interested.
6. Further, in other civil suits, if a defendant does not appear and plead upon the record, on appearing at the trial he must rest his defense merely upon a traverse of the facts.
7. In divorce proceedings, however, there can be no judgment by default even though defendant may not appear.
8. Even where defendant in a divorce proceeding has neglected to plead, and is resting upon a bare denial of the facts, or even neglects to appear, in any such case the court and the jury, acting as the third party in the triangular contest, may deny the divorce for any of the three causes mentioned in our statute even though plaintiff may have proven his case.
9. Rebutting evidence is that which explains, repels, counteracts or disproves, facts given in evidence by one's opponent.
10. Where the evidence is clearly rebuttal, it should be admitted, and its exclusion is error.

On appeal from a judgment granting divorce to the plaintiff-appellee, *judgment reversed* and *new trial ordered.*

P. Gbe Wolo for appellant. *Anthony Barclay* for appellee.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

This has been the most hotly contested, and ably presented, of all the cases tried during this term, undoubtedly due to the literary and legal ability of the lawyers appearing for the respective parties, as well as to their local and general experience.

According to the records, appellant and appellee were lawfully married in the City of Monrovia on the 18th day of June, 1930; but the romance was of exceedingly short duration, for, on the 23rd day of January, 1933, this action of divorce was filed. The pleadings having extended to the rejoinder, the case came on for trial on the 10th day of May, 1933, before Mr. Justice Russell while a Circuit Judge presiding by assignment in the First Judicial Circuit. Said judge, however, refused to try the case, because, upon inspection of the pleadings, he found that instead of being the alternate statements of law and fact upon which the parties intended to rely, they had endeavored to outdo each other in the use of vile, abusive and scurrilous language which, in his opinion, was too scandalous to be placed upon record. He, therefore, ordered the parties to replead, and postponed the trial for some other term.

Those of us who had our legal baptism of fire in the bar of Montserrado County were pained to see that any member of the bar which we prize so highly should have departed from the skilful and refined manner of pleading which we met, and left, as one of the characteristics of said bar and that it should have been left to a member of the profession hailing from another bar of not so great a reputation for ability and urbanity to condemn wholesale the pleadings of those who should be proud of the traditions which were their heritage. However, the parties took no exceptions to the order of Judge Russell, but, on the contrary, gracefully submitted thereto, and changed both the pleadings and the lawyers on both sides.

We may remark further that, of all classes of men,

lawyers should be very mindful of their responsibility to build up families rather than to lend aid to their destruction, and hence in divorce proceedings more so than any other, should be careful to do all they can to heal, rather than widen, the breach by anything they may say or do.

The new pleadings began on the 11th day of July, 1933, and this time ended only with the reply. The case came on for trial upon the points of law on the 29th day of May, 1934, before His Honor Nete-Sie Brownell, Circuit Judge resident in the First Judicial Circuit, who ruled out defendant's answer, and ordered her to trial upon a bare denial of the facts. Mr. Wolo, in the first and second counts of his brief, very strongly contended here that great injustice was done his client, the appellant in this case, by the judge's giving said ruling without notice to the defendant of the time when he intended to rule upon the issues raised, and hence without any representative of hers being present to take exceptions to the ruling should she so desire in order to lay the foundation for an appeal. Mr. Barclay, on the other hand, stated that Counsellor N. H. Gibson was present, and that as he was related to the defendant, he was her representative; but the records show that although appellant had to change her lawyers three times during the course of the trial, Mr. Gibson was never one of them, and had never been retained; hence, in our opinion, she could not be bound by any action, or neglect, of one who voluntarily appeared as a mere relative for a specific purpose without the relation of attorney and client having been previously established. In the case *Yancy* v. *Republic,* already this day decided,* Mr. Justice Russell has already called attention to the lack of patience some of our Circuit Judges tend to exhibit, and we note with exceeding regret that Judge Brownell, one of the ablest of our legal men, did not appear to have treated defendant with that patience and consideration to which she was entitled during the

* See *supra,* p. 268.

trial, especially when, as Mr. Wolo has made clear to us, she was for a long time blundering along with persons whom both himself and Counsellor Anthony Barclay characterized as novices in the science of law.

Upon this ruling, the case was taken up before the said judge and a special jury, on the 9th day of July, 1934. According to the records, the husband, plaintiff, now appellee, giving evidence in his own behalf, stated substantially that:

> "during the year 1932 the actions of his wife created a suspicion in his mind because of 1) frequent misunderstandings and disagreeableness; 2) that she would go out oftentimes and remain away until late at night, being unable, or unwilling, to report to him whither she had gone. That towards the latter part of the said year 1932 he came into possession of the letters admitted in evidence and marked by the court 'A,' 'B,' and 'C,' which letters convinced him that she had violated her marital vows and obligations with someone by the name of 'Henry,' hence he started this action of divorce."

The wife, defendant, now appellant, testifying in her own behalf, denied having committed adultery with "Henry" or anyone else; denied having written the letters which had been as aforesaid admitted into evidence; denied that they were in her handwriting; and made substantially the following statement:

> "That for about three months she was ill, suffering from breakings out on her hands and legs, and inasmuch as her husband had locked her out of his room she was compelled during that time to sleep in a hammock on the piazza while he absented himself from home everyday. She accounted for this by stating that he became angry because she had gotten possession of certain letters from a Miss Mary Johnson to him, and insisted that she should return them to him, stating that if she didn't he would put her, the wife,

outside, and the Mary Johnson in. She further testified that she herself took the letters to Miss Mary Johnson, and in the presence of a Mrs. Mary McCarey upbraided her for writing such letters to her husband which Miss Johnson promised not to repeat provided Mrs. Bryant did not expose her. She also stated that Mr. Bryant had threatened to forge her name to letters, if that became necessary, to enable him to get rid of her."

The only other witnesses called were Mrs. Angela Dennis-Brown who, although acquainted with husband and wife, stated that she was not acquainted with their handwriting and was thereupon immediately discharged from the witness stand; and a Miss Laura Lawrence who said that she could identify the handwriting, but she could not say whether or not said letters were written by the defendant to her own husband.

Counsellor Anthony Barclay, arguing the case here for appellee, contended that the Court should reject the hypothesis of appellant's counsel that said letters were written to his client, the appellee, because, although he admitted that the husband's name was Henry, the same as the unidentified individual charged as co-respondent, yet there was evidence internal in the letters themselves, he contended, to show that they could not have been written to the husband, such, for example, as references to her husband's leaving to attend the annual town meeting in Royesville from which town Mr. Bryant originally hailed; nor could they have been written to his said client by appellant before her marriage to him, while she was married to her former husband, because, as Counsellor Barclay alleged, the former husband had been domiciled in Grand Bassa, and had not the connection with Royesville the letters imputed to the addressee; and that sundry other references in said letters excluded the hypothesis that it was during her first marriage they were written, in spite of the fact that none of the three letters was

dated, and hence it was not satisfactorily shown when they were written. Mr. Barclay's attention was, however, directed to the fact that he had neglected to prove on the trial the temporary residence or habitual domicile of either husband, and hence we could not consider the points he advanced about one husband having originated from Royesville and the other from Grand Bassa.

Mr. Wolo, on the other hand, pointed out that in contrast to the said letters whose genuineness was in dispute, four undoubtedly genuine letters of the wife had been admitted without objection, upon the application of plaintiff, for the purpose of comparison with those in dispute, and that in all of the genuine ones she had been careful to date them, which was an argument against the carelessness of the writer of the documents claimed to be spurious admitted as evidence in the case [*sic*].

Keeping these facts before us we can now proceed to a consideration of the even more salient points in the case.

In the third count of Mr. Wolo's brief, he contends that the trial judge erred when, upon cross-examination, he refused to allow the plaintiff, testifying in his own behalf, to answer the question: "Please say how letters marked 'A,' 'B,' and 'C,' came into your possession," for the reason given by the judge that such a question "tended to betray confidence." Mr. Wolo having given numerous citations against the ruling of the judge aforesaid, the attention of counsel for appellee was drawn to the fact that he had cited no law in support of the ruling of the judge in his favor, but each time he was pressed to justify the said ruling he answered in an ever increasing crescendo: "irrelevant! irrelevant!! irrelevant!!!" When further pressed from this Bench, Mr. Barclay was compelled to admit that under none of the twelve rules that exclude privileged communications could the ruling complained of be justified, nor have we been able to find any. When it comes to Counsellor Barclay's insistence that it would have been irrelevant to compel the witness to tell

whence he had obtained the letters, the only evidence he had offered tending to prove adultery, we find ourselves of an entirely contrary view. First of all, the letters in dispute were not dated; defendant denied that they were in her handwriting, or that she had written them; nothing was offered to show that they ever emanated from her or had been in her possession; and the only evidence in support of them was the statement of her husband whom she had accused of having threatened to forge her name if she did not surrender to him the letters she had seized written to him by Mary Johnson, and the comparison of said letters with undoubted writings of hers by a jury. Moreover when it is considered that according to the customs universal throughout this part of Africa that in such a case a family conference is called, and the letters or other evidence placed by a relative of the aggrieved husband before the offending wife, and an explanation demanded of her before she can be accused, which was not done in this case, it should not be a source of surprise to anyone that there never has been a moment, during the whole trial, that a single member of this Bench was ever in doubt that a great injustice was done the appellant by the refusal of the trial judge to compel the husband to state from whom, and under what circumstances, the letters with which he wished to criminate his wife were obtained. For, under the rule governing the cross-examination of witnesses, the cross-examiner is entitled as a matter of right to test the witness'

> "interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, . . ." 1 Greenleaf, Evidence § 446.

And this of every witness who testifies, in order that all these may be submitted to the jury whose function it is to satisfy themselves of the credibility to be given to all witnesses who may have testified before them.

In view of the foregoing we are of the opinion that the question was improperly overruled by the trial court.

Hot as was the contest over this question it was, as it were, but a preliminary skirmish as compared with the greater combat that centred around the ruling on recrimination, by the judge having ruled out the third plea of defendant's answer, on the ground that it was a plea in confession and avoidance which did not confess: and thereafter in disallowing every effort made by defendant to prove her allegation that it was because of the letters which came into her possession, written by Mary Johnson to her husband, and her refusal to surrender them, that the estrangement had come, and ultimately this divorce suit.

Without a doubt defendant's answer was badly pled, and the judge correctly ruled that a pleading in confession and avoidance which does not give color must be dismissed. And, had the action of divorce been, as most civil actions are, a purely bilateral suit, or strictly controlled by Chapter V of the Statutes (Old Blue Book) and the relevant decisions thereon, the correctness of his ruling on the answer being unquestionable we would have felt ourselves in duty bound to support his persistent refusal to allow any evidence of recrimination to be introduced, which position he took based upon 9 *Ruling Case Law* 391, § 184.

It now becomes our duty most carefully to examine the correctness or incorrectness of the theory upon which the judge proceeded especially so, as in the very able and interesting arguments to which we listened for three days the whole practice and procedure of our courts in matters of divorce were under fire, and it was made clear long before the argument was concluded that a decision of this particular case might have the tendency to revolutionise the practice and procedure in all subsequent trials of divorce.

According to Bishop, in his treatise on the *Law of*

Marriage, Divorce and Separation (6th ed.), volume II, section 230:

> "A divorce suit, while on its face a mere controversy between private parties of record, is, as truly viewed, a triangular proceeding *sui generis,* wherein the public, or government, occupies in effect the position of a third party."

In the subsequent sections from 490 to 498, Mr. Bishop indicates the functions of the prosecuting officer in those jurisdictions in which he is authorized to intervene in all cases of divorce, and the duties of the court in all cases in which the statutes do not specifically authorize the appearance of the prosecuting attorney, and to which we shall revert later on.

Not essentially different, but rather almost identical, are the principles laid down in *Ruling Case Law,* where on pages 252–254 of volume 9, sections 11 and 12, we find the following:

> "Marriage is a relation in which the public is deeply interested and is subject to proper regulation and control by the state or sovereignty in which it is assumed or exists. The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation. This policy finds expression in probably every state in this country in legislative enactments designed to prevent the sundering of the marriage ties for slight or trivial causes, or by the agreement of the husband and wife, or in any case except on full and satisfactory proof of such facts as by the legislature have been declared to be cause for divorce. Such provisions find their justification only in this well-recognized interest of the state in the permanency of the marriage relation. The right to a divorce exists only by legislative grant, the marriage contract in this respect being regulated and controlled by the sovereign power, and not being, like ordinary

contracts, subject to dissolution by the mutual consent of the contracting parties, but only for the causes sanctioned by law. As said by the federal Supreme Court: 'Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.' * "

"Section 12: While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same unless good cause for its dissolution exists, is an interested party. It has been said by the courts and eminent writers on the subject that such an action is really a triangular proceeding, to which the husband and the wife and the state are parties. When an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made on which the state permits a divorce to be granted. Both the policy and the letter of the law concur in guarding against collusion and fraud, and it should be the aim of the court to afford the fullest possible hearing in such matters. So, on the ground of public interest, the courts are more ready than in other proceedings to relieve against defaults and to grant continuances. To discover and defeat any attempt to use, the forms of the law of divorce for vindictive or fraudulent pur-

* *Maynard* v. *Hill*, 125 U.S. 190, 31 L. Ed. 654.

poses, is a proper exercise of the legal discretion vested in all courts having divorce jurisdiction. The courts are bound to protect the public interests as well as the rights of the parties themselves, and hence before a party is entitled to a divorce it must be made to appear by proof that he or she is the innocent and injured party . . ."

The law in every jurisdiction is, of course, not the same; and all books like *Ruling Case Law* contain encyclopaedic information of the general principles, as well as of specific rulings in different jurisdictions, based upon the law of the place. Therefore the ruling of His Honor Judge Brownell based upon the 9th volume, page 391, § 184 of *Ruling Case Law* just quoted would appear at first inspection to justify his subsequent conduct of the suit since indeed it is therein set out that:

". . . Recrimination is an affirmative defense which to be available should be specially pleaded or set up in the answer as a defense. . . . [and in some states such as California, Massachusetts and New Jersey it has been held that] in an action for divorce on the ground of adultery, the court cannot, on the ground that public policy and public morals require it, entertain any matter in recrimination not properly put in issue; . . ."

It now becomes important to examine our own statutes on the subject by which we have to be controlled in arriving at a correct decision of this matter.

To Mr. Justice Dixon is justly due the credit of having, during the argument, directed the attention of bench and bar to certain unique peculiarities in the wording of the statute which, perhaps, but for his keenness, we might all have overlooked. First of all, unlike all the other enactments on our statute book, this statute does not conclude merely "any law to the contrary notwithstanding"; but ends with these words, "all laws or parts of laws conflicting with the provisions of this Act be, and are

hereby, repealed." The Act of 1906–07, page 15, begins (see section 1):

"That all actions of Divorce shall be filed in the Court . . . as other individual suits, and shall be governed by the rules and practice in said Courts *not contrary to the special provisions of this Act.*" (Itals. added for emphasis.)

Let us now consider what are some of the special provisions of said Act which distinguish it from ordinary civil suits.

According to section 3:

"The Defendant may appear and plead upon the record, or at the trial in person, or by a counsel, or both: but where the Defendant willfully neglects to appear and plead upon the records according to the regular rules of practice and pleading, he or she shall only rest his or her defence upon the plea of not guilty."

"Section 4. Should the Defendant fail to appear and plead upon the record or in person the Court shall order a plea of not guilty to be entered for such Defendant, and proceed to the trial upon the said plea, and the truth of the allegations charged in the complaint must in all cases be proven by good and sufficient evidence."

"Section 5. Upon the trial of any action of divorce, although the charge of adultery is proven by the Plaintiff, the Court and Jury may deny the divorce sought in the following cases: (a) where the offence shall have been committed by the procurement, collusion or with the connivance of the complainant. (b) where with a full knowledge of the facts that the offence has been committed, the injured party thereafter co-

> habits with the offender. (c) where it shall be proven by the Defendant that the Plaintiff has been guilty of adultery of which the Defendant has not forgiven the Plaintiff previous to the commencement of the suit, provided always the said guilty conduct of the Plaintiff can be proven to have occurred within three years before the commencement of the suit."

Now there is here an apparent inconsistency between sections three and five, which it is necessary to reconcile, since the former section provides that defendant is to plead upon the records according to the regular rules of practice and pleading or is confined solely to the plea of not guilty; while in section five even though the defendant is in default either by having neglected to plead, or having neglected to appear, the court and jury may deny the divorce sought in any of the cases mentioned under (a) and (b) : and it shall also be denied if proven by defendant that plaintiff has been himself guilty of adultery within three years uncondoned.

In this statute, as contradistinguished from all others, which permits the court to receive and decide upon affirmative evidence without a corresponding affirmative plea, it is evidently clear that the ruling of Judge Brownell was erroneous. Moreover, in the next section to that upon which he relied, being Section 185 on page 392 of volume 9 of *Ruling Case Law,* we find this provision:

> "Where it appears from the proofs properly taken, though the recriminatory charge is not specially relied on as a defense, that the plaintiff has been guilty of adultery and seeks a divorce on the ground of the adultery of the defendant the court may of its own motion dismiss the suit. . . ."

Under this statute a few cases have arisen in which,

after a verdict for plaintiff, the court has actually on its own motion denied the divorce based upon this statute, and that would in all other cases be an anomaly; for in all other cases:

> "As soon as a perfect verdict is rendered, . . . the court shall proceed to render a final judgment, in support of the verdict must be always implied as has always been the case except in actions of divorce."

But inasmuch as when the defendant only appears at the trial, or does not appear at all, and hence in neither such cases could have pled, the court may still deny the divorce on any of the affirmative defenses enumerated, in only the last of which it is specifically stated that defendant shall have the responsibility of proving, upon what affirmative plea would any such defense, in any such eventuality, be based?

It would seem, according to Bishop, that the court's duty slightly varies as to whether or not the affirmative matter evolved tends to prove collusion, condonation or recrimination. With regard to the first, collusion is either a branch of connivance or a conspiracy to cheat the court or both. In any view, a divorce will not be granted where it appears. And where it does not sufficiently appear, still if the case discloses what may create suspicion of it, the vigilance of the Bench will be specially aroused to discover and avert imposition and to detect weakness in the proof. 2 Bishop, The Law of Marriage, Divorce and Separation, §§ 28–30.

Coming to the next affirmative defense: Forgiveness of injury, especially in response to repentance is deemed in law as well as in morals commendable. And when a married party knowing the other to have committed an offence authorizing a divorce and having the ability to prove it, continues or renews the connubial intercourse, a forgiveness thereof, technically termed condonation, is conclusively presumed. But to prevent scandal in the community, and especially to induce injured consorts to

condone this sort of wrong instead of proceeding for a divorce, the law attaches to the condonation the condition that neither the like matrimonial wrong, nor any other of a sort authorising a divorce, nor yet any conjugal unkindness though progressing less far shall be committed by the forgiven party. On a violation of the condition, the original right of divorce revives. Such is the doctrine. The applications of it will somewhat vary with the sex, with the nature of the particular offence, and with the other circumstances. *Id.* at ch. IV.

Collusion and condonation were not at all involved in the case under consideration; but we have adverted to them in order to bring into clearer relief Bishop's treatment on recriminatory adultery which was submitted for the consideration of this Court.

Continuing, Bishop says:

> "By all opinions, English and American, one shown to be guilty of adultery cannot have a divorce for adultery committed by the other. And it makes no difference which was the earlier offence, or even that the plaintiff's followed a separation which took place on the discovery of the defendant's. It has also been held, and it is little questioned, that a single act of adultery is sufficient in bar, whatever the extent of guilt on the other side. . . ." *Id.* at § 80.

Furthermore, marriage creates reciprocal duties. And for certain breaches of them, commonly specified by statutes, the injured party may have a divorce absolute or partial. But if one has committed a breach of this sort, he cannot conformably with the principles of our jurisprudence have a divorce for the other's violation. To bring a case within this rule, it is not sufficient that the plaintiff simply lacks the perfection which we attribute to angels, his wrong must be such that but for the other's wrong he would be liable to be himself either partially or fully divorced. 2 Bishop, The Law of Marriage, Divorce and Separation, § 89.

Another contention of appellant's was that even if she were wrong and the trial judge correct in rejecting evidence in recrimination when she was examining in chief, still there was no justification in the judge's preventing her from introducing recriminatory evidence in rebuttal, especially in view of the question put to plaintiff when testifying for himself, as follows:

> "Do you swear that you have never at any time up to the filing of this suit committed adultery with any woman during your marriage with defendant in this suit?"

His answer was: "To the best of my knowledge I have not"; and defendant then and there immediately gave notice that she would rebut that part of the plaintiff's, now appellee's, evidence. Mr. Barclay replied that the judge did not prevent her from bringing her evidence in rebuttal, but, on the contrary, permitted her witness, Mrs. Mary McCarey, presumably called as a rebutting witness, to be sworn; but it was the defendant who, subsequently, neglected to put her upon the stand, thereby waiving the privilege of interrogating her.

Reverting to the record we find that the evidence of the plaintiff having been concluded, the counsel for defense proceeded to outline the theory of his defense to the court and jury, as was his right, and to introduce his witnesses. Whilst thus engaged he was interrupted by the counsel for plaintiff who protested against his informing the court of his intention to introduce recriminatory evidence inasmuch as the answer of the defendant had been ruled out, and the court had ordered her to rest upon a bare denial of the facts. The court then ruled that although the third count of defendant's answer had alleged that plaintiff had lived continuously in adultery with Mary Johnson from the third day of January, 1932, until the filing of the complaint, and contained other affirmative pleas in other pleas thereof, still inasmuch as the plea had been badly pled, and consequently ruled out, the de-

fendant's evidence would be confined to two points only, namely: the innocence of the defendant, and to the non-genuineness of the letters; and to this ruling upon defendant's opening address she took exceptions.

Perhaps the better practice would have been, as Mr. Barclay contended, to have put Mrs. McCarey on the stand, put the questions to her, and let them be objected to, the defendant taking further exceptions. But, inasmuch as in view of the said ruling of the court no such question would have been allowed to be answered, we are disposed to accept Mr. Wolo's excuse that it would have been a useless waste of time, since indeed no different result would have been achieved after a useless expenditure of time and money, defendant having already saved her exceptions on such view of the trial judge. This then brings us to the question: was the trial judge right or wrong in excluding the testimony so offered in rebuttal?

According to Bouvier, rebutting evidence is:

> "That evidence which is given by a party in the cause to explain, repel, counteract, or disprove facts given in evidence on the other side. . . . It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side." B.L.D., "Rebutting Evidence."

According to Black, rebutting evidence is:

> "Evidence given to explain, repel, counteract, or disprove facts given in evidence by the adverse party." Black's Law Dictionary, "Rebutting Evidence."

According to Jones:

> "Rebutting evidence means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavoured to prove. Where the evidence is clearly rebuttal, the one offering it is

entitled to have it admitted, and its exclusion is error." Jones, Evidence, § 2503 (6th ed., 1926).

Hence, we are of the opinion that the judge should have permitted the defendant to give evidence contradicting the testimony of the plaintiff, both for the purpose of bringing to the notice of the court defendant's misconduct, as well as to allow him to argue the principle contained in the legal maxim: *falsus in uno falsus in omnibus.*

One other important point urged by Mr. Wolo we must pass upon before we proceed to close. He contended that if at all Mrs. Bryant had committed adultery, or had been disposed that way, it was attributable to the neglect of her husband to cohabit with her while he, for months, had her locked out of his room, and remained away from the home, leaving her exposed to sleep in a hammock on the piazza for three months as she testified while upon the witness's stand.

Under statutes granting divorces only to parties who have been injured, "The North Carolina courts have held," says Bishop, "that one who has causelessly deserted the other cannot have the marriage dissolved for the latter's subsequent adultery. . . . 'No husband can have the bonds of matrimony dissolved by reason of the adultery of the wife committed through his allowance, his exposure of her to lewd company, or brought about by the husband's default in any of the essential duties of the married life, or supervenient on his separation without just cause.'" * *Op. cit.*, § 388.

Summing up now, we have come to the following conclusions for our guidance, and that of the courts below in this, and all other cases of divorce that may subsequently arise:

1) That the 3rd and 5th sections of our statute on Divorce (Act 1906–07, 15) are patently incon-

* Dillard, J., in *Tew* v. *Tew.*

sistent; and that when construed by the context, and especially section one, and the conclusion, enable the affirmative defenses specially mentioned in section 5 to be proven even when not properly plead;

2) That inasmuch as several attempts have been made without success by certain sections of the Republic to have said enactment either repealed or modified, every such failure to mobilize a sufficiently strong sentiment to move the Legislature but tends to strengthen the impression that said Act was intended to be of such a restrictive character as to be practically prohibitive;

3) That every action of divorce must be regarded as a triangular rather than a bilateral suit, and the judge, as representing the community, must be keen in scenting out any act of collusion or recrimination, no matter how remotely hinted at, and whether alleged or not; and in calling or interrogating witnesses to defeat the divorce whenever there is a connivance or a conspiracy to cheat the court and the public, or for a party guilty of a matrimonial injury, either by withdrawing from cohabitation with the other party to the marriage, or by having himself committed adultery, from obtaining a divorce under such circumstances.

Hence, in view of the conclusions we have reached as above expressed, it is our opinion that the judgment of the court below should be reversed, and the cause remanded for a new trial in strict accordance with the principles herein enunciated, and the appellee ruled to pay all costs incurred and accruing to the commencement of said new trial; and it is so ordered.

Judgment reversed.