[HIGH COURT OF AUSTRALIA.]

UTICK . . . . . APPELLANT;
RESPONDENT,

AND

UTICK . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1907.

SYDNEY, *November* 29.

Griffith C.J., Barton and Isaacs JJ.

Petition for dissolution of marriage and permanent maintenance — Failure of respondent to enter appearance in suit—Right to be heard on question of maintenance.

In a suit for dissolution of marriage in which the petitioner asked for an order for permanent maintenance, the respondent failed to enter an appearance in accordance with the rules of Court, but at the hearing asked to be allowed to be heard by his solicitor on the question of maintenance only. The Judge refused to hear the solicitor, and made an order for the payment of permanent maintenance.

Held, that, notwithstanding the failure to enter an appearance in the suit, the respondent, in the absence of express provision to the contrary, was entitled to be heard, and the order for maintenance, having been made without hearing him, was bad.

Order of *Simpson* J. directing the payment of permanent maintenance set aside.

APPEAL from an order of *Simpson* J. in the Matrimonial Causes Jurisdiction of the Supreme Court, directing that permanent maintenance should be paid by the respondent to the petitioner in a suit for dissolution of marriage.

The facts sufficiently appear in the judgments hereunder.

McManamey, for appellant. It is a general principle of law that every person has an unassailable right to be heard if he desires it when it is sought to make an order against him: *Smith* v. *The Queen* (1). It may be that failure to comply with rules as to appearance would subject him to the risk of having an order made against him, on the assumption that he does not desire to oppose it, but if, before an order is made, he asks to be allowed to appear, then, although the validity of what has already been done cannot be affected, he should be allowed to be heard, possibly upon terms. Even in the suit on the main question, a respondent may be heard, though he has failed to enter an appearance: *Stow* v. *Stow* (2). *A fortiori* he should be allowed to be heard on the subsidiary question of maintenance, although the main issues have gone against him by default. Once the order is made the respondent is bound for all time unless he can show a change of circumstances. [He referred to *Matrimonial Causes Act*, No. 14 of 1899, secs. 39, 40, and rules 12, 20, 108-116.]

Curtis, for the respondent. The present case does not involve the general question of the right of a party who has not entered an appearance to be heard *vivâ voce*, but only the question whether under the particular circumstances of the case His Honor rightly exercised his discretion in refusing to hear the respondent. A proper procedure is prescribed by the rules for the case of a respondent who has failed to enter an appearance in time, and wishes to do so later. If that is not adopted the Judge has a discretion as to whether the party in default should be allowed to appear. The respondent had not followed the procedure prescribed, and offered no valid excuse for not having done so.

[*Isaacs* J. referred to *Bradley* v. *Bradley* (3).]

Special leave should not have been granted. There has been no denial of justice. At any time within the year the respondent may apply to have the amount reduced. He is merely paying for his remissness in not adopting the proper procedure. The effect of the order was, not that the respondent must pay the

(1) 3 App. Cas., 614, at p. 623. (2) 9 N.S.W. W.N., 52.
(3) 3 P.D., 47, at p. 50.

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amount ordered for all time, but only until he took the steps open to him to have the amount reduced. It is a mere question of procedure: *Bagnall* v. *White* (1).

GRIFFITH C.J. This is an appeal from so much of an order made by *Simpson* J. in the divorce jurisdiction of the Supreme Court as directs that permanent maintenance be paid by the present appellant to his wife, the petitioner in a suit for dissolution of marriage. The appellant did not enter an appearance in the suit, but when the case came on for trial his solicitor asked to be allowed to enter an appearance, not for the purpose of being heard as to the merits of the suit, but only on the question of maintenance. The learned Judge, in the exercise of a discretion apparently conferred by the rules, refused to allow an appearance to be entered at that stage, and further refused to hear the solicitor on the question of maintenance. It is, to me at any rate, novel that on the trial of an action a party may not be heard in his defence either by himself or by his counsel, even though he has not entered an appearance. I referred in the course of the argument to the case of a writ of inquiry after judgment by default for want of appearance. It is novel to me that a defendant in a case of that kind cannot be heard simply because he has not entered an appearance. In the *Annual Practice*, 1907, p. 475, dealing with Order XXXVI., rule 56, under the head "Practice," it is stated that, where the defendant is in default of appearance, "Some notice, besides filing in default, should be given, because a defendant to an action for damages is entitled to let judgment go by default, and yet is also entitled to receive notice of the assessment of damages." There is no authority cited for that proposition—probably because none was necessary, the proposition being in accordance with obvious principles of justice. As was pointed out in the case cited by my learned brother *Isaacs*, an application for maintenance is a separate and independent application from the application for dissolution of marriage. Upon what principle of justice can it be suggested that a man, against whom an order for maintenance is sought, is not entitled to be heard on the issue of what is a proper amount

(1) 4 C.L.R., 89.

to order to be paid by him? Is the Judge to take the uncontested version of the wife as to her husband's means or as to her own? It seems to me that a refusal to hear a man under these circumstances is a violation of the rule *audi alteram partem*, and cannot be supported. The failure to enter an appearance in the office does not seem to me, in the absence of positive provision to the contrary, a sufficient reason for refusing to allow a man to defend himself by word of mouth. Even when a man has pleaded guilty to a criminal offence he is allowed to be heard before sentence is passed upon him. One of the consequences of the appellant's failure to enter an appearance in the suit was that he was liable to have an order made against him for maintenance. But for how much? Surely according to every principle of justice he was entitled to be heard on that question. I think, therefore, that the order was wrong on that ground. It may have been a perfectly just order. But, to quote the well-known epigram of Seneca, "*quicunque aliquid statuerit, parte inauditâ alterâ, æquum licet statuerit, haud æquus fuerit.*"

BARTON J. I concur.

ISAACS J. I think that, once you arrive at the position that is laid down by Lord *Westbury* in *Sidney* v. *Sidney* (1), referred to in *Bradley* v. *Bradley* (2), that the application for alimony or permanent maintenance is a totally distinct proceeding for a totally different object from the main question in the suit, the difficulty here is solved. And Lord *Westbury* said at the conclusion of the passage quoted by *Sir James Hannen* (3), "In fact, although it may not be so in terms, it is really an order pronounced upon an application to the discretionary power of the Court, which application can only be made after the other and more important jurisdiction has been exercised." Well, in the present case, in the petition, no doubt, notice was given that an application would be made for permanent alimony, and, apparently, the respondent not wishing to contest the main question, the case was allowed to go by default, and when the

(1) L.R., 1 P. & D., 78. (2) 3 P.D., 47.
(3) 3 P.D., 47, at p. 50.

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application for maintenance was made, the respondent said, in effect, "Now that that application has been made, I desire to be heard upon it." But he was not allowed to be heard. This Court is not in a position to say that the order was just any more than His Honor was. The very first principle of justice requires that, when one party comes into Court and asks for an order, the other side should be heard, and unless it is heard, no one can tell whether the order asked for or made is just or not. Under these circumstances there is no alternative but to set aside that portion of the decree which orders that permanent maintenance be paid by the appellant.

GRIFFITH C.J. The application for maintenance is still pending, as it has not been properly heard. The case must be remitted. It is left in the position of an application to *Simpson* J. not yet heard.

Appeal allowed. Order appealed from discharged. Case remitted to the Supreme Court.

Proctor, for the appellant: *R. W. Fraser.*
Proctor, for the respondent: *J. B. Frawley.*

C. A. W.