

## [HIGH COURT OF AUSTRALIA.]

BLANCHE EVELYN OGSTON . . . . . APPELLANT;  
 PETITIONER,

AND

MAURICE OGSTON . . . . . RESPONDENT.  
 RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF  
 WESTERN AUSTRALIA.

H. C. OF A. *Husband and wife—Divorce—Separation and maintenance order—Periodical payments*  
 1935. *—Failure to make payments—"Repeatedly and habitually"—Divorce and*  
 { *Matrimonial Causes Ordinance 1863 (W.A.) (27 Vict. No. 19), sec. 23 (Divorce*  
 PERTH, *Amendment Act 1911 (W.A.) (No. 7 of 1912), sec. 2; Divorce Amendment Act*  
 Aug. 22, 26. *1925 (W.A.) (No. 23 of 1925), sec. 2).*

Rich, Starke,  
 Dixon, Evatt  
 and McTiernan  
 JJ.

Sec. 23 (e) of the *Divorce and Matrimonial Causes Ordinance 1863* (enacted by the *Divorce Amendment Acts 1911*, sec. 2, and 1925, sec. 2) (W.A.) provides that a married woman may "present a petition to the Court praying that . . . her marriage may be dissolved . . . on the ground that the respondent, being the petitioner's husband,—(i) is separated from the petitioner under a decree or order of a competent Court or by virtue of a deed of separation, and has been so separated for a period of three years and upwards; and (ii) is, and has been during the period aforesaid, liable by virtue of a decree or order of the said Court or of a covenant in the said deed to make periodical payments to the petitioner, or to some person on her behalf, by way of alimony or for the maintenance and support either of the petitioner alone or of her and any child being offspring of the marriage; and (iii) has during the period aforesaid failed to make such payments periodically as required by the decree, order or covenant, either entirely or repeatedly and habitually."

*Held* that, to afford ground for a decree under this paragraph, the obligation to pay must be imposed upon the husband by the same instrument as effects the separation, and, to be "repeated and habitual," the failure to make the payments must be persistent throughout the period of three years considered as a

whole, but a failure in punctuality over each and every part of the period is not necessary; it is enough if, when the period is viewed as a whole, it appears that the respondent's failure to pay was so frequent that it may rightly be said that throughout the time it was habitual. The expression "periodically as required" refers to a substantial adherence to a period specified in the instrument effecting the separation but not necessarily to strict payment *ad diem*. The expression "period aforesaid" means any period of three years occurring during the separation which exists at the presentation of the petition.

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Decision of the Supreme Court of Western Australia (*Northmore C.J.*) reversed.

APPEAL from the Supreme Court of Western Australia.

On 24th May 1935 Blanche Evelyn Ogston filed a petition in the Supreme Court of Western Australia seeking the dissolution of her marriage with Maurice Ogston on the grounds, alternatively, (1) that on 23rd April 1931 the petitioner and the respondent entered into a separation agreement; under the agreement the respondent was to pay the petitioner £2 per week, and since the agreement the respondent had repeatedly and habitually failed to make payments periodically as required by the agreement; (2) that on 17th April 1931 in the Court of Petty Sessions at Dalwallinu in the State of Western Australia the petitioner obtained a separation and maintenance order against the respondent; under the order the respondent was to pay the petitioner £2 a week, the first payment to be made on 26th April 1931; on 1st April 1932 in the Court of Petty Sessions at Perth the respondent obtained a variation of the order by a reduction of the amount of maintenance to £1 per week and the respondent was ordered to pay 2s. 6d. per week off an amount of arrears owing under the original order; and the respondent had repeatedly and habitually failed to make payments periodically as required by the order and variation. At the hearing of the petition it appeared that the separation and maintenance order and the order varying it had been made as stated in the petition and the separation agreement had been made on the date mentioned. The reason for the making of the agreement did not appear, but the parties treated the order as governing their relations. The husband made payments regularly pursuant to the order until 31st August 1931 but then fell into arrears, and, although there were periods in which he paid regularly, there were long intervals in which he paid little or nothing. Particulars of the payments appear in the judgment



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of *Rich J.* hereunder. *Northmore C.J.* decided that the husband had not “repeatedly and habitually” failed to make the payments ordered and therefore the petitioner was not entitled to a decree under sec. 23 (e) of the *Divorce and Matrimonial Causes Ordinance* 1863 (enacted by the *Divorce Amendment Acts* 1911, sec. 2, and 1925, sec. 2) (W.A.); he accordingly dismissed the petition.

From this decision the petitioner now appealed to the High Court.

*Curran*, for the appellant. The original order of 17th April 1931 is the order to which regard must be had under sec. 23 (e). That is the order by which the parties were separated. The only effect of the second order was to vary the amount of maintenance. In this case there has been a “repeated and habitual” failure to make the payments required by the order. The question is not merely whether payments were made regularly but whether the order has been strictly complied with. The words of the section are “failed to make such payments *periodically* as required by the order.” The order is that the payments shall be made weekly, and it fixes the first day of payment. Regular payments, if not in compliance with the order, do not satisfy the statute. The Act gives the petitioner the right to proceed even though the payments may subsequently be brought up to date. [Counsel referred to the *Oxford English Dictionary*, s.v. “during”; *Weiler v. Weiler* (1).]

[*RICH J.* referred to *Dodd v. Dodd* (2); *The Justice of the Peace*, vol. 62, p. 563; *Brown v. Brown* (3); *Reid v. Reid* (4); *Davies v. Davies* (5).]

There was no appearance for the respondent.

The following judgments were delivered:—

*RICH J.* This is an appeal from a decree of the Supreme Court dismissing a wife’s petition for dissolution of marriage. The ground of the petition is that stated by par. e of sec. 23 of the Divorce Act, or Ordinance, as amended. The conditions which the petitioner must satisfy in order to succeed under that provision fall under three heads. First, the petitioner must show a legal separation

(1) (1918) 25 C.L.R. 109, at p. 112.

(3) (1898) 62 J.P. 711.

(2) (1906) P. 189, at pp. 194, 195.

(4) (1926) P. 1.

(5) (1919) 26 C.L.R. 348, at p. 363.



from the respondent for a period of three years and upwards. The separation may be effected by a decree or order of a competent Court or by a deed of separation. Secondly, it must appear that by virtue of the instrument which effects the separation the respondent is liable to make periodical payments to or for the petitioner. The periodical payments may be by way of alimony or for maintenance and support of herself alone or of herself and any child of the marriage. Thirdly, she must show that the respondent "has during the period aforesaid failed to make such payments periodically as required by the decree, order or covenant, either entirely or repeatedly and habitually." The manner in which this third condition is expressed in the enactment occasions some difficulty. In all instruments referring to time the word "during" is a fruitful source of ambiguity. It is capable of meaning at some time or times between the beginning and end of a period. It is also capable of meaning throughout the whole of that period. If it has the former meaning in the provision under consideration, it is enough that for some interval of time within the period of three years and upwards relied upon by the petitioner the respondent has been guilty of repeated and habitual failure to pay periodically as required. Necessarily the interval of time must be sufficiently long to allow of repetition and habit in the failure. Habit implies a repetition over some substantial period. On the other hand, if the word "during" has the latter meaning, it is necessary that over the whole period the respondent's omissions punctually to perform his obligation to pay periodically are of such an order as to merit the epithets "repeated and habitual." The provision requires that the obligation which he so fails to fulfil must arise from the instrument which effects the separation, be it an order or be it a deed. It is in that instrument that the duty to pay periodically must be found. The period and the requirement to pay will be there defined. It is the failure to make the payments periodically which must be "entire or repeated and habitual." The expression "periodically as required" is open to more than one meaning. It may refer to exact and punctual compliance with the duty to pay on specified days regularly recurring. Or it may be satisfied by a substantial adherence to a duty to pay at intervals so that arrears do not accumulate although strict

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punctuality in the time of payment is not observed. The words "repeatedly and habitually" are indefinite and refer to matters of degree. Repetition may occur without habit, but it is difficult to see how a failure to perform a recurring duty can be habitual without repetition. The notion at the back of the expression seems to be that the respondent's neglect of his duty to maintain his wife, or his wife and children, by regular payments upon which they may rely is persistent and forms the rule rather than the exception in his compliance with the obligation to them. I think the word "during" should not receive the meaning "at some time or times within the period" but should receive the meaning "throughout." The latter meaning is more in keeping with the other provisions of sec. 23 and has the effect of making the ground of divorce depend upon persistence which extends over a defined period of time, viz., three years. It does not follow that there must be a failure in punctuality over each and every part of this period, but it does follow that when the period is viewed as a whole it may justly be said of it that the respondent's failure to pay was so frequent that it may rightly be said that throughout the time it was habitual. Intervals of punctuality are quite consistent with habitual failure over a period viewed as a whole. A habit is not lost merely because it is not uniformly indulged. Further, once an omission becomes habitual, intervals of fulfilment followed by periods of omission will have a much diminished effect in countervailing the inference of habit. The expression "periodically as required" should be taken to refer to a substantial adherence to a period specified in the instrument of separation but not necessarily to strict payment *ad diem*. The intention is to ensure that the wife has a regular means of support in the amount and at the intervals prescribed by the order. The words "period aforesaid" should, I think, be taken to mean a period of three years. The separation must exist at the time the petition is presented and must have existed for a period of three years and upwards. A possible construction of the words "the period aforesaid" is that it refers to the whole period calculated back from the petition to the date of the separation. Although grammatically such a construction would be justified, I think that the sense of the enactment clearly is that "entire or repeated and



habitual failure " shall be for three years and that when this has taken place a ground of divorce has accrued and may be availed of at any time while the separation under the decree, order or deed continues.

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In the present case the wife obtained an order under the *Married Women's Protection Act* 1922-1926. The order was made on 17th April 1931. It was not drawn up, and upon the notes of the order certified by the clerk of the Court some doubt arose in this Court as to whether it complied with the requirement of the Act (see *Dodd v. Dodd* (1); *The Justice of the Peace*, vol. 62, p. 563; *Brown v. Brown* (2)). To resolve these doubts the order has been drawn up and produced to us. It appears to be a valid order properly made. By it the respondent is separated from the petitioner. By it he is liable to make periodical payments to the petitioner for maintenance. The sum payable was £2 per week, beginning on 26th April 1931. After the order was made the parties entered into a deed of separation dated 23rd April 1931. The deed contained a covenant to pay the sum of £2 per week. But, as the separation was already effected by the order, this deed cannot be relied upon for the purpose of founding the petition. Under the order the husband paid with substantial regularity until 31st August 1931. His payments amounted to £38. From that time until 1st April 1932 he made no payment. The arrears then amounted to £60. On that date he obtained an order of variation of the previous order. The amount of £2 was reduced to £1. To discharge the arrears the respondent was ordered to pay 2s. 6d. per week. The order of variation did not impose a new and independent obligation to pay £1 a week. The original order remained the source of obligation. The order of variation reduced the amount. *Northmore C.J.*, who heard the petition, was of opinion that the period upon which the petitioner must rely must begin at the date of this order. His conclusion that the petition should be dismissed depends in a great degree upon this view. It is a view I am unable to share. I think that the fact that the liability commenced with the order of separation and was affected only in amount by the later order results in its being right for the petitioner to calculate the period she desires to

(1) (1906) P., at pp. 194, 195.

(2) (1898) 62 J.P. 711.



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rely upon from the original order or any date thereafter. For some time after the order of variation the respondent made payments with regularity. They were not made with strict punctuality and the sum of 2s. 6d. a week was paid with even less punctuality than that of the £1 per week. This period of comparative regularity of payment extended from 6th April 1932 to 14th December 1932. Then a period of almost complete default began. During the whole of the year 1933 only 10s. were paid. Nothing was paid in the year 1934 until 6th April, when a payment of £2 was made. The period of three years from the date of the original order expired on 17th April 1934. At that date, out of £205 payable under the orders, the respondent had paid only £79 17s. 6d., of which £38 had been paid before the end of August 1931 and £39 7s. 6d. between 6th April 1932 and the end of December 1932. In May and June 1934 the respondent paid four sums of £2 at about fortnightly intervals. He paid nothing more until 20th October 1934, when he commenced to pay £2 2s. at about fortnightly intervals. If the period of three years is calculated from the cessation of payments at the end of August 1931, the position is that, out of £186 payable for maintenance, the respondent paid only £49 17s. 6d., and, of this sum, £39 7s. 6d. was paid between 6th April and the end of December 1932 and £8 between 8th May and 20th June 1934. During the period from the beginning of September 1931 to the end of March 1932, when the default was entire, clearly the respondent "repeatedly and habitually" failed to make payments as required by the order. It is also true of the period from the beginning of 1933 until May 1934 and 20th June 1934 until the expiration of the three years. In the intervals of payment the order was not strictly complied with, although payments were made with sufficient frequency to prevent an accumulation of arrears in respect of those periods.

On these facts the question is whether it can be properly said upon the construction given to *par. e (iii)* of sec. 23 of the Act that during the period the respondent failed to make payments periodically as required by the order "repeatedly and habitually." I think it does fall within that description. An important fact is that at the commencement of the three years now under consideration



the respondent was guilty of repeated and habitual failure over a long period. Upon resuming payment he did not strictly observe the order. When he relapsed into the practice of his habitual neglect of his obligations he showed clearly enough that his temporary resumption of payments involved no abandonment of his habit. When the entire period is considered and the comparatively small sum paid in that period and the times at which he paid that sum are taken into account, it appears that throughout the period the petitioner was left either without maintenance altogether or in a condition of insecurity because of the respondent's proneness to disregard the order. His conduct came within the mischief of the section. His failure to pay as required was persistent and may correctly be said to have been habitual over the entire period.

For these reasons I think the petitioner is entitled to a decree nisi. The appeal should be allowed, a decree nisi made and the cause remitted to the Supreme Court. The respondent must pay the costs of this appeal and of the suit.

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STARKE J. I agree that the appeal should be allowed.

DIXON J. I agree in the reasons stated by my brother *Rich*.

EVATT J. I agree with the reasons stated by the Acting Chief Justice.

McTIERNAN J. I agree.

*Appeal allowed. Order nisi made to become absolute in three months. Cause remitted to the Supreme Court. Respondent to pay the costs in this Court and in the Supreme Court.*

Solicitor for the appellant, *F. Curran*.