[HIGH COURT OF AUSTRALIA.]

AUDRAY ILMA MOSS . . . . . APPELLANT;
PLAINTIFF,

AND

LEONARD BOWLEY BOLTON MOSS . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *May* 8.

Starke, Dixon and McTiernan JJ.

Husband and Wife—Dissolution of marriage—Permanent maintenance—Application therefor—Delay—Reasonableness—"On any such decree"—Matrimonial Causes Acts 1864 *to* 1931 (*Q.*) (28 *Vict. No.* 29—22 *Geo. V. No.* 21), *secs.* 27, 27A*—*Rules of the Supreme Court* (*Q.*), *Order XIV., r.* 2; *Order LXII., r.* 8; *Order LXIX., rr.* 16, 27-29*.

The word "on" in sec. 27 of the *Matrimonial Causes Acts* 1864 *to* 1931 (Q.) has the effect of "on the occasion of."

Fox v. *Fox*, (1925) P. 157, at p. 163, applied.

A wife who left her husband in May 1931 obtained, in November 1932, in the Supreme Court of Queensland, a decree nisi for the dissolution of their marriage. That decree was made absolute in March 1933. The wife obtained an order for costs, taxed at £187, against the husband, but these were not paid until April 1934. The husband did not, after November

* The *Matrimonial Causes Acts* 1864 *to* 1931 (Q.) provide:—Sec. 27: "The Court may if it shall think fit on any decree . . . order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as having regard to her fortune (if any) to the ability of the husband and to conduct of the parties it shall deem reasonable." Sec. 27A: "(1) The Court, instead of ordering the husband to secure to the wife a gross or annual sum (as prescribed in section twenty-seven of this Act) may make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court thinks reasonable."

The *Rules of the Supreme Court* (Q.), provide:—Order XIV., rule 2: "In any cause or matter, a party suing

1932, contribute to the support of the wife. He married again in April 1933, but his whereabouts were unknown to the wife until December 1933, when she learned that he was employed in Queensland as an itinerant vendor of shares. She was advised by her solicitors that it would be difficult to obtain money from the husband, and that she should not expend more money. Steps were taken in January 1934 to recover the costs from the husband and bankruptcy proceedings to that end were commenced, with the result that in March 1934 he was discovered to be in New Zealand. In April 1934 he paid, by agreement, £150 in full settlement of costs, which the wife paid to her parents, who had advanced the money and with whom she was living and upon whom she depended for her support. In August 1934 she applied ex parte under the *Matrimonial Causes Acts* 1864 *to* 1931 (Q.), upon an affidavit sworn by her in June 1934, for leave to present a petition for permanent maintenance. The application was granted but, on a motion by the husband, was dismissed by the Full Court. On the motion the wife gave her belief of the husband's inability to pay, her poverty, and the difficulty in locating the husband, as reasons for the delay in applying for permanent maintenance. The wife appealed to the High Court.

Held, that the appeal should be allowed, as, in all the circumstances of the case, the delay in making the application for permanent maintenance was not unreasonable.

Decision of the Supreme Court of Queensland (Full Court): *Moss* v. *Moss*, (1936) Q.S.R. 44, reversed.

or defending by a solicitor shall be at liberty to change his solicitor without an order for that purpose, upon notice of such change being filed in the Registry and served on the opposite party; but until such notice is filed, and a copy thereof served, the former solicitor shall be considered the solicitor of the party until the final conclusion of the cause or matter." Order LXII., rule 8:—"Except as by these Rules otherwise provided, a motion or application shall not be made without previous notice to the party to be affected thereby. But the Court or a Judge, if satisfied that the delay caused by giving notice would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just; and any party affected by any such order may move to set it aside." Order LXIX.:—Rule 16: "A wife who has obtained a judgment nisi for dissolution of marriage . . . and who has not previously presented her petition for alimony pending the action, may, after the expiration of the time for appealing against the judgment, if no appeal is then pending, or upon the judgment being affirmed on appeal to the Full Court, file a petition for permanent alimony." Rule 27: "Applications to the Court to exercise the authority given by the twenty-seventh section . . . of '*The Matrimonial Causes Jurisdiction Act of* 1864' . . . shall be made by a separate petition, which . . . must, unless by leave of the Court or a Judge, be filed within one month after the time when the application can first be made." Rule 28: "In cases of applications for maintenance under the twenty-seventh section of '*The Matrimonial Causes Jurisdiction Act of* 1864,' the petition may be filed at any time after the judgment nisi has been pronounced." Rule 29: "An office copy of the petition shall be personally served on the husband or wife, as the case may be . . . unless the Court or a Judge directs any other mode of service, or dispenses with service on them or either of them."

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APPEAL from the Supreme Court of Queensland.

On 19th September 1932 Audray Ilma Moss filed in the Supreme Court of Queensland a petition for the dissolution of her marriage with Leonard Bowley Bolton Moss, on the ground of his adultery. There was no issue of the marriage. The defendant was served in Brisbane personally and entered an appearance in the action by a solicitor on 28th September 1932, but failed to lodge a defence. At the hearing on 23rd November 1932, on which date a decree nisi was pronounced, the solicitor on the record appeared only to inform the Court that he had had no further instructions from the defendant. He admitted service of notice of trial. This solicitor continued as solicitor on the record for the defendant until 13th December 1934, when notice of a change of solicitors was filed in the registry and served on the plaintiff. The decree nisi was made absolute on 22nd March 1933. The plaintiff was allowed her costs of the petition; these were taxed at the sum of £186 10s. 9d. In August 1934 the plaintiff made an ex parte application under Order LXIX., rule 27, of the *Rules of the Supreme Court* (Q.) for leave to file a petition for permanent maintenance under the provisions of the *Matrimonial Causes Acts* 1864 *to* 1931 (Q.) against the defendant. In support of the application she filed an affidavit, sworn by her on 23rd June 1934, in which she deposed that she had not made any previous application for alimony *pendente lite* or for permanent maintenance against the defendant, and that her reasons for not having made any such application were (*a*) that prior to 8th May 1934 she was unaware of the defendant's financial position, and in fact believed that he was not earning sufficient to support himself. She therefore considered that it would be of no benefit to her to obtain an order for the payment of maintenance as the defendant would not have been able to comply with it; (*b*) that although since the decree absolute frequent attempts had been made to recover the taxed costs of the petition from the defendant they were not paid by him until about May 1934; (*c*) that on 8th May 1934 the defendant informed her (i) that he was living in a house at Vaucluse, Sydney, for which he paid a rental of £6 16s. 6d. per week; (ii) that on 1st April 1933 he had married again and that his wife and child were living with him; (iii) that he had in his employ a trained

nurse, and also a chauffeur to drive his " 1933 model " sedan motor car in which a wireless set had been installed at a cost of £69, and (iv) that he was employed in Sydney by a certain firm which he named, and that he was " doing well."

The application was granted by *Blair* C.J. on 3rd August 1934, and the defendant was ordered to pay the costs thereof. According to the petition for permanent maintenance, which was filed on 1st October 1934 pursuant to the leave granted by the Chief Justice, it appeared that from the date of the marriage in 1926 until about May 1931, when the plaintiff left the defendant owing to his infidelity, the parties had resided at several cities and large towns throughout the Commonwealth, and that at all times and places the defendant had maintained the plaintiff on an expensive scale out of his earnings as a share salesman, his income ranging from £24 to £35 per week. After she left him in 1931, he failed to maintain her, except for a sum of £15 received by her from him prior to 16th November 1932, and she depended for her support upon her parents with whom she went to reside. The plaintiff stated that she was unable to give accurate details of the earnings of the defendant, but in al the circumstances, to the best of her knowledge, information and belief his income was not less than £60 per week, and that she herself was possessed of no income or property. When served, on 28th November 1934 with the petition for permanent maintenance, the defendant said :—" This is a great shock to me. I didn't think Audray would do this to me." He entered an appearance under protest on 13th December 1934, objecting to the jurisdiction of the Court on the ground that the Court only had power to make an order for permanent alimony on any decree for dissolution of marriage, that is, at the time of the making of the decree or shortly afterwards. On the same day the notice by the defendant, referred to above, of a change of solicitors was filed and later served on the plaintiff. On 21st February 1935 the defendant gave notice of motion to set aside the order made on 3rd August 1934, stating three grounds, namely, (*a*) that no notice of the application for the order was given to the defendant who had no opportunity of being heard thereon ; (*b*) that the Court had no jurisdiction to make an order for permanent maintenance ; and (*c*) that if the Court had jurisdiction it should

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not in its discretion grant leave to file a petition for permanent maintenance. The motion came before *Macrossan* S.P.J., on 10th April 1935, who, at the request of counsel, referred the matter to the Full Court of the Supreme Court, mutual leave being reserved to both parties to file further affidavits. Pursuant to such leave the plaintiff filed a further affidavit in which she deposed, as additional to the matters previously deposed to by her, to the following facts as reasons for the delay in presenting the petition for permanent maintenance: (*a*) that since May 1931 she had only received the sum of £15 from the defendant in respect of her maintenance; (*b*) that from about the date of the service upon him of the petition for dissolution of marriage until some weeks after the date of the decree absolute, she had no knowledge of the whereabouts of the defendant, but (*c*) from inquiries made through her solicitor in Brisbane she ascertained (i) that the defendant had left Queensland owing at least £300 to various people in and around Brisbane, and (ii) that the defendant's former employers in Brisbane had no knowledge of his whereabouts; (*d*) that some weeks after the decree absolute she discovered through reading a newspaper that the defendant had been married in Adelaide, South Australia; (*e*) that although inquiries were made through her Brisbane solicitor it was not possible to locate the defendant until December 1933, when she was informed by her solicitor that the defendant was then selling shares in Bundaberg and that it would be very difficult for her to recover any money from the defendant as he was an itinerant salesman; (*f*) that for that reason her solicitor advised her not to incur any further expense; (*g*) that early in 1934, having learned that the defendant was then employed by a certain company in Sydney, she immediately instructed her Sydney solicitors to endeavour to locate him and enforce the order for the payment of costs; (*h*) that instructions were then given, on 8th January 1934, by those solicitors to the Brisbane solicitor to obtain the necessary documents for the purpose of instituting bankruptcy proceedings against the defendant with a view to enforcing the order for the payment of costs; (*i*) that it was not until March 1934 that her solicitors received a reply from a firm of Sydney solicitors acting on behalf of the defendant who was stated to be

then in New Zealand; (*j*) that negotiations concerning payment of costs then ensued and that on 23rd April 1934 the defendant, who was said to be still in New Zealand, paid the sum of £150 in full settlement thereof; (*k*) that she first learnt that the defendant had returned from New Zealand about the beginning of May 1934, and upon her seeing him in Sydney on the 8th of that month, as referred to above, she immediately issued the necessary instructions to her solicitors to make application on her behalf for permanent maintenance as she then for the first time had information that the defendant was in a position to comply with an order for permanent maintenance; (*l*) that the costs of the proceedings for the dissolution of her marriage had been defrayed by her parents, she having no income or property and being dependent on her parents for her support from May 1931; (*m*) that on account of her financial position she was unable to take proceedings against the defendant for maintenance until the payment of costs by him on 23rd April 1934, and that her parents were unwilling to provide the money necessary in this respect; (*n*) that in June 1934 she was informed by the defendant's employer that the defendant had returned to New Zealand in order to sell shares, and that he would be there for about three months; (*o*) that in consequence of the expense involved in getting into touch with the defendant in New Zealand she did not take any steps to serve him with any process until his return to Australia on 27th November 1934; (*p*) that the petition for permanent maintenance was served on the defendant on 28th November 1934; (*q*) that in consequence of (i) the difficulty of locating the defendant until May 1934, (ii) his absence in New Zealand, (iii) his failure to comply with the order for the payment of costs, (iv) her belief that having left Brisbane while in debt the defendant would not be able to comply with an order for maintenance, and (v) her financial position, she did not instruct her solicitors to make any application for permanent maintenance at the time of the making of the decree absolute or until May 1934, and (vi) that the affidavit herein was sworn in June 1934, and the delay in making any application between May and early in August 1934 was occasioned by the fact that she was residing in Sydney and certain correspondence

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was necessary between her and her solicitor in Brisbane, which caused the subsequent delay.

The defendant did not file any affidavit relating to the merits.

Upon the motion to set aside the order of *Blair* C.J. coming on to be heard before the Full Court, it was, at the request of the parties, treated as a substantive motion for the leave of the Court under Order LXIX., rule 27.

The Full Court refused leave to the plaintiff to file a petition for permanent maintenance, and dismissed the petition filed pursuant to the order of *Blair* C.J. In the course of his judgment *Macrossan* S.P.J. said that the delay caused by the alleged difficulty in locating the defendant after decree absolute until May 1934, and by his absence in New Zealand, was met by the fact that the defendant had a solicitor on the record upon whom service could have been effected pursuant to leave of the Court. As to the defendant's alleged failure to maintain the plaintiff, she had not presented a petition for alimony pendente lite. There was nothing in the evidence to show the defendant's financial inability to comply with the order for payment of costs, but it appeared more probable that the defendant contumaciously refused to pay his just debts. The plaintiff's belief in the defendant's inability to comply with an order for maintenance did not appear to be supported by evidence as to his poverty, and, as regards her own lack of means, her position did not appear to have altered except in so far as she may have been able to call on her parents for help after they had been recouped in April 1934 the outlay already incurred in costs. His Honour further said that by deliberately deciding, on the advice of her solicitors, in December 1933, against presenting a petition for permanent maintenance, the plaintiff finalized her rights, whatever they then were, and the fact that she subsequently discovered the husband to be in very prosperous circumstances could not reawaken those rights so as to enable her to say that the petition was presented at such a time that the Court was invested with the jurisdiction to make an order for permanent maintenance " on " the decree for dissolution of marriage. His Honour said that the Court's intervention now would not, in all the circumstances of the case, be made within a reasonable time after the making of that decree. The jurisdiction

of the Court under Order LXIX., rule 16, was limited in its exercise to making an order "on any decree for dissolution of marriage." *Webb* J. said he was unable to find that the circumstances were in the category of compelling circumstances, such as an applicant's ignorance of her rights, her inability to transact business for physical or mental reasons, or the existence of some arrangement between the parties. To establish her want of means the plaintiff was required to show not merely that she had no property or income and relied on her parents for financial aid, but that she was unable to secure employment or could not be expected to seek it. Although the defendant was unwilling to pay the costs, it was far from clear that he was unable to pay, or was beyond the range of a judgment and execution. *Hart* A.J. (dissenting) said that the plaintiff had made her application for leave to file the petition for permanent maintenance within a reasonable time of the making of the decree for the dissolution of the marriage, having regard to all the circumstances of the case: *Moss* v. *Moss* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

Spender K.C. (with him *Clancy*), for the appellant. This application was made pursuant to sec. 27A of the Queensland *Matrimonial Causes Acts* 1864 *to* 1931. The judgment of *Hart* A.J. should be accepted by this Court. In construing the relevant sections of the Act and the relevant rules of Court, the test is whether the application was made within a reasonable time after the making of the decree absolute, regard being had to all the circumstances of the case. In Queensland there is no limitation of time during which a petition for permanent maintenance may be filed. The test applied by *Macrossan* S.P.J. is, in all the circumstances, too harsh. His Honour was unduly influenced by the statement of *Jessel* M.R. in *Robertson* v. *Robertson* (2). That statement is not consistent with *Scott* v. *Scott* (3), nor with *Legge* v. *Legge* (4). The view expressed by *Macrossan* S.P.J., that in December 1933 the appellant deliberately refrained from taking any action and thereby

(1) (1936) Q.S.R. 44.
(2) (1883) 8 P.D. 94, at p. 96.
(3) (1921) P. 107.
(4) (1928) 45 T.L.R. 157.

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finalized her rights as at that date, is not correct in law, nor is it a proper finding of fact. The petition for dissolution of the marriage and the petition for permanent maintenance were different proceedings, and therefore mere service upon the solicitor on the record in the former proceedings would not be good service in respect of the latter proceedings (*Rubie* v. *Rubie* (1)). The limit of construction placed upon the word " on " by decisions of the English Courts on the corresponding sections in the English Act has no application to secs. 27 and 27A of this Act. Under the English Act the Courts have regard solely to the financial condition of the spouses as at the date of the decree absolute (*Scott* v. *Scott* (2)). This Court, for the purpose of determining the question of jurisdiction, is in the same position as the Court below, which decided it as a matter of law. The delay on the part of the appellant in presenting her petition is fully and adequately explained in her affidavits. In all the circumstances of the case the delay is not unreasonable. The statements so made by the appellant are not in any way challenged by the respondent. The conclusions arrived at by *Macrossan* S.P.J. upon the evidence are erroneous, and the inferences drawn therefrom by him were incorrectly drawn. The question was not whether the respondent was in fact financially unable to pay, but whether the appellant believed him to be so. His Honour did not correctly deal with the facts. He applied incorrect tests, his answers are not correct, and are not substantive answers. The test adopted by *Webb* J. is much too narrow. The correct test is whether the delay is reasonable in all the circumstances ; whether it was caused by the compelling force of external circumstances, as here, the appellant's poverty and the difficulty of locating the respondent.

[DIXON J. Is not the real test whether the appellant's conduct in allowing time to run was liable to prejudice the respondent, and, if so, whether it was conduct which she voluntarily allowed ?]

It is submitted that that is the test. It cannot be urged that there has been an ouster of jurisdiction. Under rules 27 and 28 of Order LXIX. of the Rules of Court it was contemplated that an application might be made at any time after the decree nisi, but if the application were made within one month after the decree absolute, leave therefor

(1) (1911) 13 C.L.R. 350, at pp. 355 et seq. (2) (1921) P. 107.

must be obtained from a Judge. The right exists, but leave to exercise it must be obtained from a Judge. The fact that a lengthy period has elapsed is not in itself a barrier (*Robertson* v. *Robertson* (1)). Rules 27 and 28 have no application to sec. 27A of the *Matrimonial Causes Acts*. The only rule that has any application to a petition for permanent maintenance is rule 16 of Order LXIX. That rule does not impose a time limit. The decision in *Scott* v. *Scott* (2) was based on the circumstances in that case. In all cases it is for the Court to determine whether, as regards the passage of time, it will exercise its discretion, having regard, in doing so, to any prejudice which might be sustained by the person against whom the claim is made (*Legge* v. *Legge* (3)).

Badham, for the respondent. The question is whether or not this Court is prepared to hold that the Supreme Court of Queensland was incorrect in declining jurisdiction on the ground that in all the circumstances of the case the delay was unreasonable. That is a mixed question of law and fact. What is a reasonable time depends on all the circumstances of the case. Any given set of circumstances will call forth different opinions from different persons in different Courts. The finding is practically an exercise by the Supreme Court of its discretion. That Court decided on the facts, and after a consideration of the relevant statutory provisions, rules of Court and decided cases, found that the delay in presenting the petition was unreasonable. That finding should not be interfered with. The word " on " in sec. 27 has been extended to mean " at " or " shortly after," so that in deciding whether or not the application was made within a reasonable time, it is not " reasonable " in the sense at large, but " reasonable " in the sense that it should be made as soon as possible (*Robertson* v. *Robertson* (4)).

[DIXON J. That was discussed in *Scott* v. *Scott* (5).]

It is not merely a question of time *qua* time, which was the mistake made in *Legge* v. *Legge* (6), but, in addition, what was taking place during that time (*Scott* v. *Scott* (7)). The time must be reasonable

(1) (1883) 8 P.D. 94.
(2) (1921) P. 107.
(3) (1928) 45 T.L.R. 157.
(4) (1883) 8 P.D., at p. 96.
(5) (1921) P., at pp. 125, 126.
(6) (1928) 45 T.L.R. 157.
(7) (1921) P., at p. 120.

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having regard to all the circumstances of the particular case (*Loss* v. *Loss* (1)). Facts similar to those which in that case influenced the Court in favour of the applicant are not present in this case. The Rules of the Supreme Court of Queensland, and the decided cases, show that if there is no reasonable excuse or ground for not doing so, an application for permanent maintenance must be made within a short period after the making of the decree absolute. The onus of proving that the delay was reasonable is upon the appellant. That onus has not been discharged. There was nothing to prevent her from applying prior to the decree nisi for alimony pendente lite, or from making an application immediately after that decree, there being no appeal pending, for permanent maintenance. Service of her intention so to do could have been effected under Order XIV., rule 2, of the Rules of Court, upon the respondent's solicitor then on the record. The evidence furnished by the appellant shows that not only was the respondent not financially embarrassed during the period of delay, but that, on the contrary, the position was actually the reverse. The delay cannot be justified on the ground that the respondent was an itinerant vendor of shares. That is the only occupation he had followed since the date of his marriage with the appellant. The mere fact that he did not pay the costs, without any evidence as to the surrounding circumstances, is not evidence that he was in impoverished circumstances. There was no indication that his position had changed for the worse. The appellant allowed time to pass without applying for permanent maintenance, and thereby lulled the respondent into a state of false security. The evidence shows that the appellant elected not to require the respondent to contribute towards her support. She should not be allowed to approbate and reprobate.

The following judgments were delivered :—

STARKE J. In this case we are all of opinion that the appeal should be allowed, and the wife should have leave to present a petition for permanent maintenance under the *Matrimonial Causes Act* of Queensland. The facts which the wife has put forward as an excuse for the comparatively long delay of sixteen months since

(1) (1924) 41 W.N. (N.S.W.) 170.

the decree for dissolution are as follows. She left her husband in May 1931, and obtained her decree nisi for dissolution of marriage in November 1932. In March 1933 that decree was made absolute. Since November 1932 the husband had in no way contributed to her support. She had obtained an order for costs, which were taxed at about £187. The husband did not pay those at the time, nor for a considerable time afterwards. But the wife saw him in Bundaberg in December 1933, and consulted her solicitor as to the position. The costs had not then been paid, and the solicitor considered, and informed the wife, that it was inadvisable to waste more money in pursuing a maintenance application when it was very doubtful if her husband had means or would pay. So the matter was left, and in March 1934 the husband proceeded to New Zealand, and stayed there several months, but in April, while he was in New Zealand, he seems to have paid on account of costs a sum of £150. Soon afterwards, namely, in the month of May, the wife discovered him living in Sydney, apparently in a somewhat expensive manner. This discovery seems to have induced her to reconsider the matter of her maintenance, for in August 1934 she applied to the Supreme Court of Queensland for leave to file a petition, which was granted. Subsequently, the Full Court reversed that decision and refused her leave.

In my opinion, the Full Court of the Supreme Court were wrong. I think they exercised their discretion upon grounds which hardly did justice to the position of the wife. The cases show plainly enough that the decree for dissolution is the occasion upon which these permanent maintenance orders can be made, and *Fox* v. *Fox* (1) shows that an application may be made before decree, it may be made on decree, or it may be made after decree. But if it be made after decree, the Courts have said that it should at least be made within a reasonable time of the decree being made, and for very good reasons, of course—partly as evidence of sincerity and partly to protect the husband from incurring obligations which ought to have been considered near the time of making the decree. But, the legal position being clear, it seems to me that the Supreme Court

(1) (1925) P. 157.

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acted upon too narrow a view. It was said that the wife could have served the husband with her petition for maintenance by delivering it to the solicitor upon the record. I do not stay to inquire whether the wife would have been within the Rules of Court in so serving her husband, but it is quite plain that, in this class of case, he ought not to be so served. The matter raised the whole question of the respondent's means—his property and many other aspects of his affairs—and was properly a matter in which he ought to be personally served. That ground, therefore, has little to support it. Another ground taken was that when the husband was known to be in Bundaberg in 1933, her solicitors advised the wife that it was not worth while pursuing her husband, and that was regarded as finalizing her rights. I do not suppose by that phrase is meant that the wife gave up effectively, or released, her rights in point of law, but that she had resolved or come to the conclusion that she would not pursue her application in the circumstances then existing. What were those circumstances? The circumstances were that she was entirely without means for taking proceedings for maintenance, she was owed a considerable amount of money for costs which had not been paid and which, for all she knew, she could not recover, she did not know her husband's means, and she was, in fact, without any means whatever until the present time, apart from the costs which were paid in April 1934. But in May, as I have said, the husband returned from New Zealand, and the wife discovered him living in Sydney in circumstances which suggested considerable means on his part. She within a very short time, namely, in August 1934, took proceedings—applied to the Supreme Court for leave to file a petition. The delay of about sixteen months was not, in my opinion, in all these circumstances, at all unreasonable: *Macrossan* S.P.J. did not, I think, give sufficient weight to them.

Webb J. put the position on even narrower grounds than those already mentioned. He was of opinion that the cases require that there shall be circumstances of a compelling nature to support the jurisdiction, such as the applicant's ignorance of her rights, her inability to transact business for physical or mental reasons, or the

existence of some arrangement between the parties. The cases do not so restrict the jurisdiction of the Court. The wife's delay in presenting her petition cannot be viewed from any narrow standpoint; the question is: Was her conduct reasonable in all the circumstances of the case?

DIXON J. I agree and I have very little to add. Both here and in England the words of sec. 27 of the *Matrimonial Causes Act* have caused difficulty from the time they were enacted. But the result of the decisions now appears to be to make the word "on" equivalent to "on the occasion of" in the wide and, no doubt, proper sense of that expression. In *Scott* v. *Scott* (1) *Scrutton* L.J., citing from *R.* v. *Arkwright* (2), pointed out that the words "on" or "upon" might mean either before the act to which it related or simultaneously with the act done or after the act done as reason and good sense required with reference to the context and subject matter. When those observations were referred to in the subsequent case of *Fox* v. *Fox* (3), *Sargant* L.J. said that if you expand "on" to "on the occasion of" it would clearly embrace all three. It is necessary, no doubt, in each case to ascertain whether more than a reasonable time has elapsed. But what is a reasonable time must always be judged according to circumstances which are relevant to the subject in hand. The subject in hand in cases arising under sec. 27 is a re-arrangement of the relations of two parties who have been husband and wife, after their matrimonial relations have been determined. It has become necessary because of the dissolution of the marriage to make arrangements for their future financial and other relationships. In this way the pronouncing of a decree of dissolution is connected with the order for permanent maintenance and is the "occasion of" the latter order. In determining, therefore, whether more than a reasonable time has elapsed, it is necessary to consider the position of the two parties and the position of the Court which must make a complete determination in respect of the matrimonial alliance dissolved and the matters which arise out of its dissolution.

(1) (1921) P., at p. 125.
(2) (1848) 12 Q.B. 960, at p. 970; 116 E.R. 1130, at p. 1134.
(3) (1925) P., at p. 163.

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In the present case the parties had separated in May 1931, and, except for occasional interviews, they had seen nothing of one another until the decree nisi on 23rd November 1932. From that time, although orders had been made for payment of costs before the decree, the husband made no payment and his wife heard nothing of him until she read that he had been married on 1st April 1933. She then heard nothing of him until she learned in December 1933, from information, that he was in Bundaberg and carrying on his activities as a share salesman. She says she consulted her solicitor who advised her that it would be very difficult to obtain money from him and that his advice was not to expend more money. *Macrossan* S.P.J. has taken that to mean that she accepted the advice, that the advice related to maintenance and that she, therefore, determined she would not, in the circumstances, further consider attempting to obtain maintenance from him. I doubt very much whether that conclusion is justified by the statement in the affidavit. The suggestion appears to me to be rather that they were considering whether the order for costs could be enforced. In any case there is nothing in the affidavits to show that she accepted the solicitor's advice. Indeed, in the next month, on 8th January 1934, steps were taken to recover costs from him. Those steps resulted in nothing, because information was obtained that he was not in New South Wales or Queensland but in New Zealand. Bankruptcy proceedings were prepared but his whereabouts were not ascertained until March, except that it was known that he was somewhere in New Zealand. It was not until April 1934 that she was able to obtain any of the money from him that was owing. At that time she appears to have definitely made up her mind to proceed against him for permanent maintenance, and, as a first step, she swore an affidavit on 23rd June 1934. Those dates appear to me to show first of all that he was not in a position reasonably to complain of delay on her part. From the time he failed to defend the suit, he seems to have avoided any communication with or reference to her. He moved about in a way which would make it difficult for her to ascertain his whereabouts. She, on her side, was placed in considerable difficulties. She found that,

whether he could or could not pay, he was unwilling to obey the orders for costs. She and her solicitors were unable to obtain money from him.

In all these circumstances, I think a delay of seventeen months was not more than might be considered reasonable. Further, there is nothing to suggest that lapse of time led him to act to his prejudice upon the assumption that no claim to permanent maintenance would be made. There was no such delay as would make it difficult to adjust the relations of the parties as they would have been dealt with at the time when the decree was pronounced. *Macrossan* S.P.J. allowed his discretion, if the decision of such a matter be discretionary, to be affected by considerations to which my brother *Starke* has already referred. With one of them I have already dealt. As to the other, neither from the point of view of the litigants themselves, nor from that of their legal advisers, do I think weight should be given to the technical position that the husband's former solicitor was the proper person upon whom service could be made. Their legal advisers would be aware that it was one thing to obtain a formal order for maintenance and another thing to make it fruitful. It was of little use to obtain an order by serving process upon the solicitor upon the record or by substituted service, unless something further could be done to enforce it. Moreover the Court would naturally throw obstacles in the way of a proceeding which would really be behind the back of the respondent. I wish to add that of the judgments delivered by the Supreme Court, that of *Hart* A.J. expresses the view I take.

McTiernan J. The judgment of the Supreme Court was not, in my opinion, a sound exercise of its discretion under sec. 27 of the *Matrimonial Causes Acts* 1864 *to* 1931 to decline to hear the appellant's petition for permanent maintenance because of her delay in presenting it. I agree with the criticism which my brethren have made of the reasons of the Supreme Court for deciding that the appellant's petition was unreasonably delayed. In my judgment the appellant did present her petition within a reasonable time after the decree absolute. The circumstances proper to be taken into consideration are fully stated in the judgments which have just been delivered.

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These circumstances are sufficient to justify the exercise of the Court's discretion to hear the petition, notwithstanding the lapse of time since the decree absolute, in the appellant's favour.

The appeal should be allowed.

Appeal allowed. Order of the Supreme Court of Queensland of 2nd August 1935 set aside, and in lieu thereof it is ordered that the appellant, the plaintiff in the proceedings before the Supreme Court, be at liberty to file a petition in the Supreme Court for permanent maintenance. The respondent will pay the costs of this appeal and the costs in the Supreme Court.

Solicitors for the appellant, *Carruthers, Hunter & Co.*

Solicitors for the respondent, *McLachlan, Westgarth & Co.*

Appl *Michael Andrew Curren* 27 ACrimR 49 | Foll *R* v *Weeks* (1993) 66 ACrimR 466 | Cons *Question of Law Reserved (No1 of 1997)* (1997) 70 SASR 251 | Refd to *Ward* v *R* (2000) 23 WAR 254 | Foll *R* v *McDermott* (2003) 172 FLR 1

J. B.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

PORTER.

H. C. OF A. 1933. CANBERRA, *Jan.* 31; *Feb.* 1. Dixon J.

Criminal Law—Insanity—Temporary—Charge of murder.

Charge to the jury upon a plea of temporary insanity set up to an indictment for murder.

TRIAL on Indictment.

On 31st January and 1st February 1933 (before the passing of the *Seat of Government Supreme Court Act* 1933) Bertram Edward Porter was tried on indictment for murder at Canberra before *Dixon* J. sitting in the original jurisdiction of the High Court under sec. 30B of the *Judiciary Act* 1903-1932.