[HIGH COURT OF AUSTRALIA.]

JEFFERY . . . . . APPLICANT;
PETITIONER,

AND

JEFFERY . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY.

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SYDNEY, *May* 6; *Aug.* 4.

Latham C.J., Dixon, McTiernan, Williams and Webb JJ.

Matrimonial Causes—Dissolution of marriage—Alimony pendente lite—Application by wife before decree absolute—Application refused—Appeal to High Court as of right—Delay—Special leave to appeal—Appeal after decree absolute—Jurisdiction of Court—Ante-dating of judgment—Matrimonial Causes Act 1899-1943 (N.S.W.) (*No.* 14 *of* 1899—*No.* 9 of 1943), *ss.* 5, 41, 42, 43—*Judiciary Act* 1903-1948 (*No.* 6 *of* 1903—*No.* 65 *of* 1948), *s.* 51—*High Court Rules, Order XXXVIII., r.* 2; *Part II., Section V., r.* 1.

Upon an appeal from the dismissal, before the decree nisi for the dissolution of the marriage has been made absolute, of an application for alimony *pendente lite* the High Court may, under the combined operation of the High Court Rules, Order XXXVIII., r. 2, Part II., Section V., r. 1 and s. 37 of the *Judiciary Act* 1903-1948, make an order granting such alimony even though in the meantime the decree has been made absolute.

The purpose of alimony *pendente lite* is to make provision for a petitioning wife who otherwise would not be able to support herself properly and the facts that she has some resources and that an order for alimony would improve her financial position do not necessarily disentitle her from an order.

Principles governing and considerations affecting the discretion to order alimony *pendente lite* discussed.

Decision of the Supreme Court of the Australian Capital Territory (*Simpson* J.), reversed.

APPLICATION for special leave to appeal and APPEAL from the Supreme Court of the Australian Capital Territory.

On 15th July 1947, Marjorie Constance Jeffery, of Hove, Sussex, England, filed in the Supreme Court of the Australian Capital

Territory, a petition for the dissolution of her marriage with Charles Francis Jeffery, of Red Hill, Canberra, Australian Capital Territory, retired engineer, on the ground of his desertion of her for three years and upwards without just cause or excuse.

Appearance to the petition was entered by the husband on 31st July 1947.

On behalf of the wife a notice of motion for alimony *pendente lite* and an affidavit made by her in September 1947 in support of the motion was filed on 31st October 1947, and on 10th November 1947 an affidavit by the husband in answer to the wife's affidavit was filed.

On the application of the husband evidence of the wife and the two daughters of the marriage was taken on commission in England on 22nd September 1948 for use in the motion for alimony *pendente lite*.

A decree nisi for the dissolution of the marriage was made by the Supreme Court on 25th May 1948.

The motion for alimony *pendente lite* came on for hearing before the Supreme Court on 30th November 1948. The evidence given at the hearing, which included the evidence given on commission, showed that the husband and the wife were married at Brighton, England, on 28th December 1921. There were issue of the marriage two daughters, one aged twenty-four years and the other aged twenty years, both of whom were self-supporting but neither of whom was able to contribute to the support of her mother. At the date of the hearing the husband was aged sixty-eight years and the wife was aged fifty years. From the date of their marriage until towards the end of the year 1936 the husband and wife lived together for the most part in India, the husband being a servant of the Indian Government and stationed at Imphal, State of Manipur, Assam.

During 1936, the husband and wife paid a joint visit to England and towards the end of that year the husband returned to India but the wife remained in England where she still resided. The husband stayed in India until he was retired from the Government service in 1940 when he proceeded to Canberra and he has lived there continuously ever since. Up to about the end of 1936 the husband made his wife an allowance of from £8 to £10 a week during periods which she spent in England. At the end of that year he reduced the allowance, and it was again reduced in 1938 to £3 a week. In view of his impending retirement in April 1940 on a pension and the consequent reduction of his income the husband requested the wife to agree to an allowance of £2 a week with an addition of £1 5s. a week in respect of any period during which

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either of the daughters should spend her holidays with the wife. The wife replied that she could not agree but that if that was all he intended to allow her she must take it. Before, however, her answer had been received by the husband he had left Imphal and had proceeded to Australia. During the years 1940 to 1943 inclusive payments made by the husband to the wife averaged about £200 per annum.

In March 1942, the husband wrote to the wife stating, *inter alia*, " I trust that now Brenda (the elder daughter) has grown up both of you can help in the war effort and towards your own support." The allowance was reduced in 1943 to £100 and in April 1944 the husband ceased making payments and he had paid nothing since for the support of his wife and children.

When the payments of the allowance ceased the wife went to live with her father, who supported her. In June 1947 her father died leaving her a one-half interest in remainder in his estate valued at about £16,000 expectant on the death of her mother who was aged about eighty-eight years at the date of the hearing of the motion, and who was senile and, apparently, had become mentally as well as physically incapable. The mother was sent to a nursing home in September 1947 and, the father's establishment having been disposed of, the wife found herself homeless and without any income at all.

The evidence taken on commission showed that apart from the said interest in remainder in her father's estate, the wife was not possessed of any income or assets other than £19 in a bank, furniture worth about £150 and five hundred units of war savings certificates worth about £400. These certificates were part of seven hundred and fifty certificates given to her by her father in 1942 and 1943 so that in the event of him being killed in an air-raid she could convert them into cash for the support of herself and the children. After the death of her father the wife did sell two hundred and fifty certificates in order to live on the proceeds. After his death the wife at first occupied a flat at a rental of £4 4s. a week, but later she moved to a bed-sitting room for which she paid £1 7s. 6d. a week.

According to the wife she was not in good health, although it was improving, but suffered from varicose veins which were becoming worse.

The husband's evidence showed that he was living at Canberra in a house which he owned, and that he was " sharing the house " with a housekeeper who, " as a matter of convenience," was known as Mrs. Jeffery. Neither of them worked and they were maintained from an income of about £A850 a year which he derived as to

£A600 by way of pension from the Indian Government, and as to £A250 by way of income from investments, disregarding income tax. He stated that he was unaware of the present market value of his investments, but had set down their cost to him at more than £12,500. His income-tax assessment for the year ended 30th June 1946 was the sum of £480 15s., and for the year ended 30th June 1947 was the sum of £172 9s., both of which amounts he had paid.

The husband said that since September 1940, when he ceased paying any moneys for the support of his wife, he had not received any demand whatsoever from her for any moneys for her support, until the commencement of these proceedings.

The application for alimony *pendente lite* was dismissed on 30th November 1948. The judge said, *inter alia*, that the hearing of the motion had been delayed for reasons which could not be blamed on anyone—certainly not on the legal advisers for either side. The delays were largely caused by the fact that a commission had to issue to the High Court of Justice in England, asking for evidence to be taken on commission *de bene esse*. The matter of whether or not an order should be made was one of discretion, but his Honour thought it was a matter of judicial discretion. It appeared to him that the right to grant an order for alimony *pendente lite* must depend on two elements: (i) the necessity of the wife, and (ii) whether the wife was already sufficiently supported. Care must be taken to see that the wife does not better her financial position temporarily simply by instituting a suit. His Honour did not see any reason for altering the state of affairs which had existed from the time the petition was brought until the date of the hearing.

The decree nisi for the dissolution of the marriage became absolute on 8th December 1948.

Upon a notice of motion filed on 19th April 1949, the wife applied to the High Court for special leave to appeal against the decision pronounced on 30th November 1948, dismissing her application for alimony *pendente lite*.

In an affidavit filed in support of the application the wife's solicitor stated, *inter alia*, that on 2nd December 1948 he forwarded by air mail to the solicitors acting for the wife in England, a copy of the judgment and on 14th January 1949 received from them a cable in which they stated that owing to the wife having been in hospital they had been unable to obtain instructions and they now instructed the deponent to institute an appeal against the judgment. Counsel's opinion and assistance in the drawing of documents was sought and obtained in due course, and later further advice was obtained from counsel as to procedure. Annual holidays intervened

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and thereafter, subject to delays caused by shortage of staff, action proceeded with due expedition. He further stated that the wife felt aggrieved by the judgment and order dismissing her application and that she submitted that the leave of the High Court should be granted because, *inter alia*, she had an appeal as of right to the High Court from the said judgment under s. 82 of the *Matrimonial Causes Act* 1899-1943 (N.S.W.) in its application to the Australian Capital Territory, which she failed to institute within the time limited by that section for the reasons above mentioned.

It was agreed by the parties that, if the special leave to appeal were granted, the application should be treated as the hearing of the appeal.

Further facts and relevant statutory provisions appear in the judgments hereunder.

St. John, for the applicant. Although the order sought to be appealed from is an interlocutory one there is a power to appeal by special leave under s. 51 (1) of the *Seat of Government Supreme Court Act* 1933-1945. There is also an appeal as of right under s. 82 of the *Matrimonial Causes Act* 1899-1943 (N.S.W.) as applied to the Australian Capital Territory. The fact that that appeal was not made in due time should be accepted by the Court as a special circumstance in determining whether leave should be granted. Section 41 of the *Matrimonial Causes Act* 1899-1943 was made applicable in the Australian Capital Territory by the *Matrimonial Causes Ordinance* No. 22 of 1932. Although relied upon by the Court below *Grose* v. *Grose* (1) and *Mighall* v. *Mighall* (2) have little or no application to this case. The judge failed to realize the vital distinction that the applicant's only means of support ceased upon the death of her father, which occurred prior to the making of the application. The first-mentioned case merely confirms that alimony *pendente lite* is within the discretion of the Court. Upon the facts that discretion should be exercised in favour of the applicant (*Welton* v. *Welton* (3); *Stephenson* v. *Stephenson* (4)). The applicant did not support herself by her own exertions and was not able so to do (*Thompson* v. *Thompson* (5)). She was not sufficiently supported. The test cannot be: Would the granting of the application improve the wife's financial position? If it were so then the absurd result would follow that a wife without means could not obtain an order for alimony *pendente lite* because it would

(1) (1939) 57 W.N. (N.S.W.) 14.
(2) (1929) V.L.R. 105.
(3) (1927) P. 162, at p. 178.
(4) (1941) 14 A.L.J. 403.
(5) (1867) L.R. 1 P. & D. 553.

"better her financial position." The order for alimony *pendente lite* should be dated back to the date of the citation and the date of the application itself: High Court Rules, Order XXXVIII., rule 2.

Clegg (with him *McGregor*), for the respondent. Leave should not be granted in this application. To do so would be merely to embark upon an academic discussion on a matter of no particular general importance, there now being no jurisdiction in any court to make an order for alimony *pendente lite*, the decree in the suit having now been made absolute and there not now being any *lis pendens*: *Rayden and Mortimer* on the *Practice and Law in the Divorce Division*, 3rd ed. (1932), p. 210; *Halsbury's Laws of England*, 2nd ed., vol. 10, p. 176, par. 1093. To found an order there must be proof of a subsisting marriage (*Smyth* v. *Smyth* (1)). The Court has no power to make an order for alimony *pendente lite* after the decree absolute has been made (*M.* v. *M.* (2); *Davis* v. *Davis* (3); *Ellis* v. *Ellis* (4); *Foden* v. *Foden* (5); *Van Mehr* v. *Van Mehr* (6)). This is an application for special leave to appeal against an interlocutory order made in a suit which has now ceased to exist. The right to permanent alimony is a right preserved by statute. From the earliest times alimony *pendente lite* was never regarded as a matter of right. This matter is one governed by the practice of the Ecclesiastical Courts, it not being a proceeding for the dissolution of a marriage. The only matter those courts were concerned with in connection with applications for maintenance pending suit, that is alimony *pendente lite*, until the final rights of the parties were determined by the final decree was whether the wife was sufficiently maintained between the date of the lodgment of the petition and the date the decree was made absolute. The right, if any, to maintenance pending suit was nebulous and transitory (*Westmeath* v. *Westmeath* (7)). Instances of the way in which the judicial discretion has been exercised unfavourably to the wife in circumstances similar to those present in this case are *Coombs* v. *Coombs* (8); *Burrows* v. *Burrows* (9); *George* v. *George* (10); *Holt* v. *Holt* (11); *Bass* v. *Bass* (12); *Swan* v. *Swan* (13); *Grose* v. *Grose* (14) and *Mighall* v. *Mighall* (15). A wife is not entitled to better her position by or

(1) (1824) 2 Add. 254 [162 E.R. 287].
(2) (1928) P. 123.
(3) (1910) 27 W.N. (N.S.W.) 186.
(4) (1883) 8 P.D. 188, at p. 189.
(5) (1894) P. 307.
(6) (1921) P. 404.
(7) (1829) 2 Hag. Ecc. 653; 2 Hag. Ecc. (Supp.) 133 [162 E.R. 987, at p. 1037].
(8) (1866) L.R. 1 P. & D. 218.
(9) (1867) L.R. 1 P. & D. 553, at p. 554.
(10) (1867) L.R. 1 P. & D. 553, at pp. 554, 555.
(11) (1868) L.R. 1 P. & D. 610.
(12) (1915) P. 17, at pp. 21, 22.
(13) (1908) 25 W.N. (N.S.W.) 72.
(14) (1939) 57 W.N. (N.S.W.) 14
(15) (1929) V.L.R. 105.

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upon the bringing of a suit (*Powell* v. *Powell* (1)). Having regard to the assets possessed by the applicant it cannot be said that she was "not sufficiently supported" (*Buchanan* v. *Buchanan* (2)). The precise terms used by him show that the judge below realized that the matter was one of judicial discretion. All matters proper to be considered were considered by him. The applicant had not for several years required the respondent to maintain her, and had, during that period, been maintained from other sources. She should not be placed in a different position because she had brought a petition for the dissolution of the marriage. The judge, in the exercise of the absolute discretion vested in him, did not act arbitrarily but properly exercised his discretion judicially and in accordance with the way in which, as shown by the cases referred to above, other judges have exercised the discretion reposed in them. Even though this Court would have decided the other way had it been the Court of first instance, it will hesitate to interfere with the proper exercise of the discretion vested in the primary judge (*Powell* v. *Powell* (3)).

St. John, in reply. The only matter before the Court in *Ellis* v. *Ellis* (4) was the question of alimony *pendente lite* between decree nisi and decree absolute. That case was misunderstood by the Court in *Davis* v. *Davis* (5). It was not held in *M.* v. *M.* (6) that the Court did not have jurisdiction. It would be fair and just that an order be made, even after decree absolute, having regard to the fact that the delay was not in any way the fault of the applicant. So far as jurisdiction is concerned, an order might be made at any time after the decree absolute. Under the provisions of s. 37 of the *Judiciary Act* 1903-1948 this Court possesses all the powers which were possessed by the Supreme Court of the Australian Capital Territory at the time the application came on for hearing before that Court. This is so even though that Court no longer has the necessary jurisdiction (*Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (7)). It is the purpose of the court not merely to provide an applicant wife with current provision but also to recoup her for the money she has been compelled to expend. The court has jurisdiction and in the circumstances of this case that jurisdiction should be exercised (*Foden* v. *Foden* (8)). *Coombs* v. *Coombs* (9) was criticized by the judge in *Bowerman* v. *Bowerman* (10) in which it was decided that in determining the question of

(1) (1874) L.R. 3 P. & D. 186.
(2) (1948) 48 S.R. (N.S.W.) 430.
(3) (1874) L.R. 3 P. & D., at pp. 190, 191.
(4) (1883) 8 P.D. 188.
(5) (1910) 27 W.N. (N.S.W.) 186.
(6) (1928) P. 123.
(7) (1931) 46 C.L.R. 73, at p. 106.
(8) (1894) P., at pp, 313, 314.
(9) (1866) L.R. 1 P. & D. 218.
(10) (1913) 31 W.N. (N.S.W.) 9.

alimony *pendente lite* the court will not take into consideration capital assets possessed by the wife, but only her income. A wife is not bound to sell her assets and thus denude herself of capital (*Ploog* v. *Ploog* (1)). A wrong principle was applied in *Buchanan* v. *Buchanan* (2). That case came before the Full Court of the Supreme Court by way of stated case for the determination of points of law only. The fact that the income which the applicant had during her father's lifetime ceased on his death is an important distinction between this case and the cases cited on behalf of the respondent as cases in which the court had decided unfavourably to the wife concerned. In those cases the source of income still continued, whereas in this case the applicant did not have any income whatever.

[WILLIAMS J. referred to *Miles* v. *Chilton* (3).]

The applicant is not prejudiced by the fact that she did not make any demand for maintenance during the years 1944-1947. During the greater part of that period conditions of war and the aftermath of war prevailed and she was supported by her father. Factors which should be taken into consideration in determining whether an application for alimony *pendente lite* should be granted and the quantum of such alimony were discussed in *Bayley* v. *Bayley* (4).

Cur. adv. vult.

Aug. 4.

The following written judgments were delivered :—

LATHAM C.J. This is an application for special leave to appeal from an order of the Supreme Court of the Australian Capital Territory (*Simpson* J.) dismissing a motion for alimony *pendente lite* in a divorce suit in which the wife, Marjorie Constance Jeffery, was petitioner on the ground of desertion. Special leave is necessary before there can be an appeal—*Seat of Government Supreme Court Act* 1933-1945, s. 51. The parties have agreed that, if special leave is granted, the application should be treated as the hearing of the appeal.

The petition was filed on 15th July 1947. The petitioner was in England and the respondent resides at Canberra. On 31st October 1947 the notice of motion for alimony *pendente lite* was served. Decree nisi was made on 25th May 1948. The motion for alimony *pendente lite* was heard and dismissed on 30th November 1948. The decree nisi became a decree absolute for dissolution of marriage

(1) (1947) V.L.R. 12.
(2) (1948) 48 S.R. (N.S.W.) 430.
(3) (1849) 1 Rob. Ecc. 684, at p. 700 [163 E.R. 1178, at p. 1184].
(4) (1947) 65 W.N. (N.S.W.) 56.

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as of course on 8th December 1948 : Ordinance of the Australian Capital Territory No. 5 of 1938, s. 4.

The New South Wales *Matrimonial Causes Act* 1899, subject to some amendments, is made applicable in the Australian Capital Territory by *Matrimonial Causes Ordinance* No. 22 of 1932. Section 41 of the *Matrimonial Causes Act* provides :—" Upon any petition for dissolution of marriage the Court shall have the same power to make interim orders for payment of money by way of alimony or otherwise to the wife as it has in a suit instituted for judicial separation."

Section 42 is as follows :—" Where the application for judicial separation is by the wife the Court may make any order for alimony which it deems just."

Section 43 authorizes orders for alimony upon or after making a decree for judicial separation.

Alimony *pendente lite* is a provision for the proper maintenance of the wife during the pendency of the suit. Marriage continues up to the pronouncement of a decree absolute (see *Brown* v. *Walters* (1)). Accordingly, an order can be made in respect of the period between service of petition and order absolute. A question arises in this case, however, as to the time at which such an order can be made—whether it can be made after decree absolute. In *Latham* v. *Latham and Gethin* (2) it was held that such an order could not be made after decree nisi. This case, however, was overruled in *Ellis* v. *Ellis* (3) where it was held that in a suit for dissolution of marriage the court has power to order alimony *pendente lite* after a decree nisi has been made. In *Foden* v. *Foden* (4) there was an application for alimony *pendente lite* in a suit by a husband for nullity of marriage. The application was made after decree nisi and it was held that an order could be made. In the headnote to this case the decision is stated in the following words : " The application may be made by the wife after the decree nisi has been pronounced if the decree has not been made absolute." Lord *Herschell* L.C. said : " it was said that there was no pending suit, because a decree nisi had been made. That argument is, in my opinion, quite untenable. Till the decree nisi has been made absolute, the suit is clearly pending " (5). This passage suggests that an order for alimony *pendente lite* can be made only during the pendency of the suit, and therefore not after decree absolute. But the actual decision related only to an application made after decree

(1) (1931) 46 C.L.R. 290.
(2) (1861) 2 Sw. & Tr. 299 [164 E.R. 1011].
(3) (1883) 8 P.D. 188.
(4) (1894) P. 307.
(5) (1894) P., at p. 312.

nisi, and therefore the case cannot be regarded as authority for the proposition that an order cannot be made after decree absolute.

In *M.* v. *M.* (1) however, there was, in my opinion, a definite decision on this point by Lord *Merrivale* P. In that case an application was made for alimony *pendente lite* after a decree for judicial separation—such a decree being a final decree, and not merely a decree nisi. It was held that the wife who had obtained the decree absolute was not entitled to an allotment of alimony *pendente lite* unless she obtained an order for it before the decree. Lord *Merrivale* stated that the practice of the court with respect to alimony *pendente lite* rested on the fact that the process resorted to " before decree " is a privileged procedure limited by the necessities of the case, and not the exercise of a substantive right such as gives a cause of action. " The necessity which can be so dealt with ceases when the decree is granted " (2). His Lordship then stated that to make an order after decree absolute would be " a new departure," and the application was refused. Investigation of the authorities shows no case in which an order for alimony *pendente lite* has been made after order absolute in any matrimonial proceeding, and in view of the decision in *M.* v. *M.* (1) I am of opinion that the proper principle to be applied is that there is no jurisdiction to grant alimony *pendente lite* after the petitioner has ceased to be a wife. When there is no *lis pendens* the jurisdiction of the court to grant alimony *pendente lite* disappears.

The application for alimony was heard eight days before the decree became absolute and accordingly at that time the Supreme Court had jurisdiction to make the order sought. It is submitted, however, for the respondent that this Court, dealing with the matter after decree absolute, cannot now allow the appeal and make an order for alimony. It is contended that this Court must consider the circumstances of the case as they now actually exist, including the fact of the decree absolute. On the other side reference is made to *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (3) where the distinction between an appeal and the rehearing of a case was emphasized and it was held that upon an appeal, strictly so called, the only judgment which could properly be given was the judgment which ought to have been given at the original hearing and that the law as it existed at the date of the original hearing should be applied in the determination of the appeal, even if since the original hearing the law had been altered or repealed. But this principle cannot be extended so far as to produce the

(1) (1928) P. 123.
(2) (1928) P., at p. 127.
(3) (1931) 46 C.L.R. 73.

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result that the court ignores all events which have happened after the original hearing: for example, the death or the bankruptcy of a party would not be ignored by the court. Similarly, where the maintenance of a particular status, e.g. that of a married person, is a necessary element in jurisdiction (as in the present case) such a change cannot be treated as of no relevance. At the present time the appellant is no longer the wife of the respondent and therefore (it is argued) no court can now make an order for alimony *pendente lite* against him though an order for permanent alimony can be made: see *Matrimonial Causes Act*, s. 43.

The *Rules of the High Court*, Order XXXVIII., rule 2, provide that "When a judgment is pronounced by the Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court otherwise orders, and the judgment shall take effect from that date: Provided that by special leave of the Court a judgment may be ante-dated or post-dated." This provision is made applicable to a judgment given by the Court in its appellate jurisdiction by Appeal Rules, Section V., rule 1. Accordingly a judgment now given by the Court (in the absence of such special leave) must bear the date of the day upon which it is given, and the judgment takes effect so as to bind the parties only as from the day when it is pronounced. A court should not ante-date a judgment so as to produce the effect of giving jurisdiction which it would not otherwise possess (*In re Keystone Knitting Mills' Trade Mark* (1)). But the jurisdiction of the court to hear the appeal is beyond doubt. The court has jurisdiction under the *Judiciary Act* 1903-1948, s. 37, to give "such judgment as ought to have been given in the first instance." It is therefore the duty of this Court upon appeal to make such order as in its opinion the Supreme Court should have made when the application was made to it. Ante-dating an order made upon the appeal would not have the effect of giving jurisdiction which otherwise would not exist. The decree nisi has been made absolute and as, in the absence of a special order, the order of this Court would take effect only from the day when it is pronounced (when the petitioner is no longer a wife) the Court cannot, in my opinion, properly make such an order unless it gives leave for the order to be ante-dated.

In the present case if the order is ante-dated to the day upon which the decision of the Supreme Court was given there can be no doubt as to the effectiveness of the order, and the only question is whether the Court ought to ante-date the order. The delay in hearing the appeal was not in any way the fault of the appellant.

(1) (1929) 1 Ch. 92.

If the appeal had been heard within eight days after the decision in the Supreme Court no question could have arisen as to the propriety of this court making such order as it thought proper. The rule to be applied is *actus curiae neminem gravabit*, and, accordingly, I am of opinion that if the Court should think proper to make an order for alimony it should be ante-dated to 30th November 1948.

I come now to the merits of the appeal. The parties were married in 1921. The respondent husband lives in a house at Canberra which he owns and has an income by way of pension and returns from investments which, after payment of income tax, is about £670 a year. The wife at the time of the application to the Supreme Court was forty-nine years old and the husband sixty-seven years old. There were two children of the marriage—both self-supporting. Since 1944 the wife had lived in England and had not been supported by her husband. Her father supported her. Shortly before the filing of the petition her father died. He had, however, before his death, given her War Savings Certificates of an ultimate value of £750. She had supported herself by cashing some of these certificates in advance of maturity and at the time of the application still possessed certificates worth £400 upon maturity. At that time they were worth about £300. Under her father's will she had a vested interest after the death of her mother, who was eighty-nine years of age, in one half of her father's estate, which estate was valued at about £16,000. *Simpson* J. in these circumstances held that as alimony *pendente lite* is only intended to be a provision to enable the wife to support herself during the pendency of her suit, there was no necessity for an order, and that in the absence of such necessity no order should be made.

I do not agree with the suggestion contained in *George* v. *George* (1) and other cases that the wife should never be allowed to improve her position by obtaining an order for alimony *pendente lite*. Such a proposition appears to me to ignore the obvious purpose of such alimony, namely, to make provision for a petitioning wife who otherwise would be unable to support herself properly. An order for alimony *pendente lite* always improves the financial position of a wife. Accordingly I am unable to accept one of the grounds upon which the learned judge rejected the application. It would be wrong to lay down a rule that as long as a wife had any means whatever she could not obtain an order for alimony *pendente lite*. She is not bound to exhaust the whole of a small capital in order to maintain herself during the pendency of a suit. Each case must be considered in all its circumstances and particularly with regard

(1) (1867) L.R. 1 P. & D. 553, at p. 554.

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to the station in life and the financial position of each of the parties. In the present case it appears to me to be unreasonable to expect the wife to expend the major part of the not large sum represented by the war savings certificates to support herself during the suit, even though she has an expectation upon the death of her mother of coming into possession of a substantial amount of property, and even though that prospect is a not distant prospect owing to the advanced age of the life tenant. In my opinion leave to appeal should be granted and an order should be made for a moderate allowance, from the date of service of the petition to the date of the decree absolute, of £3 per week and in my opinion the order should be ante-dated to 30th November 1948.

DIXON J. This is a motion for special leave to appeal pursuant to s. 51 (1) (*d*) of the *Seat of Government Supreme Court Act* 1933-1945. The order from which it is sought to appeal is an order of the Supreme Court of the Australian Capital Territory pronounced on 30th November 1948 whereby an application by a wife petitioning for divorce for alimony *pendente lite* was dismissed. Apparently an appeal might have been brought within fourteen days of the order as of right, as a result of the *Matrimonial Causes Ordinance* 1932, as amended, which applies the *Matrimonial Causes Act* of New South Wales, as amended, to the Australian Capital Territory. In this application of the Act the reference in s. 82 to an appeal to the Full Court becomes a reference to an appeal to the High Court, and, of course, in relation to the original or general jurisdiction in matrimonial causes, references to the Supreme Court become references to the Supreme Court of the Australian Capital Territory.

But the petitioner lives in England and before her authority to appeal was obtained by her proctors here, the time limited for an appeal as of right had passed. In a proper case the Court grants special leave to a party who has lost an appeal as of right owing to failure duly to exercise it, if there was an intention to appeal and the failure duly to do so has not prejudiced the opposite party and is not due to such a fault of the applicant as to deprive him of any title to indulgence or relief. In the present case the respondent appeared to oppose the application but he did not rely as a ground of opposition upon the existence of an appeal as of right which the applicant had failed to pursue within the time limited. The application was argued fully on both sides, with a view, as I understood, to making it unnecessary if the Court thought the application should be granted, to argue again the substantive appeal. The parties were married at Brighton, England, on 28th December 1921,

the husband then being forty and the wife twenty-two years of age. The children of the marriage are two daughters, one born on 21st October 1924 and the other on 1st July 1928. The husband was in the service of the Government of India. The wife was the only daughter of a London accountant, who was not without means. Before her marriage her father had made a will by which he disposed of his estate in favour of his wife for life and after her death for his daughter and his son in equal shares. When he died on 22nd June 1947 this will came into operation. The appellant lived in India with her husband for some years, but apparently this period was broken by visits to England of some duration. At length in 1936, when after a joint visit to England her husband returned to India, she remained behind with her two daughters, who were at school. His service was in the State of Manipur in Assam and he was stationed at Imphal. He remitted an allowance for the maintenance of his wife and daughters and provided for the latter's schooling. For a time he wrote frequently, recounting the doings and gossip of the station. But as time advanced his communications appear to have shown more concern with the financial than with any other side of their relations and he reduced the rate of allowance. Up to the end of 1936 he had allowed his wife from £8 to £10 a week while she was in England. But at the end of 1936 he began on a much lower scale. In 1938 the allowance seems still further to have been reduced and to have been fixed at £3 a week. In April 1940 he was to leave Imphal and retire from the service on a pension and in anticipation of the consequent reduction of his income he requested her to agree to an allowance of £2 a week with an addition of £1 5s. a week for any period during which either of the children should spend her holidays with her mother. To this the applicant replied that she could not agree but if that was all he intended to allow her she must take it. However, before he received her answer, he had left Imphal and had come to Australia. He settled in Canberra. His choice seems to have been determined partly by climate and partly by a belief that in the Australian Capital Territory he need pay no income tax. For some years, if his statement is to be accepted, this belief remained uncorrected. But at length his misapprehension was effectually removed by an assessment. His source of income was partly a pension from the Indian Government and partly the income from investments, some Australian and some not. The pension amounts to £A600 and the income from investments to about £A250, that is disregarding income tax. For three or four years after he arrived in Australia he made payments to his wife which probably were intended to represent £3 a week. It is

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said that if they are averaged they give about £200 a year, though this is hardly borne out by the bank account. But after April 1944 all payments stopped. On this taking place the applicant went to live with her father, who supported her. On his death his establishment was disposed of. His widow, who is now eighty-nine, was senile and, as I gather, had become mentally as well as physically incapable. She was sent to a nursing home and in September 1947 the applicant found herself homeless and with no income at all. Upon the death of her mother she will become entitled to a half-share in her father's estate, which was valued at £16,000, but during her mother's life she takes nothing. Her mother's senility made it impossible, no doubt, for the applicant to obtain any relief from that quarter. Her only resources consisted in 750 units of War Savings Certificates which her father had given her in 1942 and 1943. He had, she said, given them to her in case he was killed in an air raid, so that she could obtain money by turning them into cash. Every 100 units were equal to £75 if cashed. She moved into a furnished flat and lived there for five months on the proceeds of 250 units of the certificates, which she had turned into cash. The rent was four guineas a week. Then, alarmed at the dwindling of her resources, she left that for a bed-sitting room at Ovingdean, for which she paid 27s. 6d. a week. In 1936 a suite of furniture had been bought for about £130 and this she still possessed. Her daughters were both at work. The elder maintained herself. The younger was training as a nurse and received only £4 a month, but she had board and lodging. The applicant herself, although she had discussed the possibility of finding employment, had not done so, for the reason, she said, that her health was unequal to it.

In the communications between the parties before the death of the applicant's father there seems to have been some discussion of divorce, and in 1946 the applicant apparently had petitioned in the Probate Divorce and Admiralty Division for a dissolution of their marriage. But her husband had established a domicile in Australia. Whether for this or for some other reason the proceedings came to nothing. The applicant, however, decided to present a petition in Australia, presumably before her father died. At all events, on 15th July 1947, three weeks after his death, a petition for dissolution on the ground of desertion was filed on her behalf in the Supreme Court of the Australian Capital Territory. On 31st October 1947 her proctors filed a notice of motion for alimony *pendente lite*. The hearing of the application was much delayed. Unfortunately, it was considered necessary to issue a commission to England for the taking of her evidence and that of her daughters upon the application.

The suit came on to be heard before the application. It was undefended and a decree nisi was pronounced. The hearing of the application did not take place until eight days before the date upon which the decree would become absolute. It is hard, however, to see why these delays, which were not to be laid at the petitioner's door, should prejudice her application for alimony *pendente lite*. The respondent opposed the grant of alimony *pendente lite* on the ground that for a number of years she had subsisted without any contribution to her support on his part, that her resources were sufficient to maintain her during the progress of the suit, that she should not be permitted to use a petition for dissolution as a means of improving her financial position by obtaining an order for alimony and that his own income, after meeting taxes, was insufficient for his needs. As to the last ground, or element, he seems to have received in 1948 an assessment for £172 9s. for tax for the previous financial year and to have paid it. But it is possible that he is faced with the burden of arrears of tax. He has a house of his own in Canberra. He has a housekeeper to whom, as he says, he pays a salary, although " as a matter of convenience " she is known as Mrs. Jeffery. In addition, he finds it necessary to employ a charwoman. The cost of living is high. He must live with a certain measure of comfort. There are fares too, and to keep fit he must belong to the golf club. Modest as these demands are, they eat up his income.

The learned judge of the Supreme Court of the Australian Capital Territory dismissed the application of the petitioner for alimony *pendente lite*. His Honour's ultimate ground for doing so is expressed in his conclusion. His conclusion was that he did not see any reason for altering the state of affairs, which had existed from the time the petition was brought until that day. In a preceding passage his Honour had said that the making of an order for alimony *pendente lite* must depend upon two elements, the necessity of the wife and, secondly, whether she was already sufficiently supported. He observed that care must be taken to see that the wife does not better her financial position temporarily by simply instituting a suit. His Honour referred to *Grose* v. *Grose* (1) and *Mighall* v. *Mighall* (2) as authorities confirmatory of his view. These grounds do not appear to me to be at all satisfactory, more particularly in their application to the facts of the case.

The helpless condition in which a wife was left by the rules of the common law governing the capacity of a married woman and the vesting of her personal property in her husband may have been the

(1) (1939) 57 W.N. (N.S.W.) 14. (2) (1929) V.L.R. 105.

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origin of the practice of the Ecclesiastical Courts of granting alimony *pendente lite*. But in spite of the many changes affecting the status of a married woman, she is entitled to look to her husband to maintain her unless her need for maintenance is adequately supplied. " Though the juristic capacity of married women has been broadly speaking equalized in recent years with that of other citizens the changes made have not eliminated some of their privileges. The course of events, mainly legislative, which has given to married women capacity to contract and to sue and be sued, has not abrogated certain elementary rules of law as to the consequences of marriage " : per Lord *Merrivale* in *Dewe* v. *Dewe* (1). So long as the wife was a competent suitor in the Ecclesiastical Courts it was the general practice of those courts to require the husband to make provision according to his means for her maintenance and the costs of her suit : per Lord *Merrivale* in *Welton* v. *Welton* (2). Dr. *Lushington* stated it as a well established principle of law that when the fact of marriage is acknowledged or proved alimony follows as a matter of course, except where a wife has a provision of her own sufficient for her condition in life and proportionate to the means of her husband (*Miles* v. *Chilton* (*Falsely calling herself Miles*) (3). Section 42 of the *Matrimonial Causes Act* provides that where the application for judicial separation is by the wife the court may make any order for alimony which it deems just, and s. 41 provides that upon the petition for dissolution of marriage the court shall have the same power to make interim orders for payment of money by way of alimony or otherwise to the wife as in a suit for judicial separation. The result is to confer upon the court a power to order alimony *pendente lite* as it shall deem just. *Bonney* J. has well described this as " a mandate to exercise a discretion in the light of the facts " (*Stephenson* v. *Stephenson* (4)). The court can therefore act with greater freedom perhaps than the Ecclesiastical Courts, though s. 42 deals with a matter to which the direction contained in s. 5 applies, namely, the direction to proceed and act and give relief on principles and rules which in the opinion of the court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts of England acted and gave relief but subject to the provisions contained in the Act and to the rules and orders under the Act.

While the purpose of alimony *pendente lite* was to provide for the wife's maintenance during the progress of the suit, it replaced and still replaces the provision to which a wife was entitled under the general law. In the absence, therefore, of some countervailing

(1) (1928) P. 113, at p. 119.
(2) (1927) P. 162, at p. 169.
(3) (1849) 1 Rob. Ecc. 684, at p. 700 [163 E.R. 1178, at p. 1184].
(4) (1941) 14 A.L.J. 403.

circumstance, such as the sufficiency of the resources at her own command, the lack of means of her husband coupled with her ability to support herself, disqualifying conduct on her own part, or other reason to the contrary, she will normally be given alimony pending the suit.

When during a long period of separation the wife has dispensed with support from her husband a presumption naturally arises that she does not need it. Where facts are not shown which explain the absence of any request on her part for support from him and make her need for alimony appear, the court may well think that to make the suit the occasion of altering a situation that has gone on so long is not just. The references which are to be found in a number of places in the authorities to a refusal to allow the suit to be used for placing the wife in a better financial position than before its institution do not relate to wives who depended upon their husbands for support but have been left by them without adequate maintenance and yet have managed somehow to live.

In the present case the applicant depended for years on the allowance her husband made to her. She expressed her dissent from its reduction and when at length he failed to make the payments she returned to her father and mother, looked after them and was supported by them. Two years had scarcely passed before she petitioned for dissolution of marriage, though it is true in the wrong jurisdiction. No presumption appears to me to arise from these facts that she did not need her husband's support. But if such a presumption did arise, its effect was at once destroyed by the death of her father and the loss by her of all means of subsistence except for resort to the War Savings Certificates.

The learned judge's reference to the need of taking care to see that the wife did not better her financial position temporarily by simply instituting a suit appears to me to be quite misconceived. Again, the fact that she had no sufficient means of maintaining herself after her father's death is, I think, abundantly clear. The War Savings Certificates her father had given her lest he be killed provided her with a slender capital resource for an emergency. Normally a wife is not expected to exhaust her capital to maintain herself, in exoneration of her husband's obligation (cf. *Bowerman* v. *Bowerman* (1)). No doubt it would be wrong to lay it down that never will the possession by a wife of capital suffice to provide her with adequate means of maintaining herself so that an order for alimony *pendente lite* should not be made. Circumstances vary infinitely and there is no warrant for fettering the discretion which the statute confers upon the court to act as it deems just. But it

(1) (1913) 31 W.N. (N.S.W.) 9.

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would be unreasonable to expect a woman to use up a small capital fund held against an emergency and to treat the existence of the fund as a ground for refusing alimony pending suit. Prima facie, moreover, maintenance is an affair of income. The conclusion which his Honour reached that no reason could be seen for altering the state of affairs which had existed from the beginning of the suit does not take into account the fact that from the beginning of the suit the petitioner strove to obtain an order altering the very circumstances obtaining when the petition was filed. It is ironical that the opposition of the respondent and the long delay which ensued before her application could be heard should be treated by the court as a reason for refusing it. Because of the delay she was forced to change her standard of living and also to use up portion of her very small capital. Surely these are grounds for making an order to take effect from the service of the citation, not for refusing alimony.

In my opinion the reasons for the order under appeal are untenable. The respondent's complaint that his net income is insufficient for his own needs cannot on the figures be entertained as a ground for refusing an order. I think that an order for some moderate sum ought to have been made in the Supreme Court of the Australian Capital Territory. It was objected, however, by the respondent that it was now too late to reverse the order of that Court dismissing the application and to make an order for alimony *pendente lite*. The ground of the objection is that since the order appealed from was made, the decree nisi in the suit has been made absolute. It is contended that as the suit is at an end an order relating to the pendency of the suit cannot be made. The decision of Lord *Merrivale* in *M.* v. *M.* (1) is relied upon for the proposition. That decision is based upon the view that alimony *pendente lite* was granted for the purpose of ensuring that the wife should be heard in the cause, that it was not granted in satisfaction of any substantive right and that it was a transitory proceeding limited by the necessities of the case, which ended with decree absolute. I am not certain that his Lordship attached sufficient weight to the retroactive nature of orders for alimony *pendente lite* and to the unrestricted ambit of the statutory power to grant such alimony. Further, the general rule expressed in the maxim *actus curiae neminem gravabit* should apply where the difficulty arises from a course of judicial action. It is evident that one aspect of an order for alimony *pendente lite* is the recoupment to the wife of expenditure on maintenance she has incurred or made from other sources before the order is granted. The jurisdiction of the court is not at an end

(1) (1928) P. 123.

when the decree nisi is made absolute and it is not altogether true that the purpose of the remedy has gone. The wife may have lived on credit in the expectation of an order and her resources may have been depleted. But however this may be I am of opinion that in exercising our appellate jurisdiction we should not act on the view that the decree absolute superseded our power of correcting the error of the learned judge. Our jurisdiction is to review the decrees, judgments, orders or sentences appealed from and if we think they are erroneous to do what ought to have been done. We cannot always ignore subsequent events when we come to make an order in lieu of an order appealed from that we are prepared to discharge. For instance we could not order a new trial after setting aside a judgment if a party had died and the cause of action had not survived : *Ryan* v. *Davies Brothers Ltd.* (1). But in such a case as the present there is no reason why we should not do what in our opinion the court below ought to have done.

The question at what amount the alimony *pendente lite* should be fixed is one which we should decide. Having regard to the net income of the husband, to the scale of past allowances to the wife and to the mode of life she adopted, I would fix it at £3 a week from the service of the citation until the making of the decree absolute.

I think special leave to appeal should be granted. The appeal pursuant to such special leave should be allowed with costs, and so much of the order below as dismissed the motion for alimony *pendente lite* should be discharged and an order to the foregoing effect substituted.

McTiernan J. The main question is whether the refusal of the wife's application for alimony *pendente lite* was an erroneous exercise of the discretion which the Supreme Court has under the statutory provisions which applied to this proceeding. These provisions are contained in ss. 5, 41, and 42 of the *Matrimonial Causes Act* 1899, as amended, of New South Wales. The *Matrimonial Causes Ordinance*, No. 22 of 1932, as amended, of the Australian Capital Territory made it necessary for the Supreme Court to proceed on and give relief in accordance with the terms of the above sections.

The wife invoked the jurisdiction given the court by the terms of s. 41. This section says that upon a petition for dissolution of marriage the court shall have the same power to make interim orders for the payment of alimony or otherwise to the wife as the court has in a suit instituted for judicial separation. The power is defined by s. 42, which says that in that suit, if instituted by a wife,

(1) (1921) 29 C.L.R. 527.

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the court may make any order for alimony which it deems just. A proceeding for alimony *pendente lite* is within the terms of s. 5, but if this section contains anything inconsistent with s. 42, the provisions of the latter would prevail. They contain the measure of the jurisdiction given to the court. It has jurisdiction to make any order for the payment of alimony pending the suit which the court deems just. Upon the terms of these sections the order is not as of course. But the refusal to make it may, in some circumstances, be contrary to the statute and not an exercise of the discretion given to the court: for example the refusal of an application by a well-conducted wife who has insufficient money to provide for her subsistence and livelihood pending suit if her husband has the means to do so.

It has been shown that the interim order which the court is empowered to make is for the payment of money by way of alimony. In *Leslie* v. *Leslie* (1) the President said "The amount of the alimony, and indeed in some degree the question of whether or not it should be allowed at all, is of discretion in the Court, a discretion to be exercised judicially according to established principles of law, and upon an equitable view of all the circumstances of the particular case." It is argued for the wife that it is plain upon a consideration of the facts of the case and the reasons of the Supreme Court for declining to make an order that the dismissal of the application was an erroneous exercise of the discretion given to the court. It is argued for the husband, on the other hand, that it was within the judicial discretion of the court to refuse to make the order, but it was conceded that there was nothing in the case to prevent the court from making the order, and that an exercise of the court's discretion in favour of the wife would not necessarily have been wrong. The evidence shows that at the time the wife filed this notice of motion her means actually consisted only of the residue of the bonds given to her by her father, the value of which was then about £400. The question is whether it was just to leave the wife to support herself entirely by these bonds. The interest on them was, of course, insufficient. I think that in the circumstances it was unreasonable and unjust to compel her to subsist and maintain herself during the pendency of the suit entirely on the proceeds of the bonds rather than to order her husband to make a just allowance to her for her subsistence and livelihood during that period out of his ample estate. The primary questions were the wife's need of further means of support and the ability of the husband to provide the means. In my judgment the court did not give due weight

(1) (1911) P. 203, at p. 205.

to the fact that if no order was made the wife's only means of support until the termination of the suit would be this diminishing residue of bonds. They were her only reserves, and I think it was not just to leave her entirely dependent upon them. To leave her in that position was, I think, to compel her to live precariously: cf. *Welton* v. *Welton* (1). The learned judge said that "Care must be taken to see that the wife does not better her financial position temporarily." A just order for alimony *pendente lite* necessarily improves the financial position of the wife during the pendency of the suit. But the prior question is: Would her means, if no order was made, be sufficient to provide for her until the suit terminates? If not, the fact that her financial position would be improved by an order cannot be a good reason for refusing to make it. As to the consideration mentioned by the learned judge, see *Welton* v. *Welton* (2) per Lord *Hanworth*: and as to the basis of the wife's right, see *Leslie* v. *Leslie* (3). In my judgment the learned judge misapplied or gave undue weight to the principle that a wife is not entitled to use an application for alimony *pendente lite* merely to improve her financial position. I am of the opinion that an order ought to have been made upon the wife's application. For that reason leave to appeal should be given.

This Court has jurisdiction upon the appeal to give such judgment as ought to have been given by the Supreme Court upon the wife's application: *Judiciary Act*, s. 37. A decree absolute has been made in the suit. But the suit was pending at the time she filed her notice of motion for alimony *pendente lite*. The Supreme Court should, in my opinion, have made an order for the payment of alimony to the wife from the date of the service of the citation until the final decree (see *Clifton* v. *Clifton* (4); *Ellis* v. *Ellis* (5)). In my opinion the Court should upon this appeal make an order to that effect and the amount of alimony should be at the rate of £3 per week. Special leave to appeal should be granted and the appeal allowed.

WILLIAMS J. I agree that special leave to appeal should be granted and that an order should be made for the payment of a moderate weekly sum as alimony *pendente lite* from the date of the service of the petition to the date of decree absolute. But I do not agree that under ss. 41 and 42 of the *Matrimonial Causes Act* 1899 (N.S.W.) the court has no jurisdiction to make an order for the

(1) (1927) P. 162, at p. 178.
(2) (1927) P., at p. 178.
(3) (1911) P., at p. 205.
(4) (1878) 1 S.C.R. (N.S.) (N.S.W.) (D.) 21.
(5) (1883) 8 P.D. 188.

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payment of alimony *pendente lite* after decree absolute. The order can of course only provide for the payment of such alimony up to that date, but I can see no reason why proceedings taken before that date to obtain the order should not be heard and determined either before or after that date. In *Latham* v. *Latham and Gethin* (1) it was held that alimony *pendente lite* could only be allowed up to the date of the decree nisi. That case was overruled by *Ellis* v. *Ellis* (2) where it was held that the court could allow such alimony during the further period between the decree nisi and the decree absolute. But *Ellis* v. *Ellis* (2) did not decide that an order for the payment of alimony *pendente lite* could only be made before the decree nisi was made absolute.

I do not regard the case of *M.* v. *M.* (3) as a decision that the court has no jurisdiction to make such an order after decree absolute. Lord *Merrivale* said " To give a direction now for inquiry as to the wife's maintenance during the period from March to November 1927, while the litigation was proceeding, would be a new departure, and in view of the hardships which often arise where a husband is petitioner it would involve mischievous consequences. The application, therefore, is refused " (4). His Lordship therefore did not say that he had no jurisdiction to make the order but, as I read his judgment, refused it in the exercise of his discretion. There is also the decision of *Gordon* J. in *Davis* v. *Davis* (5). His Honour there held that after decree absolute the court cannot make an order for alimony *pendente lite*. With all respect I cannot agree with this decision. In the course of his judgment his Honour said, in reference to *Ellis* v. *Ellis* (2) : " Both *Cotton* L.J., and *Bowen* L.J., took the view that after decree absolute no order could be made for alimony *pendente lite*. And it seems to me that the pendency of a *lis* must *ex hypothesi* be a condition precedent to the making of an order for alimony *pendente lite* ." I can find nothing in the judgments of *Cotton* L.J. and *Bowen* L.J. in *Ellis* v. *Ellis* (2) which indicates that they took this view. Their Lordships were concerned only with the question whether alimony *pendente lite* could be granted in respect of the period between decree nisi and decree absolute and were not concerned with the question whether an order could be made after decree absolute. There are no words in ss. 41 or 42 of the Act to limit the power of the court to make orders to the period before decree absolute, and in my opinion the court has jurisdiction to make an order for alimony *pendente lite* after decree

(1) (1861) 2 Sw. & Tr. 299 [164 E.R. 1011].
(2) (1883) 8 P.D. 188.
(3) (1928) P. 123.
(4) (1928) P., at p. 127.
(5) (1910) 27 W.N. (N.S.W.) 186.

absolute where the proceedings have been commenced before that date. In this way proper effect is given to the principle that the court will not allow unavoidable delays in litigation to interfere with the rights of the parties (*In re Scad, Ltd.* (1)).

WEBB J. I agree with the Chief Justice that leave to appeal should be granted and that an order should be made for £3 per week and be ante-dated to 30th November 1948, when the motion for alimony *pendente lite* was heard.

Simpson J. did not take into account the fact that the petitioner was not satisfied to provide for her own maintenance without a demand on the respondent for support. Had she been so satisfied the rule that prevents a wife from improving her financial position temporarily by receiving alimony *pendente lite* might have justified the dismissal of the motion. But on the facts here the principle of law applicable was that stated in *Miles* v. *Chilton* (2) referred to by *Dixon* J., namely, that alimony follows as a matter of course except where the wife has a provision of her own sufficient for her condition in life and proportionate to the means of her husband. The petitioner did not have such a provision.

Grant special leave to appeal from the order of the Supreme Court. By consent treat the motion for special leave as the hearing of the appeal. Allow appeal with costs. Discharge order of the Supreme Court. In lieu thereof order that the respondent pay petitioner a weekly sum of £3 by way of alimony pendente lite from the date of the service of the petition, indorsed with the citation, to the date of the decree nisi for dissolution being made absolute. Order that the respondent pay the petitioner's costs of the application to the Supreme Court for alimony pendente lite including the costs of taking evidence on commission.

Solicitors for the applicant: *C. W. Davies & R. G. Bailey*, Queanbeyan, by *A. J. Morgan & Son.*

Solicitors for the respondent: *E. R. Boardman*, Queanbeyan, by *Mackenzie Russell.*

J. B.

(1) (1941) Ch. 386.

(2) (1849) 1 Rob. Ecc., at p. 700 [163 E.R., at p. 1184].