H. C. OF A. 1955-1956.

THE QUEEN v. KIRBY; EX PARTE BOILER-MAKERS' SOCIETY OF AUSTRALIA.

Taylor J.

possessed over disputes confined to its own borders" (1). Much the same thing was said by *O'Connor* J. in the same case (2).

These observations, which are by no means conclusive of the question in this case, do however serve to indicate the special character of the arbitral functions of the Commonwealth Court of Conciliation and Arbitration. They bear little, if any, resemblance to executive or legislative functions as generally conceived; on the contrary, both in their nature and exercise they present a number of features which are characteristic of judicial functions. These considerations, coupled with the fact that the combination in one tribunal of both arbitral and limited judicial authority is and has been for over half a century a well-recognized concept, induce me to think that, unless there is to be found in the Constitution any clear provision or implication which denies to the legislature the right to combine these two functions in a court constituted under ss. 71 and 77 (i.), the prosecutor's submissions must fail. While I am conscious of the weight of the arguments advanced by the prosecutor they have failed to convince me that there is to be found in the Constitution any implication which, in the face of the special character of the power conferred by par. (xxxv.), could so operate. Accordingly I am of the opinion that the order nisi should be discharged.

Order absolute for a writ of prohibition prohibiting further proceedings upon the order dated 31*st May* 1955 *and the order dated* 28*th June* 1955 *made by the Commonwealth Court of Conciliation and Arbitration. The respondent the Metal Trades Employers' Association to pay the prosecutor's costs.*

Solicitors for the prosecutor, *Maurice Blackburn & Co.*

Solicitor for the respondent judges of the Court of Conciliation and Arbitration and for the Attorney-General of the Commonwealth intervening by leave, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent Metal Trades Employers' Association, *Salwey & Primrose.*

R. A. H.

(1) (1909) 8 C.L.R., at pp. 526-527. (2) (1909) 8 C.L.R., at p. 504.

[HIGH COURT OF AUSTRALIA.]

VIANT . . . . . APPELLANT;
PLAINTIFF,

AND

VIANT AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1955.

ADELAIDE, *June* 15;

MELBOURNE, *July* 18.

Dixon C.J., Webb, Kitto and Taylor JJ.

Matrimonial causes—Dissolution of marriage—Unreasonable delay—Delay of thirty-two years—Exercise of discretion— Matrimonial Causes Act 1929-1941 (*S.A.*) (*No.* 1946 *of* 1929—*No.* 51 *of* 1941), *s.* 12 (1) (*b*).

In an action by a husband for dissolution of marriage on the grounds of adultery and desertion, it appeared that the husband had delayed for thirty-two years before commencing the action. Throughout this period the wife had been living with the co-defendant and they had several children, all of whom were now grown up. The husband had appeared completely indifferent to whatever life the wife might live. He had no desire to re-marry. He was led to commence the action for dissolution by a request made to him by his wife's brother, who induced him to commence proceedings by interviewing a solicitor with him and by accepting personal responsibility for the costs of the husband to be incurred in the proceedings.

Held, that the husband had been guilty of unreasonable delay, and the trial judge having in the exercise of his discretion refused to make an order for divorce, there was no reason to interfere with his decision.

The unreasonableness of delay is not a mere matter of duration; the delay must be culpable, suggesting an acquiescence in the wrongful conduct of the guilty spouse, or a condonation of it, or insensibility or indifference to the loss of the spouse, or an insincerity in the complaint, or something in the nature of connivance.

The discretion to grant or refuse the relief sought must be exercised with a profound concern for the vital interest which society has in maintaining high respect for the institution of marriage and in insisting upon the observance of established standards of conduct on the part of those approaching the courts for divorce.

Decision of the Supreme Court of South Australia (*Abbott* J.), affirmed.

H. C. OF A. 1955. VIANT v. VIANT.

APPEAL from the Supreme Court of South Australia.

This was an appeal from the Supreme Court of South Australia (*Abbott* J.) refusing an order for divorce sought by the appellant against his wife on the grounds of adultery and desertion for three years and upwards. Although the grounds were made out, the trial judge refused the order, considering that the action was collusive, that the appellant was not suing in good faith and that he had been guilty of unreasonable delay in seeking relief.

The material facts appear in the judgment of the Court hereunder.

F. G. Hicks, for the appellant. Agreements as to costs are permissible, provided that the person agreeing to pay is a party whom the court would, or could, order to pay, or who is interested or acts on behalf of such a party, and the arrangement is not so extravagant as to be corrupt or to amount to a bribe. [He referred to *Hanson* v. *Hanson* (1); *Brine* v. *Brine* (2); *Amber* v. *Amber* (3); *Barlow* v. *Barlow* (4); *Tuckwell* v. *Tuckwell* (5); *Mericka* v. *Mericka* (6); *Johannsen* v. *Johannsen* (7); *Robb* v. *Robb* (8); *Gabric* v. *Gabric* (9); *Heffernan* v. *Heffernan* (10); *Ward* v. *Ward* (11); *Cohen* v. *Cohen* (12); *Polley* v. *Polley* (13); *Teale* v. *Burt* (14); *Malley* v. *Malley* (15); *Dutko* v. *Dutko* (16); *Prockiw* v. *Prockiw* (17); *Shaw* v. *Shaw* (18); *Robinson* v. *Robinson* (19); *Riddell* v. *Riddell* (20); *Walsh* v. *Walsh* (21); *Hudson* v. *Hudson* (22).] Although the appellant would not have sought a divorce unless asked to do so, he nevertheless was genuinely seeking such an order and his action was bona fide. The Court should exercise its discretion in favour of the appellant on the question of unreasonable delay: *Blunt* v. *Blunt* (23); *Turnbull* v. *Turnbull* (24); *Henderson* v. *Henderson* (25); *Zarnke* v. *Zarnke* (26); *Buswell* v. *Buswell* (27); *Cowell* v. *Cowell* (28); *Richards* v. *Richards* (29); *Lowe* v. *Lowe* (30).

There was no appearance for either of the respondents.

Cur. adv. vult.

(1) (1937) 58 C.L.R. 259.
(2) (1924) S.A.S.R. 433.
(3) (1937) S.A.S.R. 27.
(4) (1937) S.A.S.R. 246.
(5) (1952) S.A.S.R. 240.
(6) (1954) S.A.S.R. 74.
(7) (1953) S.A.S.R. 141.
(8) (1952) V.L.R. 255.
(9) (1953) V.L.R. 282.
(10) (1953) V.L.R. 321.
(11) (1944) V.L.R. 249.
(12) (1943) 43 S.R. (N.S.W.) 37; 60 W.N. 37.
(13) (1941) Tas. S.R. 5.
(14) (1951) P. 438.
(15) (1909) 25 T.L.R. 662.
(16) (1946) 4 D.L.R. 471.
(17) (1948) 4 D.L.R. 140.
(18) (1944) 4 D.L.R. 9.
(19) (1951) 4 D.L.R. 448.
(20) (1952) S.C. 475.
(21) (1934) Q.W.N. 32.
(22) (1939) Q.W.N. 40.
(23) (1943) A.C. 517.
(24) (1945) 47 W.A.L.R. 31; 19 A.L.J. 245.
(25) (1948) 76 C.L.R. 529.
(26) (1950) 81 C.L.R. 572.
(27) (1954) S.A.S.R. 70.
(28) (1954) 71 W.N. (N.S.W.) 217.
(29) (1952) P. 307.
(30) (1952) P. 376.

THE COURT delivered the following written judgment :—

This is an appeal by a husband from an order of the Supreme Court of South Australia (*Abbott* J.) dismissing an action in which he had claimed a divorce from his wife, the first respondent, on the grounds of her adultery with the second respondent and her desertion of the appellant without just cause or excuse for the statutory period. The grounds relied upon were made out by the evidence, but the learned judge refused relief, being of opinion that the action was collusive, and that the plaintiff was not suing in good faith and had been guilty of unreasonable delay.

The spouses were married in December 1918, the husband then being twenty-two years of age and the wife twenty. They lived together for only eighteen months. During this period the husband was an employee in smelting works at Port Pirie. In June 1920 an opportunity arose for him to obtain employment at similar works in Upper Burma and he left for that country under an arrangement with his wife that she would follow him when he should succeed in obtaining a house there. A house, however, could not be found. For a year they corresponded, but then the wife became friendly with the second respondent, Richardson, and after another three months the husband learned of the association. A further letter to his wife having remained unanswered, he wrote no more, and in June 1922 he returned to South Australia. He was given what he called "certain information" about his wife, but did not look for her. For ten years he lived at Port Pirie, and ever since 1932 he has lived in Adelaide except for a term of three years at the Woomera Rocket Range. He appears to have known all along, as the fact was, that his wife and Richardson were living together as man and wife and had children, but he made no attempt either to induce his wife to return to him or to obtain a divorce. So matters rested for thirty-two years. The learned judge summed up the situation by saying : "The opinion I have formed of the plaintiff is that he has from the first been convinced that his wife was committing adultery and would not return to him ; his affection for her was not very strong ; he has never had any wish to marry again, nor does he now desire to do so ; he has been satisfied to live his own life, and has been completely indifferent to whatever life she might live ; and he has never had any intention, nor the least desire, to divorce his wife."

In November 1954, however, the husband commenced an action for divorce, being led to do so by a request made to him by his wife's brother. The wife and Richardson were about to go to reside at Kingoonya, where the brother had a gold mine. It was

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the brother who took the initiative towards a divorce, and he induced the husband to commence proceedings by interviewing a solicitor with him and accepting personal responsibility for the costs. This arrangement was fully and frankly disclosed to the trial judge, and in giving his evidence the husband said : " I would like to be divorced from my wife, but if my brother-in-law had not spoken to me about it I would not have taken this action."

Abbott J. felt himself constrained by his interpretation of the case of *Mericka* v. *Mericka* (1), contrary to the view which he would otherwise have taken on the authority of *Brine* v. *Brine* (2), to hold that because of the arrangement as to costs the action was collusive. His Honour did not suspect any agreement or arrangement to pervert the course of justice in any way, but he was satisfied that the brother-in-law's acceptance of the liability to pay the costs was the consideration for the husband's initiation of the proceedings, and he regarded the brother-in-law as the wife's agent in his negotiations with the husband. Whether this was enough to justify a finding of collusion is open to serious argument ; but we do not find it necessary to decide the question, for it is clear that his Honour's decision to dismiss the action on the ground of unreasonable delay must be upheld.

Unreasonable delay on the part of a plaintiff seeking a divorce is made a discretionary bar to relief by s. 12 (1) (*b*) of the *Matrimonial Causes Act* 1929-1941 (S.A.). The unreasonableness of delay is not a mere matter of duration ; the delay must be culpable, in the sense in which that expression is used in the authorities reviewed by *Karminski* J. in *Lowe* v. *Lowe* (3). It must suggest an acquiescence in the wrongful conduct of the guilty spouse, or a condonation of it, or an insensibility or indifference to the loss of the spouse, or an insincerity in the complaint, or something in the nature of connivance : *Turnbull* v. *Turnbull* (4). In the present case the delay was quite plainly of this kind. It would be difficult to find a case in which the length and circumstances of the delay were more eloquent of a complete lack of concern on the part of the husband that his wife had left him and formed an adulterous association with another man. His docile acceptance of the situation fell little short of a consent to its indefinite continuance.

The case was therefore one in which, if there were no other bar to relief, a discretion to dismiss the action clearly existed. It was a judicial discretion, to be exercised in accordance with established

(1) (1954) S.A.S.R. 74.
(2) (1924) S.A.S.R. 433.
(3) (1952) P. 376.
(4) (1945) 47 W.A.L.R. 31 ; 19 A.L.J. 245.

principle. It would not have been right for the learned judge to adopt, without considering other factors in this case, the concluding words of a quotation which he made from *Binney* v. *Binney and Hill* (1): ". . . as I am satisfied that there has been culpable delay and real acquiescence by the petitioner in the adultery of his wife the petition must be dismissed" (2). Even though the delay was culpable, his Honour was bound to consider whether in all the circumstances that was a sufficient reason for declining to grant a divorce. There seemed not the remotest possibility of the spouses ever becoming reconciled, and much might no doubt be said for the desirability of enabling the long-standing relationship between the wife and Richardson to be given the status of legal marriage. But there was nothing in the evidence to show that any of the three persons most closely concerned felt, or had ever felt, much interest in the topic, and the children of the irregular union, who of course would not be legitimated by a subsequent marriage, were all grown up and were said not even to know that their parents were unmarried. The matter which called for the greatest consideration was the public interest. The remedy of divorce was being sought by a husband whose attitude the trial judge was able to describe, with entire justification, by saying: "Having had a discussion with his brother-in-law, he has no desire to play the part of the dog in the manger, and has consented, so long as he is to incur no expense nor any great trouble, to divorce his wife, if it will give her any satisfaction." He was nonchalantly seeking from the court, at the persuasion of a third party, the dissolution of a marriage which he had treated for thirty odd years as of no significance, in order that legal regularity might be obtained for an adulterous union to which he had shown for the same period a phlegmatic indifference. In these circumstances, the view was certainly open, to say the least, that a divorce ought to be refused in the interests of society, lest the courts should seem to view with equanimity a cynical unconcern for the mutual rights and obligations of the marriage tie and an easy tolerance of extra-marital relations.

Abbott J. was led by his consideration of modern decisions to remark that any interest which the public might once have been thought to have in upholding the sanctity of marriage and in discouraging divorce proceedings by parties guilty of the so-called discretionary bars would, if looked at frankly, seem to have disappeared. "In view of the development of judicial opinion", he said, "it would seem at least doubtful how far any real discretion now remains to be exercised by the trial judge". It would have

(1) (1936) P. 178.

(2) (1936) P. 178, at p. 181.