[HIGH COURT OF AUSTRALIA.]

DANIEL . . . . . APPELLANT;

AND

DANIEL . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1906.

SYDNEY, *Nov.* 29.

Griffith C.J., Barton and Isaacs JJ.

Husband and wife—Divorce—Custody of child of marriage—Discretion of Judge—Matrimonial Causes Act (*N.S.W.*), (*No.* 14 *of* 1899), *sec.* 4.

Appeal to High Court—Question of status under laws relating to divorce—Judiciary Act 1903 (*No.* 6 *of* 1903), *sec.* 35, *sub-sec.* (*a*) (3)—*Special leave—Practice.*

An order of the Judge in Divorce under sec. 4 of the *Matrimonial Causes Act* 1899, awarding the husband, the successful petitioner in a suit for dissolution of marriage, the custody of a child of the marriage is not a judgment which "affects the status of any person . . . under the laws relating to divorce" within the meaning of sec. 35, sub-sec. (*a*) (3), of the *Judiciary Act* 1903.

In the exercise of the powers conferred upon the Divorce Court by the *Matrimonial Causes Act* 1899, with regard to the custody of children, the Court has a wide discretion, which will not be reviewed by a Court of Appeal unless it is exercised capriciously or upon a wrong principle.

Principles to be observed by the Court in the exercise of its discretion, considered.

On the hearing of an appeal from a judgment of the Supreme Court, which had been set down to be heard without special leave, the High Court held that the judgment appealed from was not one from which an appeal lay as of right under sec. 39 of the *Judiciary Act* 1903, but allowed the appellant to move forthwith for special leave to appeal, and proceed at once.

Special leave to appeal from the decision of *Simpson* J., 6th March 1906, refused.

APPEAL from an order of *Simpson* J. in the Supreme Court of New South Wales in its Matrimonial Causes Jurisdiction.

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The respondent, the husband of the appellant, obtained a decree for the dissolution of his marriage with the appellant on the ground that she had failed to comply with an order for the restitution of conjugal rights. Subsequently, on motion upon notice, the Judge in Divorce, after taking evidence on affidavit, made an order giving the custody of the only child of the marriage to the respondent.

It was from the latter order that the present appeal was brought by the wife without leave.

The facts of the case are not material to this report.

E. M. Stephen (*Windeyer* with him), for the appellant. The order was made under sec. 4 of the *Matrimonial Causes Act* 1899, and is therefore an order of the Supreme Court. The order is one affecting the status of the child within the meaning of sec. 35, sub-sec. (*a*) (3) of the *Judiciary Act* 1903. Its condition is affected in so far as it depends upon the person to whom and by whom the filial duties are owed. Its legal relationship to other persons is affected. Being a child it is subject to extrinsic control, and is therefore under a status, and the rights which attach to its status depend upon the person to whom it owes obedience. The order touches those rights. [He referred to *Quick and Groom, Judicial Powers of the Commonwealth*, p. 150; *Maine, Ancient Law*, 15th ed., p. 169; *Matrimonial Causes Act* 1899, sec. 60.]

[GRIFFITH C.J.—If it were a question whether a particular person had or had not attained the age of twenty-one years, the status would be affected. But the position of the child in the abstract is not affected by this judgment. It only fixes the person to whom the child owes the duty or who owes the duty to the child. If this affected the status, so would an order appointing a guardian. The section applies only to judgments which affect the status, not to all those made under the laws affecting status.

ISAACS J.—The status of the child is not changed by the order. He is still a minor.]

Then I ask for special leave to appeal.

[GRIFFITH C.J.—This Court is not in the habit of granting special leave to appeal on questions of fact.]

The Judge applied the rules of law wrongly to the facts before him. While stating that the dominant consideration was the welfare of the child, he in fact gave most weight to the question which was the innocent party. He did not properly consider the nature of the home to which the father would take the child, nor the conditions of climate, &c., under which the child would have to live. The case was heard entirely upon affidavits, so that this Court has the same material before it as the Judge had. [He referred to *D'Alton* v. *D'Alton* (1).]

[GRIFFITH C.J. referred to *Chetwynd* v. *Chetwynd* (2).]

Blacket (*Edwards* with him), for the respondent. The order cannot affect the status of the child. The only question was whether the child should be in the care of the father or the mother, but it was still of the same status, and the parents' status was not involved.

[GRIFFITH C.J.—You may be heard on the application for special leave as the application is for leave to proceed at once.]

This Court should not lightly interfere with the discretion of the Court of first instance where the proper principles were applied, and the only matter in issue was the proper view to take of the facts before the Court: *Handley* v. *Handley* (3). There must be something which amounts to a miscarriage of justice before the Court of Appeal will interfere in such cases: *Wigney* v. *Wigney* (4). No general rule can be laid down as to the class of cases in which an order of the kind should be made: *Symington* v. *Symington* (5). It is purely a matter of discretion. In the grounds of appeal it is not suggested that any wrong principle was followed, and the Judge's decision was absolutely justified by the facts before him. In *D'Alton* v. *D'Alton* (1) the question was between the husband and the wife, but in this case the child has not been taken from the custody of the mother but from that of a third party with whom the mother had placed it.

The respondent asks for costs of the appeal. The wife has separate property.

(1) 4 P.D., 87.
(2) L.R. 1 P. & M., 39.
(3) (1891) P., 124.
(4) 7 P.D., 177.
(5) L.R. 2 H.L. Sc., 415, at p. 420.

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[GRIFFITH C.J.—Why should not the Court give costs as in any other case? Certainly it is a case between husband and wife. The Court can give costs if it thinks fit. Whether we think we should give them is another matter. As a rule costs are not given to a husband against a wife.]

E. M. Stephen, in reply. The discretion of the Judge is a judicial discretion, and will be interfered with if wrongly exercised on the facts. [He referred to *Donohue* v. *Donohue* (1).]

Costs should not be given against the mother, as she has acted in the interest of the child, not of herself.

GRIFFITH C.J. This is an appeal, set down to be heard without special leave, from an order of the Judge of the Divorce Court giving the custody of a child of divorced persons to the father, the petitioner in the suit. The appeal was instituted by the mother, and it is claimed for the appellant that the judgment giving the custody of the child affects the question of status within the meaning of sec. 35 of the *Judiciary Act* 1903, which allows an appeal to be brought without leave from any judgment of the Supreme Court of a State which "affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency." The question at issue in this case is merely whether the father or the mother should have the custody of the child. How can that be said to be a question of status? Without pretending to give an exhaustive definition, I apprehend that the term "status" means something of this sort: a condition attached by law to a person which confers or affects or limits a legal capacity of exercising some power that under other circumstances he could not or could exercise without restriction. That definition, as I have said, may not be exhaustive, but it indicates, at any rate, the sort of thing that is meant. The answer to the question whether an infant ought to be placed in the custody of his father or his mother does not affect the capacity of the child or of anybody else to do anything, and therefore I do not think that this is a question of status at all. The instances given by the section itself serve to show what the words mean, that is to say, such

(1) (1901) 1 S.R. (N.S.W.), (Div.) 1.

questions as whether a person is legally married or not, or is a bankrupt or not. Those are very different matters from this. In my opinion, therefore, an appeal does not lie in this case as of course.

But Mr. Stephen was allowed to move for special leave to appeal, and he did so. It is to be observed that the only grounds of appeal stated in the notice—by which, of course, the appellant is not conclusively bound on this motion—are that the learned Judge was wrong in the conclusion to which he came on the question of fact before him, and it is not the practice of this Court to grant special leave to appeal on questions of fact. But it is suggested further that the learned Judge did not apply the right principle to the facts, that he attached too much weight to some considerations and not enough to others. But it is well settled by the authorities, including those to which we have been referred, that, in the exercise of the powers given to the Court by the Divorce Act, the Court has a very large discretion, which cannot be fettered by any arbitrary rule, and it is always difficult to obtain special leave to appeal from a decision given by the Court in the exercise of such a discretion. There are some principles however which must be observed by a Court in the exercise of a discretion of that kind. I do not know that they are anywhere better stated than by *Sir James Hannen* in *D'Alton* v. *D'Alton* (1). In that case there had been a judicial separation between husband and wife on the wife's petition, by reason of the husband's cruelty and adultery. The wife asked to have the custody of the children, and the learned President made some observations in reference to that part of the case, which I will read. He said (2):—"In the unfortunate circumstances which have arisen between the parties to this suit, the sole difference between the parents with regard to the children being now apparently the question of religion, I have to consider what is most for the benefit of their offspring, whose interests are of paramount importance on this application. If these parents had been of the same religion I should have given the custody of one, possibly of both, of the children, at any rate for the present, to the mother, upon the principle that she ought not, by reason of

(1) 4 P.D., 87. (2) 4 P.D., 87, at pp. 87, 88.

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the wrongful act of the father, to be deprived of the comfort and society of them. But as she avows that her main object is to bring them up as Roman Catholics, I have to consider, first of all, whether she has any right to insist upon this? and, secondly, whether it is for the interests of the children that she should so bring them up?

"With regard to the rights of the petitioner, the principle which guides the Court is, that the innocent party shall suffer as little as possible from the dissolution of the marriage, and be preserved, as far as the Court can do so, in the same position in which she was while the marriage continued—first, by giving her a sufficient pecuniary allowance for her support; and secondly, by providing that she should not be deprived of the society of her children unnecessarily. As it has been put by one of my predecessors, 'the wife ought not to be obliged to buy the relief to which she is entitled, owing to her husband's misconduct, at the price of being deprived of the society of her children.'"

I do not cite these passages as laying down rules which must be applied in this case, but as stating the principle which a Judge, exercising the powers conferred by this section of the Statute, will endeavour to apply to the facts before him; and, on referring to the judgment of the learned Judge in this case, it appears to me that these are exactly the principles upon which he relied. The principles applicable to the case of an application by a husband are exactly the same as those applicable to the case of a wife.

In this case, on the husband's petition, a divorce was granted for desertion consequent upon the refusal by the wife to obey an order for restitution of conjugal rights, the wife being in the wrong, as the learned Judge found as a matter of fact. She insists that, notwithstanding that, she is entitled to the custody of the child. The learned Judge, rightly I think, attached some weight to the fact that she was in the wrong, and refused the application.

There was another point sought to be made, that, by reason of certain special circumstances, it would be unsafe for the child if the custody were given to the father, because, forsooth, the father was living in a place in New South Wales that was not so healthy for children as some other parts of the country. Was there ever

such a preposterous contention as that the rights of the parties to a divorce suit should depend upon what part of the territory the parents chance to reside in? Are Courts to lay down the rule that persons who reside in some parts of the country are debarred from asserting their natural rights in regard to the custody of their children? As a matter of fact the learned Judge did not believe the story about the unhealthiness of the place where the father was living. No doubt, if it were clearly shown to the Court that the father was living in a place which was so unfit for human habitation that the child would be likely to die if compelled to go there, the Court would not refuse to give the custody of the child to the wife or some person appointed by her. But in this case the learned Judge thought that no such case had been established. For my part, I do protest against the encouragement of the opinion that there are some parts of this State or any other State in Australia that are unsafe for human residence. I have a better opinion of Australia than that.

In my opinion the learned Judge made no mistake in law, and on the facts I think I should probably have come to the same conclusion as he did; and therefore, as the appeal will not lie as of course, the proper order to make is that special leave be not granted, and the appeal be struck out.

BARTON J. I am of the same opinion.

ISAACS J. I concur in the judgments delivered, and only wish to say one or two words upon the question of the discretion of the Court under the *Matrimonial Causes Act* 1899. Sec. 60 of that Act provides that in a suit for obtaining a judicial separation the Court may make such order as it deems just and proper with respect to the custody, maintenance, and education of the children of the marriage, and if it thinks fit, may direct proceedings to be taken for placing them under the protection of the Supreme Court in its equitable jurisdiction. The legislature has not laid down any rigid rule to bind the Court in the exercise of its discretion, and although some decisions up to a certain period appeared to somewhat limit the discretion of the Court, the case of *Thomasset* v. *Thomasset* (1), I think, set that matter

(1) (1894) P., 295.

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at rest. The judgment of the Court of Appeal was delivered by *Lindley* L.J. and *Lopes* L.J.

Lindley L.J. said (1):—"In my judgment, the wide discretion conferred on the Divorce Court by the Divorce Acts has been unduly restricted by judicial decisions. Such discretion ought to be exercised in each particular case as the circumstances of that case may require; and in exercising such discretion the Divorce Court, which has all the old powers of the Court of Chancery, is not and ought not to consider itself fettered by any supposed rule to the effect that it has no power to make orders under the Acts respecting the custody, maintenance, and education of infants who, being males, are over fourteen, or who, being females, are over sixteen. I am clearly of opinion that, whether the children are males or females, the jurisdiction conferred by the sections of the Divorce Acts on which this case turns can, since the Judicature Acts, at all events, be exercised during the whole period of infancy—that is, until the children, whether males or females, attain twenty-one; although I do not say that a child who has attained years of discretion can, except under very special circumstances, be properly ordered into the custody of either parent against such child's own wishes." And *Lopes* L.J. at the end of his judgment said (2):—"In my judgment, the Divorce Court has power, under the sections in question, to make orders for the custody, maintenance, and education of children up to the age of twenty-one years—a power to be exercised discretionally according to the particular circumstances in each case in which its interference is invoked."

Of course this discretion is not to be capriciously exercised, but judicially, and is to some extent reviewable. But I think that what was said by Lord *Cairns* L.C. in the case cited by *Mr. Blacket*, *Symington* v. *Symington* (3), affords a very good general guide indeed. His Lordship pointed out that in the Scottish Act there was a provision very similar to that in the English Act from which sec. 60 is taken, and His Lordship referred to the argument in which it was suggested that where a wife established her title either to a divorce or a judicial separation, it was almost

(1) (1894) P., 295, at p. 302. (2) (1894) P., 295, at p. 307.
(3) L.R., 2 H.L. Sc., 415, at p. 420.

a matter of course that the decree should carry with it for her the custody of the children; and that, having shown good cause for severing the conjugal tie, she, not being in fault herself, should not be amerced or punished by being deprived of the custody of the children. His Lordship said this:—"My Lords, I should greatly regret that any general rule, so sweeping, and, as it appears to me, so inconvenient in its working, should be laid down on a subject of this description. It appears to me that the Act of Parliament has given the Court the widest and the most general discretion, and has purposely done so; and I think it must be the duty of the Court to consider all the circumstances of the particular case before it—the circumstances of the misconduct which leads to a separation no doubt—the circumstances of the general character of the father—the circumstances of the general character of the mother—and, above all, it should be the duty of the Court to look to the interest of the children, and carefully to weigh the comparative advantages or disadvantages of giving the custody of all or any of them to the one parent or to the other. I am at a loss to conceive how any general rule upon such a subject can be laid down. Certainly I should prefer to ask your Lordships to act, not upon any general rule, but upon the circumstances of the case now before us." It seems to me that is, as nearly as you can frame it, a statement of the principles by which Courts should be guided in the exercise of their discretion. The legislature thought fit to impose no definite rule for the exercise of the discretion of the Court, and if the circumstances of this case are looked at as we should expect them to be looked at, then I think it is clear that the Court has in this case done its duty, and exercised its discretion in a judicial manner, and that no sufficient grounds have been shown for disturbing the decision.

Special leave refused. Appeal dismissed with costs. Costs not to exceed amount of deposit.

Proctor, for appellant, *H. T. Morgan.*
Proctor, for respondent, *T. J. Dickson.*

C. A. W.