[HIGH COURT OF AUSTRALIA.]

THOMAS EDWIN BROWN . . . . . APPELLANT;
RESPONDENT,

AND

MARY BROWN . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1906.

SYDNEY, *Dec.* 20.

Griffith C.J., Barton and Isaacs, JJ.

Husband and wife—Judicial separation—Custody and maintenance of child not provided for in decree—Undertaking by wife not to apply for maintenance—Matrimonial Causes Act (*N.S.W.*), (*No.* 14 *of* 1899), *sec.* 60—*Appeal in formâ pauperis—Costs.*

The decree in a suit for judicial separation gave the husband custody of the children of the marriage, naming them, and contained an undertaking by the wife not to claim at any time maintenance for herself so long as the parties remained judicially separated.

Held, that, under the decision in *Brown* v. *Brown*, 3 C.L.R., 373, the Divorce Court had jurisdiction to entertain, and the wife was not precluded by the decree from making a subsequent application to the Court under sec. 60 of the *Matrimonial Causes Act* 1899 for an order against the husband for the custody and maintenance of a child of the marriage born after the decree, for which no provision had been asked for in the suit or made in the decree.

Quære, whether an express undertaking by the wife not to make application for maintenance of the child would have been binding.

The High Court will not as a rule order an unsuccessful appellant *in formâ pauperis* to pay costs of the appeal beyond the amount paid into Court as security.

Decision of *Simpson* J., 8th May 1906, affirmed.

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 appellant and respondent in this appeal were respondent and petitioner respectively in a suit for judicial separation, and the order from which the appeal was brought was an order made by *Simpson* J. after decree, giving the present respondent the custody, and ordering the appellant to pay a certain sum for the maintenance, of a child of the marriage born subsequently to the decree. This was the child in respect of which the proceedings forming the subject matter of the appeal in *Brown* v. *Brown* (1) were taken.

On application in Chambers *O'Connor* J. gave leave to appeal *in formâ pauperis*, and reduced the security to £1.

The facts and the proceedings are fully stated in the judgment of *Griffith* C.J.

Appellant in person. The respondent was aware at the date of the decree that the child was about to be born. The decree was the result of a compromise by the parties of all their rights as against one another at that date, and all further liability on either side was put an end to. There was in effect a contract to leave one another alone for the future. The respondent should not have been allowed to re-open the matter by applying for maintenance of this child. Her undertaking not to apply for maintenance was intended to include all such claims whether in respect of such children or herself.

Even if she was entitled to make the application, there was no evidence before the Judge from which he could have inferred that the child was legitimate. There was no evidence of the age of the child at birth. It was born eight months after the decree, and there is is no presumption of access during the separation. [He referred to *Jones* v. *Jones* (2); *Gandy* v. *Gandy* (3); *Morris* v. *Davies* (4).

[GRIFFITH C.J.—The question of legitimacy cannot be raised now. The decision of the learned Judge may be quite wrong, but we have no materials before us to justify us in interfering with it. We are bound to act on the assumption that the child was legitimate.]

(1) 3 C.L.R., 373.
(2) 1 N.S.W. W.N., 88.
(3) 7 P.D., 168.
(4) 5 C. & F., 163.

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The decree for judicial separation was a nullity, and therefore the Divorce Court had no jurisdiction to entertain this application. It is not open to parties to obtain a decree by consent, and therefore the parties are bound by their compromise, not by the terms of the decree. By the compromise all questions of maintenance were for ever settled. [He referred to *Charlesworth* v. *Holt* (1).]

Cowan, for the respondent, was not called upon.

20th December.

GRIFFITH C.J. This is an appeal from an order made by the learned Judge of the Divorce Court after a decree for judicial separation, giving the custody of a child of the marriage to the mother, and ordering the appellant, whom the learned Judge found to be the father of the child, to contribute to its maintenance. The order is appealed from substantially on the ground that all the questions in dispute between the husband and the wife had been disposed of by the decree which was made on 24th March 1904. The decree, as drawn up, stated that the cause came on for hearing in the presence of the petitioner's solicitor on the wife's petition for judicial separation, and of the respondent in person, " whereupon and upon reading the petition and affidavit verifying the same and the answer of respondent and hearing the evidence given *vivâ voce* of petitioner this Court by consent of both parties doth hereby order and decree " as follows:—First, that the petitioner be judicially separated from the respondent. Some point was taken as to the decree being made by consent. But it appears that evidence was heard, so that no question arises on the abstract question whether the Court had jurisdiction to make an order for judicial separation by consent. The consent to be inferred from this decree is that the facts were admitted by the parties so far as was necessary to found the decree. Then the decree went on to direct that the respondent should have the custody of the six children described as the issue of the marriage between the parties, and that the petitioner should be allowed to have access to them at certain times and places. Finally the decree contained an undertaking

(1) L.R. 9 Ex., 38.

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by the petitioner in these words :—" The petitioner undertakes not to claim (now or at any future time) maintenance for herself so long as she is judicially separated." A fortnight or so after this decree was pronounced another child was born, as to the paternity of which there was a dispute. The present appellant refused to contribute to its maintenance. Thereupon the present respondent proceeded against him under the *Deserted Wives and Children's Act* 1901 for an order for maintenance, and obtained it; but on appeal to this Court the order was set aside on the ground that the jurisdiction to deal with the maintenance of the children of the marriage was, after the decree for judicial separation, in the Supreme Court, and the magistrate had no jurisdiction, that power being reserved to the Court itself by the express terms of sec. 60 of the *Matrimonial Causes Act* 1899, of which sub-sec. (1) provides that :—" In any suit or other proceeding for obtaining a decree of judicial separation or of nullity or dissolution of marriage the Court may—(*a*) make such orders as it deems just and proper with respect to the custody maintenance and education of the children the marriage of whose parents is the subject of such suit or other proceedings." Sub-sec. (2) provides that :—" Such orders and directions may be made (*a*) from time to time by interim orders before making the final decree, or (*b*) by provisions in the final decree, or (*c*) from time to time after the final decree upon application by petition for the purpose." (*See Brown* v. *Brown*) (1). It is settled, in the interpretation of that section, that the application need not be made by one of the parties to the suit, but may be made by anyone else in the interest of the child. On that point the case of *Chetwynd* v. *Chetwynd* (2) must be taken to have settled the law as to the rights of husband and wife on such applications. This Court, in giving judgment in *Brown* v. *Brown* (1), pointed out that the remedy of the wife, if she wished to obtain maintenance for the child born under such circumstances, was to make application to the Supreme Court. I said in the course of my judgment (3) :—" Clearly then the Court had jurisdiction to make provision, by its decree or afterwards, for this child, but it was not asked to do so. As was

(1) 3 C.L.R., 373.
(2) L.R., 1 P. & D., 39.
(3) 3 C.L.R., 373, at p. 383.

pointed out in *Ex parte Bindon* (1) it was open to the wife to make the application for alimony for the child, but she chose not to do so. Further, it is open to the Court still to vary that decree on a proper application for that purpose." My learned brother *Barton* said (2):—"So that, when the decree was made, the mother knew very well that there would soon be another child to be maintained, and it was open to her to make an application in respect of it; and there can be no doubt that the Court had jurisdiction to make an order affecting that child. It had assumed jurisdiction over the whole of the matter in controversy between the parties. However, no application was made for that purpose." Then, after reading sec. 60, he added:—"So that the wife not only had the right to make application at the time, but she could have done so at any time after the decree." And my learned brother, *O'Connor*, said (3), "It was laid down in *Ex parte Bindon* (1) that any person who wishes to have such a decree varied must go to the Divorce Court for a further order. The respondent might have gone to that Court and asked to re-open the matter for the purpose of having a special adjudication as to the maintenance of this child which has been born since the decree. But that step has not been taken." After that judgment was given by this Court, the respondent took the step that this Court pointed out as the proper one for her to take, and presented a petition in the Divorce Court in the regular form prescribed under the Act, asking for an order for the custody and maintenance of this child against the husband. At the hearing evidence was given on both sides, and the learned Judge came to the conclusion that the child was the child of the present appellant, and made the order for maintenance and custody of the child, which is now appealed from. There is no ground for objecting to the order so far as regards the finding of fact. The only ground, therefore, that is really open to the appellant is this—that the wife, by the undertaking given in the previous decree, is debarred from making the application, that is to say, as between the parties themselves.

The first subject for inquiry is, what was the effect of the

(1) (1904) 4 S.R. (N.S.W.), 503. (2) 3 C.L.R., 373, at p. 388.
(3) 3 C.L.R., 373, at pp. 391, 392.

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undertaking? Both parties were aware that the child was expected to be born shortly after the decree. No provision was made in the decree for its maintenance. The wife undertakes not to claim "now or at any future time maintenance for herself." In my opinion that cannot be construed as an undertaking not to claim maintenance for the child. That objection, therefore, fails. The learned Judge had jurisdiction to decide that this child was a child of the marriage. If there had been in the decree an undertaking by the wife that she would not make any application to the Court for the custody and maintenance of the expected child, and any question were to arise as to the effect of such undertaking, it would be a matter worthy of argument how far it was binding upon the wife. But as there is no such question arising here, I express no opinion on the subject, except to say that, whatever conclusion the Court might have come to it would be more a matter of form than of substance, for it is clear that, even if the wife were debarred from making an application, any other person might make it in the interest of the child.

For these reasons I am of opinion that the appeal fails.

BARTON J. I am of the same opinion. I think that His Honor has made the matter perfectly clear, and I do not propose to add anything to what he has said.

ISAACS J. I also agree with the judgment given by the Chief Justice.

Cowan, for the respondent, asked for costs of the appeal. [He referred to *Brown and Powles on Divorce*, 6th ed., p. 463; *Ward* v. *Ward* (1).]

GRIFFITH C.J. It is the practice of the Privy Council that a successful appellant *in formâ pauperis* gets such costs as ought to be allowed in such a case. Undoubtedly we have jurisdiction to allow costs. But we do not wish to give costs against a pauper suitor.

The appellant referred to *Johnson* v. *Lindsay and Co.* (2).

GRIFFITH C.J. The practice undoubtedly is not to grant costs in these cases. The appellant was granted leave by Mr. Justice

(1) 1 Sw. & Tr., 484; 29 L.J.P., 17. (2) (1892) A.C., 110.

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O'Connor to proceed *in formâ pauperis*, and the security was reduced to £1. The proper method, if the appellant has property and should pay the costs, is to apply to have him dispaupered; but we will not grant leave to apply to dispauper, as we think this litigation has gone on long enough. You will get the £1 paid into Court.

Appeal dismissed.

Solicitor for respondent, *E. W. Downes.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

RICH . . . . . APPELLANT;
PLAINTIFF,

AND

STRELITZ BROS. & MOSS . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1906.

PERTH, *Oct.* 29, 30, 31. *Nov.* 1, 5.

Griffith C.J., Barton and Higgins, JJ.

Practice—New trial—Trial with jury—Misdirection—Fraud—Amendment of pleadings before High Court.

In an action tried with a jury, the plaintiff sought to have a certain contract set aside on the ground of a conspiracy to defraud him. The case was left to the jury generally, and they found for the defendants. No objection was taken at the time to the Judge not having put specific questions to the jury.

Held, that the plaintiff was not entitled to a new trial on the ground of misdirection.

Quære, whether, under the circumstances, the plaintiff was, on the hearing of the appeal before the High Court, entitled to amend his pleadings in order to raise a new case suggested to be disclosed by the evidence, and to have a new trial.

By consent, and subject to terms, order of the Supreme Court of Western Australia varied.