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THE KING v. ERSON.

The Full Court held that guilty knowledge was an essential ingredient in offences created by sec. 10 of the Act, and they therefore answered the question in the negative: *R.* v. *Erson* (1).

An application to the High Court was now made on behalf of the Crown for special leave to appeal from that decision.

Morley, for the Crown. *Mens rea* is not a necessary ingredient of an offence under sec. 10. Similar language was used in the *Customs Act* 1901 to create offences, and it was held in *Stephens* v. *Robert Reid & Co. Ltd.* (2) that *mens rea* was not a necessary ingredient.

[GRIFFITH C.J. That rule always applies to revenue Statutes.]

The same reasoning applies to the interpretation of provisions for the protection of the revenue after it is collected as to the interpretation of provisions for the protection of the revenue while in course of collection. After the decision in *Stephens* v. *Robert Reid & Co. Ltd.* (2) similar offences were created by similar language in several Commonwealth Acts, and the same interpretation should be given in each case. [Counsel also referred to *Hobbs* v *Winchester Corporation* (3).]

The judgment of the Court was delivered by

GRIFFITH C.J. Special leave will be refused.

Special leave to appeal refused.

Solicitor, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

(1) (1914) V.L.R., 144; 35 A.L.T., 117.

(2) 28 V.L.R., 82; 23 A.L.T., 242.

(3) (1910) 2 K.B., 471.

[HIGH COURT OF AUSTRALIA.]

McCONVILLE . . . . . APPELLANT;
CO-RESPONDENT,

AND

BAYLEY . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 23.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Husband and wife—Divorce—Adultery—Evidence—Prior acts of adultery—Corroboration—Wife respondent attending for examination by order of Judge—Marriage Act 1890 (*Vict.*) (*No.* 1166), *sec.* 109.

Practice—High Court—Appeal from Supreme Court of State—Appeal as of right—Divorce—Order for costs against co-respondent—Appeal by co-respondent—Judgment affecting status—Judiciary Act 1903-1910 (*No.* 6 *of* 1903—*No.* 34 *of* 1910), *sec.* 35.

A suit for divorce by husband against wife on the ground of her adultery with the co-respondent was defended by the co-respondent alone. The wife attended for examination pursuant to an order made by the Judge under sec. 109 of the *Marriage Act* 1890 (Vict.), and was examined accordingly.

Held, that evidence given by her of adulterous relations between her and the co-respondent was admissible as against the co-respondent to show that their relations on a subsequent occasion, the adulterous nature of which would otherwise be improbable, were adulterous.

Such evidence of the wife need not be corroborated.

A decree *nisi* for dissolution of marriage whereby the only order made against the co-respondent is an order to pay costs, is not, so far as the co-respondent is concerned, a judgment which "affects the status of any person" within the meaning of sec. 35 of the *Judiciary Act*, and therefore the co-respondent is not entitled as of right to appeal to the High Court.

Decision of the Supreme Court of Victoria (*Madden* C.J.) affirmed.

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McCONVILLE v. BAYLEY.

APPEAL from the Supreme Court of Victoria.

A suit for dissolution of marriage was instituted by Thomas Henry Bayley against Christina Jane Bayley, his wife, on the ground of her adultery with James McConville, who was made a co-respondent. By the petition adultery was alleged to have taken place on various dates, *inter alia*, from May to September 1910, and on 9th August 1912. The respondent did not defend the suit, but the co-respondent did. At the hearing the respondent was not called as a witness by either of the parties, and *Madden* C.J., in exercise of the power conferred by sec. 109 of the *Marriage Act* 1890, directed her to be called, when she was examined by him, and cross-examined by counsel for the petitioner. In answer to the learned Chief Justice she said that on 9th August 1912 adultery took place between her and the co-respondent at Maffra; and in answer to a further question by him she said that before the co-respondent left Avenel, where he had been living until he went to live at Maffra, and where the respondent had lived with her husband, the co-respondent and she had committed adultery more than once. A decree *nisi* for a dissolution of marriage, with costs against the co-respondent, having been made, the co-respondent now appealed to the High Court.

McArthur K.C. (with him *L. Woolf*), for the appellant.

[GRIFFITH C.J. Does an appeal lie here as of right?]

The judgment is one affecting status, and an appeal lies under sec. 35 (1) of the *Judiciary Act*. See *Bleeze* v. *Fopp* (1). The finding that the respondent to the suit and the co-respondent committed adultery must be a finding against the co-respondent, and he is entitled to ask that there should be a rehearing. If there is no appeal as of right, special leave should be granted. There are two important questions of law: first, as to whether evidence of prior acts of adultery was admissible to prove the adultery alleged to have been committed on 9th August 1912. As to that, evidence is not admissible to show that a person charged with a particular offence is one who is likely to have committed it: *R.* v. *Bond* (2); *Body* v. *Body* (3).

(1) 13 C.L.R., 324.
(2) (1906) 2 K.B., 389.
(3) 30 L J.P.M. & A., 23.

[ISAACS J. referred to *R.* v. *Ball* (1); *R.* v. *Chitson* (2); *R.* v. *Fisher* (3); *R.* v. *Ellis* (4).]

The second point of law is whether, in the absence of corroboration, the wife's evidence as to the adultery should have been acted upon. The learned Chief Justice did not apply his mind to the question of absence of corroboration, and in that respect may be said to have misdirected himself. [Counsel referred to *Little* v. *Little* (5); *Gwynne Hall on Divorce*, p. 19; *Browne and Watt on Divorce*, 8th ed., p. 255; *Beck* v. *Beck* (6).]

[ISAACS J. referred to *Curtis* v. *Curtis* (7); *Read* v. *Read* (8).]

Dethridge and *Lowe*, for the respondent, were not called upon.

GRIFFITH C.J. This is an appeal brought as of right by the co-respondent in a divorce suit in which a decree *nisi* for a divorce was pronounced, the only order made against the co-respondent being that he should pay the costs of the petitioner. He claims to be entitled to appeal to this Court under sec. 35 of the *Judiciary Act*, which provides that "The appellate jurisdiction of the High Court with respect to judgments of the Supreme Court of a State, . . . shall extend to the following judgments whether given or pronounced in the exercise of federal jurisdiction or otherwise and to no others, namely: (*a*) Every judgment, whether final or interlocutory, which . . . (3) affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency."

The only part of the judgment by which the appellant is aggrieved is that which orders him to pay costs, and that is the only point upon which he is entitled to appeal. It is impossible to say that so far as he is concerned the judgment is one which affects the status of any person.

But we allowed Mr. *McArthur* to treat the matter as an application for special leave to appeal, which, of course, we might grant. But when special leave to appeal is asked from an order

(1) (1911) A.C., 47, at p. 71.
(2) (1909) 2 K.B., 945.
(3) (1910) 1 K.B., 149.
(4) (1910) 2 K.B., 746.
(5) 4 A.J.R., 143.
(6) 1 W. & W. (I.E. & M.), 199.
(7) 21 T.L.R., 676.
(8) (1905) V.L.R., 424; 27 A.L.T., 8.

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for costs, it will not be granted unless it is shown that the Court from which the appeal is sought to be brought has gone wrong on some question of law of general importance. The only matters of law which Mr. *McArthur* was able to suggest are that the learned Chief Justice received inadmissible evidence tending to show that the appellant had committed adultery with the respondent to the suit, and that certain evidence given by the respondent on that subject was uncorroborated.

The evidence given by the respondent was given under sec. 109 of the *Marriage Act* 1890, which provides that "The Court may if it think fit order the attendance of the petitioner or respondent, and may examine him or her or permit him or her to be examined or cross-examined on oath on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery."

The learned Chief Justice directed the respondent to be called, and asked her a number of questions. The petitioner charged adultery committed with the co-respondent in the years 1910 and 1912—in 1910 at Avenel, and in 1912 at Maffra. With regard to the adultery alleged to have been committed at Maffra, the circumstances were such as to render it highly improbable that adultery then occurred for the first time. But, if adulterous relations had existed between the parties in 1910, quite a different complexion was put upon the evidence as to the acts which took place in 1912. Mr. *McArthur* objects that such evidence is inadmissible. It appears to me, however, to be admissible on principles necessarily adopted every day in dealing with divorce cases. The case of *R.* v. *Ball* (1), mentioned by my brother *Isaacs*, is the latest and clearest exposition of the rule applied in such cases. When it is a question of innocence or guilt as to the relations between a man and a woman who are not married, the whole history of the relationship is necessarily involved. You cannot say that the relationship between a man and a woman in 1910 is irrelevant to the question of their relationship in 1912. Therefore that point of law fails. I may say that the Victorian law as to the examination of a respondent appears to be different from the law of the other States.

(1) (1911) A.C., 47.