[HIGH COURT OF AUSTRALIA.]

PRISCILLA MARTHA KERR WEILER . APPELLANT;
PETITIONER,

AND

ARTHUR ALEX WEILER . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1918.

SYDNEY, *August* 15.

Barton, Isaacs and Rich JJ.

*Husband and Wife—Divorce—Frequent convictions and imprisonment of husband and habitually leaving wife without means of support—Non-support of wife by husband while in prison—Matrimonial Causes Act* 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 16.

Sec. 16 of the *Matrimonial Causes Act* 1899 (N.S.W.) provides that "Any wife who at the time of the institution of the suit has been domiciled in New South Wales for three years and upwards . . . may present a petition to the Court praying that her marriage may be dissolved on one or more of the grounds following . . . (*d*) that her husband has within five years undergone frequent convictions for crime and been sentenced in the aggregate to imprisonment for three years or upwards and left the petitioner habitually without the means of support."

*Held*, that a husband may habitually leave his wife without the means of support within the meaning of sub-sec. (*d*) while he is imprisoned.

Decision of the Supreme Court of New South Wales (*Gordon* J.): *Weiler* v. *Weiler*, 34 N.S.W.W.N., 220, reversed.

APPEAL from the Supreme Court of New South Wales.

A petition for dissolution of marriage dated 1st November 1916 was instituted by Priscilla Martha Kerr Weiler against her husband, Arthur Alex Weiler, on the ground that the respondent had within

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five years undergone frequent convictions for crime and had been sentenced in the aggregate to imprisonment for three years and upwards, and had left the petitioner habitually without the means of support. The issues whether the petitioner was married to the respondent and whether the ground alleged was proved were tried before *Gordon* J. Evidence was given that on 14th August 1914 the respondent was convicted of two several criminal offences and was sentenced for each offence to two years' imprisonment, the sentences being concurrent, and that on 3rd July 1916 he was convicted of seven several criminal offences and was sentenced for each offence to penal servitude for three years, the seven sentences being concurrent. The respondent was in prison serving the last mentioned sentences at the date of the petition. Evidence was given for the petitioner to the effect that in January 1914 the respondent left her, that since that time up to the date when she gave evidence he had not contributed anything towards her support, and that practically during the whole of that time she had maintained herself by nursing.

*Gordon* J. found that the issue whether the respondent had within five years undergone frequent convictions for crime and had been sentenced in the aggregate to imprisonment for three years and upwards and had left the petitioner habitually without means of support had not been proved, and he therefore dismissed the petition: *Weiler* v. *Weiler* (1).

From that decision the petitioner now appealed to the High Court.

*E. M. Noble*, for the appellant. The fact that a husband has been imprisoned during the period of five years prior to the petition is irrelevant to the question whether he has habitually left her without means of support within the meaning of sec. 16 (*d*) of the *Matrimonial Causes Act* 1899. The leaving without means of support, having once begun, cannot be interrupted by the imprisonment of the husband, and may be habitual notwithstanding the imprisonment. *Drew* v. *Drew* (2) is an authority that desertion once begun continues throughout the imprisonment of the deserter, and by analogy leaving without means of support is in the same position. A husband is

(1) 34 N.S.W.W.N., 220. (2) 13 P.D., 97.

under an obligation to support his wife, and imprisonment does not relieve him of that obligation. He cannot better his position by his wrongdoing.

There was no appearance for the respondent.

*Cur. adv. vult.*

The judgment of the COURT, which was read by ISAACS J., was as follows :—

This is an appeal from *Gordon* J., who dismissed the wife's petition for divorce. The petition was presented under sec. 16 (*d*) of the *Matrimonial Causes Act* (No. 14 of 1899). Sec. 16 provides that "Any wife who at the time of the institution of the suit has been domiciled in New South Wales for three years and upwards (provided she did not resort to New South Wales for the purpose of such institution) may present a petition to the Court praying that her marriage may be dissolved on one or more of the grounds following . . . (*d*) that her husband has within five years undergone frequent convictions for crime and been sentenced in the aggregate to imprisonment for three years or upwards and left the petitioner habitually without the means of support." The learned Judge was satisfied as to the marriage, which took place on 14th October 1908. He was not satisfied as to the petitioner's domicile, but stated that if that had been the only bar in the way of the petitioner, he would have allowed further evidence to be tendered on the question of domicile. His Honor also found that the respondent came within that part of the sub-section which says: "within five years undergone frequent convictions for crime and been sentenced in the aggregate to imprisonment for three years or upwards." His Honor, however, felt difficulty about the words "and left the petitioner habitually without the means of support." The conclusion he came to was that the Legislature did not mean to make two offences out of one, by intending that a man in gaol who in fact while he was in gaol left her without support would come within the provision. His Honor's opinion was rested largely on the word "habitually." And he thought that the latter part of the

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sub-section could not be satisfied except the man were free from imprisonment.

We agree with the learned Judge in thinking that the offence is composite, but we do not think its elements are mutually exclusive. The sub-section does not allow the wife to obtain a divorce merely because within the last five years her husband has been frequently convicted for such serious offences as have led to his imprisonment for three years or more, it may, indeed, be for the whole five years; nor does it allow her to get that relief merely because during that period she has been habitually left without means of support. But if within that period both things concur, she has the right to petition —other conditions existing. A man who has been convicted and imprisoned (say) for the whole five years may yet have left his wife well provided for out of his means. Or he may have left her for the whole period in utter poverty, and dependent on her own labour to obtain subsistence. Why has he not then satisfied both conditions? The sub-section certainly contemplates that "habitually" may be fulfilled during the five years, and it also contemplates that the imprisonment may last the whole five years, and yet during the same period the latter part of the sub-section may be satisfied. If, then, the enactment contemplates that both elements may exist during the whole period of the five years, it necessarily connotes that a man may habitually leave his wife without means of support within the meaning of the sub-section while he is imprisoned. There is nothing in the word "habitually" which militates against this view. It is opposed to casual or occasional. Where the wife is left without means of support "habitually," it denotes such a continuity, or recurrence or persistence in fact of the condition of being so left, which is recognized as specially hard upon her, and which being added to the other element in the enactment calls for remedy. Unless the special criminality denoted in the first half of the sub-section is to be regarded as an excuse for the special hardship of the latter part, there is no reason why they should not coexist. And further, the longer the period of imprisonment, the greater would be the excuse.

On the whole we think the sub-section, properly construed, was satisfied by the evidence. The wife was in fact left practically

during the whole period without means except such as she could earn by her own labour of nursing. We think that the appeal should be allowed, and that in view of the statement of the learned Judge as to domicile the cause should be remitted to his Honor to be dealt with as to that point as in his discretion he thinks just.

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*Appeal allowed. Order dismissing petition discharged. Declaration that it has been proved that during the period of five years mentioned in sub-sec. (d) of sec. 16 the respondent left the petitioner habitually without means of support. Cause remitted to Supreme Court to be dealt with as it thinks just, subject to the above declaration.*

Solicitor for the appellant, *S. Bloomfield.*

Cons *Challita & Makhlouf* 37 ACrimR 175 | Dist *R v Palmer* (1992) 64 ACrimR 1 | Cons *Bridge v R* (1964) 118 CLR 600 | Cons *R v Greatorex* (1994) 74 ACrimR 496 | Discd *R v L* [1996] 1 NZLR 53

B. L.

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[HIGH COURT OF AUSTRALIA.]

JACKSON . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *August* 8.

*Criminal Law—Trial—Comment upon accused person refraining from giving evidence on oath—Statement made not on oath—Summing-up—Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 407.

By sec. 407 of the *Crimes Act* 1900 (N.S.W.) it is enacted that every accused person in a criminal proceeding shall be competent but not compellable to

Barton, Isaacs, Gavan Duffy and Rich JJ.