[HIGH COURT OF AUSTRALIA.]

AMY MARGARET SEYMOUR MOSES . . APPELLANT;
PETITIONER,

AND

HERBERT CHARLES MOSES . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1920.

SYDNEY, *April* 8, 9, 14.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Husband and Wife—Divorce—Grounds of divorce—Habitual cruelty—"During three years and upwards"—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 16.

Practice — Costs — Divorce proceedings — Unsuccessful appeal by wife — Wife's costs of appeal.

Sec. 16 of the *Matrimonial Causes Act* 1899 (N.S.W.) provides that a wife may present a petition to the Court for dissolution of her marriage on the ground (*inter alia*) "(*b*) that her husband has during three years and upwards been a habitual drunkard and . . . habitually been guilty of cruelty towards her."

Held, that the words "during three years and upwards" in that section qualify the words "been guilty of cruelty towards her" as well as the words "been a habitual drunkard."

Held, also, that in divorce proceedings where a wife brings an unsuccessful appeal her costs of the appeal are in the discretion of the Court.

Decision of the Supreme Court of New South Wales (*Gordon* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

On a petition by Amy Margaret Seymour Moses for the dissolution of her marriage with Herbert Charles Moses, on the ground that the respondent had during three years and upwards been a habitual drunkard and habitually been guilty of cruelty towards the petitioner, the issues were heard by *Gordon* J., who found that, although the respondent had during the three years and upwards

been a habitual drunkard, there was not sufficient evidence to establish that during three years and upwards the respondent had been guilty of cruelty towards the petitioner. The claim for a dissolution of the marriage was therefore refused, but the petitioner was granted a decree for judicial separation.

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

The other material facts are stated in the judgment hereunder. The arguments on the question whether the evidence of the petitioner proved the allegation of cruelty for three years and upwards are not reported for the reason appearing in the judgment of *Knox* C.J.

Ralston K.C. (with him *A. W. Ralston*), for the appellant. It is not necessary under sec. 16 (*b*) of the *Matrimonial Causes Act* 1899 (N.S.W.) that habitual cruelty should extend over the period of three years. The words "during three years and upwards" in that sub-section qualify the words "been a habitual drunkard" only, and not the words "habitually been guilty of cruelty towards her" (*Thomas* v. *Thomas* (1)).

[There was no appearance for the respondent.]

KNOX C.J. read the following judgment:—Two questions were raised on this appeal, one depending on the construction of sec. 16 (*b*) of the *Matrimonial Causes Act* 1899 and the other whether the decision of *Gordon* J. was contrary to the evidence. With regard to the former, I agree with *Gordon* J. in thinking that in order that a wife may succeed in a claim for a decree for dissolution of marriage on the ground that her husband has been a habitual drunkard and has habitually been guilty of cruelty towards her, it is necessary for her to prove habitual drunkenness and cruelty on his part during three years and upwards. On the construction of sec. 16 (*b*) it is clear that the expression "has during three years and upwards" qualifies not only the words "been a habitual drunkard" but also the words "habitually been guilty of cruelty towards her."

The ground that the decision of *Gordon* J. was contrary to the evidence was based on the contention that the evidence of the appellant if accepted established a case of habitual cruelty for three years and upwards. It was argued that *Gordon* J. had accepted

(1) 35 N.Z.L.R., 676.

H. C. OF A. 1920.

MOSES v. MOSES.

KNOX C.J.

the appellant as a witness of truth, and consequently should have found that habitual cruelty for three years and upwards had been proved. With the consent of counsel for the appellant (the respondent not having appeared on the appeal) I saw *Gordon* J., who informed me that, having regard to the manner in which the appellant gave her evidence and to the absence of corroboration on matters on which it might have been expected that corroboration could have been obtained, he felt that he was not justified in acting on the uncorroborated evidence of the appellant with regard to alleged acts of cruelty before the year 1912. It was suggested that *Gordon* J. might have regarded the acts of the respondent which were deposed to by the appellant as insufficient to establish a case of cruelty, even if her evidence were taken as literally correct, but I am satisfied, after discussing the matter with him, that this contention is unfounded. Under the circumstances I do not think it is open to this Court to review the decision arrived at by *Gordon* J. after hearing the evidence and observing the demeanour of the witnesses.

ISAACS J. In view of the communication made by *Gordon* J. to the Chief Justice, I think that no other conclusion can be arrived at. I agree with what has been said by the Chief Justice.

GAVAN DUFFY J. I agree with what has been said by the Chief Justice.

RICH J. I agree.

STARKE J. I agree.

Ralston K.C. Where in a divorce matter a wife who has no means appeals, she is entitled to her costs of the appeal even if she is unsuccessful, if her solicitor has acted *bonâ fide* in the matter. The only exception is where the wife has been found guilty of adultery. Unless the solicitor has acted so unreasonably as to be guilty of misconduct, the wife is entitled to her costs of the appeal. The reason is that the matter is one of public importance, being a question of status, and it is in the public interest that the wife should be able to defend herself, if she is a respondent, or to place her case

properly before the Court, if she is the moving party (*Otway* v. *Otway* (1); *Robertson* v. *Robertson* (2); *Sheppard* v. *Sheppard* (3)).

[KNOX C.J. *Otway* v. *Otway* was an appeal by the husband.] That makes no difference.

[RICH J. In *Earnshaw* v. *Earnshaw* (4), where a wife was given her costs of a successful appeal by her husband, it was stated by the Court that the decision had no application to an unsuccessful appeal by a wife, and in *Halsbury's Laws of England*, vol. XVI., p. 604, that case is stated to lay down the practice.

[KNOX C.J. The practice in this Court and in the Court of New South Wales is to the contrary (*Fremlin* v. *Fremlin* (5); *Hawksworth* v. *Hawksworth* (6)).]

Fremlin v. *Fremlin*, on the whole, supports the appellant's view. In *Te Kloot* v. *Te Kloot* (7) a wife who unsuccessfully appealed was allowed her costs.

[STARKE J. I do not think that there is a rigid rule. The general rule is that as to the hearing the wife gets her costs, but that she does not get her costs of an unsuccessful appeal unless she shows special circumstances.]

KNOX C.J. I think that the costs of this appeal, as in every other case, with certain exceptions which are immaterial here, are in the discretion of the Court, and that in this particular case no order ought to be made as to costs.

ISAACS, GAVAN DUFFY, RICH and STARKE JJ. concurred.

Appeal dismissed.

Solicitors for the appellant, *Windeyer, Fawl, Williams & Osborne.*

B. L.

(1) 13 P.D., 141.
(2) 6 P.D., 119, at pp. 122, 124.
(3) (1905) P., 185, at p. 190.
(4) (1896) P., 160, at p. 164.
(5) 16 C.L.R., 212, at p. 242.
(6) 19 N.S.W.L.R. (Div.), 1.
(7) 15 N.S.W.L.R. (Div.), 1.