[HIGH COURT OF AUSTRALIA.]

HUGH TEMPLE SMELLIE SHANKS . . APPELLANT;
PETITIONER,

AND

KATHLEEN ALEXANDRA SHANKS AND ANOTHER . . . . . } RESPONDENTS.
RESPONDENT AND CO-RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1942.

SYDNEY, *April* 8-10.

Rich, Starke, McTiernan and Williams JJ.

High Court—Appeal as of right—"Judgment . . . which affects the status of any person under the laws relating to marriage or divorce"—Dismissal of petition for dissolution of marriage—Judiciary Act 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *sec.* 35 (1) (*a*) (3).

A decree dismissing a petition for dissolution of marriage is a judgment which affects the status of a person under the laws relating to marriage or divorce within the meaning of sec. 35 (1) (*a*) (3) of the *Judiciary Act* 1903-1940; therefore an appeal as of right will lie therefrom to the High Court.

APPEAL from the Supreme Court of New South Wales.

Hugh Temple Smellie Shanks petitioned the Supreme Court of New South Wales in its matrimonial causes jurisdiction that his marriage with his wife, Kathleen Alexandra Shanks, be dissolved on the ground of her adultery with a named co-respondent. In a petition brought by the wife she sought a decree of judicial separation on the ground of her husband's cruelty to her.

The suits were consolidated.

Bonney J. found that the wife and co-respondent were not guilty of the adultery as alleged and dismissed the husband's petition. A decree for judicial separation was made on the wife's petition.

From these decisions the husband appealed to the High Court.

The only matter calling for report is the preliminary objection taken by the respondents as to the competency of the appeal against the dismissal of the petition for dissolution as an appeal as of right.

Windeyer K.C. (with him *Badham*), for the appellant.

Clancy K.C. (with him *Maguire*), for the respondents, took the preliminary objection that a decree dismissing a petition for the dissolution of a marriage is not a judgment which affects the status of any person under a law relating to marriage or divorce within the meaning of sec. 35 (1) (*a*) (3) of the *Judiciary Act* 1903-1940, and that therefore an appeal as of right does not lie therefrom to the High Court.

Cur. adv. vult.

April 10.

The following written judgments were delivered :—

RICH AND WILLIAMS JJ. The appellant sued his wife for a divorce on the ground of her adultery with the co-respondent. The respondent petitioned for a decree of judicial separation on the ground of cruelty. The suits were consolidated and ordered to be tried together. His Honour dismissed the husband's petition and allowed the wife's petition ; the husband then appealed to this court.

The respondent and co-respondent took the preliminary objection that the petitioner did not have an appeal as of right, and the determination of this point depends upon whether the decree affects the petitioner's status under the laws relating to marriage and divorce. The *Judiciary Act* 1903-1940, sec. 35 (1) (*a*) (3), in our opinion does give the petitioner an appeal as of right. It applies whenever the judgment affects the status of one of the spouses under the laws relating to divorce. In New South Wales the relevant statute is the *Matrimonial Causes Act* 1899, sec. 12 of which provides that any husband may present a petition for dissolution of marriage on the ground that his wife has since the celebration thereof been guilty of adultery. " Affect " and " status " are both words of wide import and should be given a liberal meaning (*In re Buckingham County Council and Hertfordshire County Council* (1))—See also *Kaye* v. *Sutherland* (2) ; *Tassell* v. *Hallen* (3) ; *Salvesen or Van Lorang* v. *Administrator of Austrian Property* (4). If they were construed narrowly the result would be that an appeal as of right would not lie if the petitioner had succeeded and obtained a decree nisi, because a change of status is only affected when the decree nisi is made absolute (*Fender* v. *St. John-Mildmay* (5)). But, to quote *Farwell* J. in *In re Selot's Trust* (6), " affecting . . . the status " is " a very different thing from changing the status." The true position is that the

(1) (1899) 1 Q.B. 515, at p. 520 ; 68 L.J. Q.B. 417, at p. 419.
(2) (1887) 20 Q.B.D. 147.
(3) (1892) 1 Q.B. 321.
(4) (1927) A.C. 641, at pp. 652, 653, 662.
(5) (1938) A.C. 1, at pp. 16, 24.
(6) (1902) 1 Ch. 488, at p. 492.

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Rich J. Williams J.

right to have the marriage dissolved on the ground of adultery is one of the legal rights attached by the Act to the marriage status. A judgment wrongfully dismissing a suit for dissolution of marriage on this ground affects this right, and therefore does affect the petitioner's status. The petitioner therefore has an appeal as of right against the decree dismissing this petition. So it becomes unnecessary to consider whether the granting or dismissal of a suit for judicial separation comes within the sub-section.

[Their Honours then dealt with the other grounds of appeal and continued :—] The " pith and marrow " of the whole case is that the evidence which his Honour accepted clearly justified his decision, and this court is quite unable to say that he was wrong in accepting this evidence. He delivered a very elaborate and painstaking judgment in which he analysed the various events in great detail, and it is evident that he gave very careful and prolonged consideration to the cause. The appeal should be dismissed.

STARKE J. Marriage is a status. A decree dissolving a marriage is a judgment upon status. It is said, however, that a decree refusing a dissolution of marriage is not a judgment within the meaning of the *Judiciary Act* 1903-1940, sec. 35, " which affects the status of any person under the laws relating to . . . marriage," because it does not modify, change, or destroy the status of marriage. But it relates to, or affects that status, because it pronounces upon the question whether that status should or should not be dissolved.

The foundation of the appeal to this court in such a case is that the judgment denies the appellant a dissolution of his marriage status under the law relating to marriage.

On the merits I have nothing to add to the reasons of my brethren except to express my surprise that so hopeless an appeal was ever brought. It must be dismissed.

MCTIERNAN J. In my opinion the objection that the appeal does not lie of right should not be sustained either in the case of the decree dismissing the appellant's petition for divorce or in the case of the decree granting his wife judicial separation. The objection is founded on too narrow a construction of what is meant by the words " a judgment which affects the status of any person under the laws relating to marriage or divorce." If the word " affects " in sec. 35 means, as the respondents contend, alters, the appeal against the decree dismissing the appellant's petition would not lie as of right, because it is clear that the decree does not alter the appellant's status : See *Needham* v. *Bremner* (1). The word

(1) (1866) L.R. 1 C.P. 583, at p. 585.

"affects" is one of the three forms of expression adopted by the section to describe the relation of the judgment to the appealable subject matter. The other two forms of expression are: "given or pronounced for or in respect of," and "involves directly or indirectly." These are wide forms of expression. In its ordinary usage "affects" is a synonym for touching, or relating to, or concerning. In my opinion the word has that meaning in the context of sec. 35. This section should be construed as conferring the most ample jurisdiction that the fair meaning of the words will allow. In a suit for divorce the status of the parties is involved and the decree, whether it allows or refuses the petition, touches the status of the parties. In the case of *G.* v. *M.* (1) it was said in terms that the decree the subject of that appeal involved a question of the appellant's status. If the word "affects" is read as meaning relating to or touching, then sec. 35 gives a right of appeal both from a decree of divorce and a decree refusing a divorce. In *Bleeze* v. *Fopp* (2) the judgment of the Supreme Court was in effect that the respondent should not be made bankrupt. *Griffith* C.J. said: "The judgment affects the status of the respondent within sec. 35" (3). So far as regards the decree for judicial separation, while the decree retains the marriage bond, yet it has the effect produced by the operation of secs. 37 and 38 of the *Matrimonial Causes Act*. The meaning of "status" is explained by *Griffith* C.J. in *Daniel* v. *Daniel* (4). It is plain that this decree does affect the legal condition which according to this explanation is involved in the status of the parties. For these reasons, I think that an appeal lies as of right from the consolidated decree containing both the decrees of which the appellant complains.

I agree that the appeal should be dismissed. There are no substantial grounds for disagreeing with the primary judge's opinion of the credibility of the witnesses. It was not unreasonable to reject the petitioner's case. Upon the whole of the evidence, I think that the story which the judge accepted was in the main the more probable one.

Preliminary point overruled. Appeal dismissed.

Solicitor for the appellant, *Otto Brown*.
Solicitors for the respondents, *S. G. Sommers & Stewart*.

J. B.

(1) (1885) 10 App. Cas. 171, at p. 177.
(2) (1911) 13 C.L.R. 324.
(3) (1911) 13 C.L.R., at p. 325.
(4) (1906) 4 C.L.R. 563, at p. 566.