[HIGH COURT OF AUSTRALIA.]

AGNES IRVINE FORD . . . . . APPELLANT;
PETITIONER,

AND

MORGAN FORD . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1947.

SYDNEY, *Mar.* 28, 31; *May* 5.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

High Court—Appeal as of right—"Judgment . . . which affects the status of any person under the laws relating to . . . marriage, divorce"—Judicial separation—Dismissal of petition—Judiciary Act 1903-1946 (*No.* 6 *of* 1903—*No.* 10 *of* 1946), *s.* 35 (1) (*a*) (3)—*Matrimonial Causes Act* 1899-1943 (N.S.W.) (*No.* 14 *of* 1899—*No.* 9 *of* 1943), *ss.* 37, 38—*Married Women's Property Act* 1901 (*N.S.W.*) (*No.* 45 *of* 1901), *s.* 3.

A decree dismissing a petition for judicial separation is not a judgment which affects the status of a person under the laws relating to marriage or divorce within the meaning of s. 35 (1) (*a*) (3) of the *Judiciary Act* 1903-1946; therefore an appeal as of right will not lie therefrom to the High Court.

So *held* by *Latham* C.J., *Starke*, *Dixon* and *Williams* JJ. (*McTiernan* J. dissenting).

APPEAL from the Supreme Court of New South Wales.

Agnes Irvine Ford appealed to the Full Court of the Supreme Court of New South Wales against a decree by *Edwards* J. dismissing a petition for judicial separation brought by her under the *Matrimonial Causes Act* 1899-1943 (N.S.W.) on the ground of the cruelty of her husband Morgan Ford.

The Full Court dismissed the appeal whereupon the petitioner appealed to the High Court as of right.

The facts of the case are not material to this report.

The relevant statutory provisions are set forth in the judgments hereunder.

Twigg (Solicitor), for the respondent, took the preliminary objection that an appeal against a decree dismissing a petition for judicial separation did not lie to the High Court as of right.

Richards, for the appellant. A decree for a judicial separation affects the status of a wife within the meaning of s. 35 (1) (*a*) (3) of the *Judiciary Act* 1903-1946: See *Shanks* v. *Shanks* (1) and the *Matrimonial Causes Act* 1899-1943 (N.S.W.), ss. 37, 38.

[STARKE J. referred to *Armytage* v. *Armytage* (2).

WILLIAMS J. referred to *Anghinelli* v. *Anghinelli* (3).]

Upon the granting of a decree for a judicial separation ss. 37 and 38 of the *Matrimonial Causes Act* 1899-1943 come into operation and alter the general law so far as the wife is concerned, and also affect her standing in the community generally. Under those sections, during the period of the separation, the judicially separated wife is, for the purposes of property, contracts and torts, considered as a *feme sole*. The authorities approved in *Brown* v. *Holloway* (4) were overruled by the decision in *Edwards* v. *Porter* (5). That decision will now be followed by this Court (*Piro* v. *W. Foster & Co. Ltd.* (6)). Although a judicially separated wife remains a married woman the incidences of that status are altered or varied by the decree; therefore the decree is one which "affects the status of any person under the laws relating to . . . divorce" within the meaning of s. 35 (1) (*a*) (3) of the *Judiciary Act* 1903-1946. The words "affect" and "status" are words of wide import and should be given a liberal meaning (*Shanks* v. *Shanks* (7)). The meaning of the word "status" is as shown in *Daniel* v. *Daniel* (8). "Affecting" the status is different from "changing" the status (*In re Selot's Trust* (9)). The legal position of parties judicially separated is very similar to the legal position of parties in a suit for dissolution of marriage after decree nisi and before decree absolute, that is to say the status continues but it is affected because of the change or difference in the rights and liabilities of the parties (*Fender* v. *St. John-Mildmay* (10)). In the Ecclesiastical Courts a decree of divorce had the very limited effect of taking away consortium (*Attorney-General for Alberta* v. *Cook* (11)). The problem for determination is not whether the status of marriage exists or otherwise, but whether it has been affected within the meaning of s. 35 (1) (*a*) (3) of the *Judiciary Act* 1903-1946. All that was decided in *Armytage* v. *Armytage* (12) was

(1) (1942) 65 C.L.R. 334, at p. 337.
(2) (1898) P. 178, at pp. 195, 196.
(3) (1918) P. 247, at pp. 254-256.
(4) (1909) 10 C.L.R. 89.
(5) (1925) A.C. 1.
(6) (1943) 68 C.L.R. 313.
(7) (1942) 65 C.L.R., at p. 335.
(8) (1906) 4 C.L.R. 563, at p. 566.
(9) (1902) 1 Ch. 488, at p. 492.
(10) (1938) A.C. 1, at p. 16.
(11) (1926) A.C. 444, at pp. 462, 463.
(12) (1898) P. 178.

H. C. OF A. 1947. FORD v. FORD.

that the fact that the decree was given special statutory effect in modern times was not sufficient for the court to say that because of that special statutory effect the granting of a decree was a matter affecting status and therefore the court should not exercise jurisdiction unless domicile were proved. The problem before the court in that case was whether it should exercise jurisdiction in judicial separation. That problem is not the problem before this Court. If the Court be of opinion that an appeal does not lie as of right then the appellant requests leave to move forthwith for special leave to appeal and to proceed immediately (*Daniel* v. *Daniel* (1)). The judge of first instance wrongly rejected evidence of specific assaults and drunkenness on the part of the husband which, although occurring outside the period covered by the particulars furnished by the wife, was intended to be in rebuttal of contrary evidence on general lines given by the husband.

Twigg. The true position can be ascertained only by a consideration of the precise words of the Acts with which the Court is concerned. It is clear from *Armytage* v. *Armytage* (2) that the relation of marriage still subsists. A decree of judicial separation leaves unimpaired the status of marriage but suspends some obligations and rights (*Miles* v. *Miles* (3)). Under the *Matrimomial Causes Act* 1899-1943 (N.S.W.) the word " divorce " means dissolution of marriage and it had that meaning in 1903 when the *Judiciary Act* 1903 was enacted; therefore that meaning should be given to the word as used in s. 35 (1) (*a*) (3) of the *Judiciary Act.* Throughout the *Matrimonial Causes Act* 1899-1943 a wife who has obtained a decree of judicial separation is put into a position different from that of a wife who has obtained a decree for dissolution of marriage: See particularly ss. 31, 37, 38, 39, 40. The meaning of the word " status " as used in s. 35 (1) (*a*) (3) of the *Judiciary Act* 1903 was considered in *McConville* v. *Bayley* (4).

LATHAM C.J. The Court does not desire to hear you on the application for special leave to appeal.

Richards, in reply. Section 35 (1) (*a*) (3) of the *Judiciary Act* 1903-1946 is not restricted to divorce laws but refers to and includes laws relating to divorce, which is a much wider phrase and is sufficiently wide to include judicial separation under the *Matrimonial Causes Act* 1899-1943 because it is a branch of the law which might properly be termed a divorce law or a marriage law.

Cur. adv. vult.

(1) (1906) 4 C.L.R. 563.
(2) (1898) P. 178
(3) (1922) 22 S.R. (N.S.W.) 117, at p. 120; 39 W.N. 61, at p. 63.
(4) (1914) 17 C.L.R. 509.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal from a decree dismissing a wife's suit for judicial separation. The appeal has been instituted in this Court as of right. A question of jurisdiction arises. The appellant contends that there is a right of appeal under s. 35 (1) (*a*) (3) of the Commonwealth *Judiciary Act* 1903-1946. This provision gives a right of appeal from a judgment of the Supreme Court of a State which " affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy or insolvency." It has been held in *Shanks* v. *Shanks* (1), that the words " affects the status " should be given a wide and liberal interpretation, and in that case it was held that a decree dismissing a petition for dissolution of marriage was a judgment which affected the status of a person under the laws relating to marriage or divorce. It is contended for the appellant in the present case that a decree for judicial separation affects the status of the husband and wife and on the authority of *Shanks* v. *Shanks* (1) that the refusal to make such a decree is a judgment affecting such status.

The *Matrimonial Causes Act* 1899 (N.S.W.), ss. 37 and 38, state the effect of a decree for judicial separation. Section 37 (1) provides that a decree for judicial separation shall have the same effect as a decree for a divorce *a mensâ et thoro* would have had in England according to the law in force before the passing of 20 & 21 Vict. c. 85, and that it should have such other effect as mentioned in the *Matrimonial Causes Act*. A decree for judicial separation does not dissolve the marriage—the status of marriage remains (*Attorney-General for Alberta* v. *Cook* (2) ; *Pastre* v. *Pastre* (3)). The husband and wife are still husband and wife. They are still married persons though neither is under any duty, so long as the decree for separation remains in operation, to live with the other.

Section 37 (2) provides that where there is a judicial separation the wife shall, from the date of the decree and whilst the separation continues, be considered a *feme sole* with respect to property of every description which she may acquire or which may come to her or devolve upon her. This provision that the wife shall be considered a *feme sole* in respect of property does not alter the position of the wife because, as a married woman, she was in the position of a *feme sole* with respect to property by virtue of the *Married Women's Property Act* 1901 (N.S.W.), s. 3.

(1) (1942) 65 C.L.R. 334.
(2) (1926) A.C. 444, at p. 462.
(3) (1930) P. 80.

H. C. OF A. 1947. FORD v. FORD. Latham C.J.

Section 37 (3) provides that a judicially separated wife may dispose of her property in all respects as a *feme sole* and that on her decease it shall, in case she dies intestate, go as it would have gone as if her husband had been then dead. This provision makes a difference in the devolution upon intestacy of the property of a judicially separated wife, if her husband survives her, as compared with the devolution of her property if she had not been judicially separated.

Section 38 (1) of the *Matrimonial Causes Act* provides that :—" In every case of a judicial separation the wife shall whilst so separated be considered as a *feme sole* for the purposes of contract and wrongs and injuries and suing and being sued in any civil proceeding." The decree for judicial separation does not make any difference to the position of a married woman in respect of the matters mentioned in this provision because under the *Married Women's Property Act* 1901, s. 3, she was able to sue and be sued in contract or in tort in all respects as if she were a *feme sole*.

Section 38 (2), however, provides :—" The husband shall not be liable in respect of any engagement or contract entered into or for any wrongful act or omission by the wife or for any costs incurred by her as plaintiff or defendant." This provision excludes any liability of a judicially separated husband for his wife's torts. For a pronounced difference of judicial opinion upon such liability see *Brown* v. *Holloway* (1), and the cases there cited. It has now been held by the House of Lords that, notwithstanding the provision which in the New South Wales *Married Women's Property Act* is to be found in s. 38 (2), a husband is still liable to be sued with his wife for a tort committed by her during coverture (*Edwards* v. *Porter* (2)). This decision overrules the authorities which were approved in *Brown* v. *Holloway* (1) and is inconsistent with the decision in *Brown* v. *Holloway* (1) itself. In accordance with the decision of this Court in *Piro* v. *W. Foster & Co. Ltd.* (3), this Court would now follow the decision in *Edwards* v. *Porter* (2). Thus the effect of s. 38 (2) of the *Matrimonial Causes Act* is that the husband of a wife from whom he is judicially separated is in a different position in respect of her torts committed during coverture from that in which he would have been if no decree of judicial separation had been made.

Section 38 (3) provides that :—" Where upon any such judicial separation alimony is decreed or ordered to be paid to the wife and the same is not duly paid by the husband he shall be liable for necessaries supplied for her use." If the husband pays the alimony ordered he is not liable for necessaries. This provision limits the rights of the wife which would otherwise exist in this respect.

(1) (1909) 10 C.L.R. 89.
(2) (1925) A.C. 1.
(3) (1943) 68 C.L.R. 313.

Thus a decree for judicial separation changes the position of the parties in the following respects : (1) as to marital duties ; (2) as to the rights of a husband upon a wife dying intestate ; (3) as to the liability of a husband for certain of his wife's torts ; (4) as to the husband's liability for necessaries. Though the status of the parties as married persons is not affected by the decree of judicial separation, because they still remain married persons, yet the incidents of the relation between them, and, in certain particulars, of their relations to other members of the community, are altered as a consequence of the decree. Does such a decree create a status intermediate between the status of a married person and that of an unmarried person ?

A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class and which, in most cases at least, could not be created by any agreement of such persons. An alien, for example, as distinct from a subject of the Crown, a married person as distinct from an unmarried person, a bankrupt as distinct from other persons generally, are all persons who have a particular status. The mere fact that an alien is an alien means that he is subject to certain disabilities and disqualifications in law. A husband because he is a husband owes special duties to his wife which he owes to no other person and cannot owe, merely as a matter of law, to any other person. A bankrupt, simply because he is a bankrupt, cannot deal with his property in the same manner as other persons. These consequences follow as a matter of law from the fact of membership of a particular class of persons.

If the effect of a judgment is to place a person in or to remove a person from such a class the judgment affects the status of that person. Thus a decree of divorce, a judicial declaration that a person is an alien, and an order of sequestration in the bankruptcy jurisdiction are all judgments which affect status.

But a variation effected by a judgment of the rights and obligations of a person having a particular status does not necessarily affect the status of that person. Thus an order setting aside or varying a provision for alimony for a married woman or a divorced woman or a judicially separated woman is not an order affecting her status. The conviction of an alien for refusing to register under a law applying to aliens and therefore involving a determination that it followed from the fact that he was an alien that he was bound to register would not affect his status as an alien. A declaration that he was not an alien but was a naturalized British subject would affect his status.

H. C. OF A. 1947. FORD v. FORD. Latham C.J.

The distinction between the status itself and the incidents of status as possibly varying from time to time is well illustrated by the case of *In re Adam* (1). In that case a person who was resident in the Mauritius claimed that he was a citizen of the Mauritius and was not liable to be treated as an alien. He claimed that an order made by the Governor requiring him to depart from the island was invalid.

It was held in the Privy Council that, in accordance with a prior decision in *Donegani* v. *Donegani* (2), the status of Adam must be determined by the laws of England, but that the laws of the colony must decide what rights and liabilities were attached to the status when ascertained. It was held that he was an alien and the Privy Council then proceeded to determine what were his rights as an alien. The distinction is clearly drawn between the status of an alien and the particular rights which an alien as such may be entitled to enjoy, or the liabilities to which he may be subject.

Upon this general reasoning I am of opinion that a decree of judicial separation does not affect the status of the parties. There are some judicial observations which support this conclusion, though there does not appear to be any definite decision on the question. I refer to *Armytage* v. *Armytage* (3), where *Gorell Barnes* J. pointed out that a decree of judicial separation, having the same effect as a sentence of divorce *a mensâ et thoro*, did not dissolve the marriage but merely suspended either for a time or without limitation of time some of the obligations of the parties, and he said " The effect of the sentence was to leave the legal status of the parties unchanged " (4). He referred to provisions corresponding to ss. 37 and 38 of the New South Wales *Matrimonial Causes Act* and said that it was doubtful whether they affected a wife's status. Further observations on the matter are to be found in *Anghinelli* v. *Anghinelli* (5), where again reference was made to the statutory provisions defining the effect of a decree for judicial separation. *Swinfen Eady* M.R. said : " I do not consider it to be settled that a decree for judicial separation will affect the status of married parties " (6). A similar opinion was expressed by *Warrington* L.J. (7).

In my opinion a decree for judicial separation is not a judgment affecting the status of the parties and it follows that a refusal of such a decree cannot be held to be such a judgment. Accordingly, in my opinion, there is no appeal as of right in the present case. The appeal should be struck out.

An application was made for special leave to appeal but the Court has already stated that in our opinion this is not a case in

(1) (1837) 1 Moore 460 [12 E.R. 889].
(2) (1835) 3 Knapp 63 [12 E.R. 571].
(3) (1898) P. 178.
(4) (1898) P., at pp. 195, 196.
(5) (1918) P. 247.
(6) (1918) P., at p. 254.
(7) (1918) P., at p. 256.

which special leave to appeal should be granted. An appeal would turn practically entirely upon questions of fact.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales in Full Court dismissing an appeal from a decree which dismissed a petition on the part of the appellant praying judicial separation from her husband, the respondent.

The *Judiciary Act* s. 35 provides for an appeal to this Court from every judgment which affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency. But it is contended that a decree granting or refusing a decree for the judicial separation of husband and wife does not affect the status of either of them and consequently that no appeal lies as of right in the present case to this Court.

"Status," among natural persons, arises from a variety of causes (*Holland, The Elements of Jurisprudence* 13th ed. (1924), p. 351; *Allen* on *Legal Duties and other Essays in Jurisprudence* (1931), p. 37). The term has "no very precise connotation" and judicial decisions throw but little light upon its meaning. But writers upon jurisprudence, from *Austin* onwards, have endeavoured to define the meaning of the term. Dr. *Allen*, in his essays already mentioned, says (p. 42) that "it appears to be the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both." But he adds (p. 47) that "we must . . . distinguish three quite separate things: Status, the condition which gives rise to certain capacities or incapacities or both; Capacity, the power to acquire and exercise rights; and the Rights themselves which are acquired by the exercise of capacity." And see also *A Text-Book of Jurisprudence*, Oxford at the Clarendon Press 1946 by *G. W. Paton* the Professor of Jurisprudence in the University of Melbourne, pp. 255-260. This definition or description is sufficient and accurate enough for the disposal of the present case.

Marriage is a status within the definition and a status well known to the law. And it is well settled that a decree for judicial separation leaves the "legal status of the parties unchanged" (*Armytage* v. *Armytage* (1); *Attorney-General for Alberta* v. *Cook* (2)). It gives protection from some of the consequences of the marriage status and suspends some of the obligations of the parties but it does not make a permanent or any change in the status of the parties (see *Cheshire* on *Private International Law*, 2nd ed. (1938), p. 371). It does not affect the existence of the status but only the legal consequences or effects of it.

(1) (1898) P., at p. 196. (2) (1926) A.C., at p. 462.

H. C. OF A. 1947. FORD v. FORD. Starke J.

In *Anghinelli* v. *Anghinelli* (1), *Swinfen Eady* M.R. observed that he did not consider it to be settled that a decree for judicial separation affected the status of married persons and *Warrington* L.J. (2) was not prepared to accept the view that a decree for judicial separation affected the status of parties. *Gorell Barnes* J. in *Armytage* v. *Armytage* (3) said in effect that it was doubtful if a decree for judicial separation affected the wife's status.

In *Ryan* v. *Ryan* (4) this Court assumed jurisdiction in an appeal against the refusal of a decree for judicial separation without objection and without reference to the foundation of its jurisdiction or any formal determination upon the subject.

In this case objection is taken and the jurisdiction of the Court falls for decision.

In *Shanks* v. *Shanks* (5) the majority of the Court thought it unnecessary to determine whether an appeal to this Court was competent as of right, in cases granting or refusing a decree for judicial separation.

It appears from the decision of *Eustace* v. *Eustace* (6) that domicil alone or residence alone gives jurisdiction to English Courts to decree judicial separation.

The jurisdiction to determine the status of married persons resides according to English law in the courts of their domicil (*Le Mesurier* v. *Le Mesurier* (7)). Therefore, it is said that a decree for judicial separation founded upon domicil must affect their status. But in truth the decision rests upon the terms of the *Matrimonial Causes Act* 1857 (Imp.). It "invested the Court . . . with what is prima facie a general jurisdiction in certain matters of personal status and of personal relationship" and there is nothing in the statute which confines "the exercise of the jurisdiction within narrower bounds than those set by the application of the test of domicil" (8). However, Sir *Henry Duke* P. observed: "I think the change in the status of a woman for which ss. 25 and 26 of the Act provide was not only unknown to the Ecclesiastical Courts but was such as none of the Courts of the realm could previously have decreed" (9). And *Atkin* L.J. said (10) that he desired to add that the reason which led him to hold that domicil gave jurisdiction in suits for judicial separation was that the provisions of ss. 25 and 26 of the *Matrimonial Causes Act* 1857 affected the status of the spouses after decree. These are the well-known sections which in

(1) (1918) P., at p. 254.
(2) (1918) P., at p. 256.
(3) (1898) P., at pp. 195, 196.
(4) (1914) 18 C.L.R. 601.
(5) (1942) 65 C.L.R. 334.
(6) (1924) P. 45.
(7) (1895) A.C. 517.
(8) (1924) P., at p. 50.
(9) (1924) P., at p. 51.
(10) (1924) P., at p. 54.

case of judicial separation provide that whilst separation continues the wife shall be considered as a *feme sole* with respect to property of every description which she may acquire or may come to or devolve upon her and that she shall whilst so separated be considered as a *feme sole* for the purposes of contract, wrongs, injuries and so forth. Under the *Married Women's Property Act* 1901 (N.S.W.), a married woman is now capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee.

But none of these provisions affect the existence of her status as a married woman but only the legal consequences or effects of it. And it is to these consequences and effects, I apprehend, that the learned judges refer in *Eustace* v. *Eustace* (1), when they use the rather ambiguous expressions relating to a change of status affected by the *Matrimonial Causes Act* 1857. They did not mean that the existence of the married status was affected for, as already stated, a decree for judicial separation leaves the legal status of the parties unchanged. It does not affect that status but only some of its legal consequences and effects; and that does not affect status, to use the expression of the *Judiciary Act*.

As well might it be argued that a decree granting or refusing restitution of conjugal rights affects status as a decree granting or refusing judicial separation for in either case domicil alone or residence alone gives jurisdiction to English Courts (*Perrin* v. *Perrin* (2)).

In my judgment, a decree granting or refusing a decree for judicial separation does not affect the status of any person within the meaning of the *Judiciary Act* s. 35. Accordingly this appeal is not competent and should be dismissed.

DIXON J. The order from which this appeal has been brought was made by the Full Court of the Supreme Court of New South Wales and dismisses an appeal from a decree pronounced in the matrimonial causes jurisdiction of that Court. The decree was pronounced in a wife's suit for judicial separation and it dismissed the suit. The petitioning wife, having thus appealed unsuccessfully to the Full Court, appealed to this Court as of right and not by special leave. She did so on the footing that the order is one affecting the status of a person or persons under the laws relating to marriage or to divorce.

Section 35 (1) (*a*) (3) of the *Judiciary Act* 1903-1946 includes among the orders to which the appellate jurisdiction of the High

(1) (1924) P. 45. (2) (1914) P. 135.

H. C. OF A. 1947. FORD v. FORD. Dixon J.

Court extends every order of a Supreme Court which "affects the status of any person under the laws relating to aliens, marriage divorce, bankruptcy or insolvency."

We have now to decide whether under this provision the appeal is competent. Its competency depends upon the question whether the refusal of a decree of judicial separation affects status under the marriage or divorce laws.

A decree of judicial separation produces certain consequences upon the rights and liabilities of the spouses flowing from the status of marriage. But it does not change their status to that of unmarried persons. If our law recognized as a distinct status the position of married persons judicially separated, the refusal of a decree of judicial separation would, no doubt, be an order affecting status. But though the reciprocal rights and duties of spouses judicially separated are not the same as those to which otherwise marriage gives rise and in some degree there is a variation of their legal relation to others, nevertheless there is no special category for such spouses recognized as a distinct status and possessing a legal designation. It is not necessary for the purpose of our decision to attempt the difficult task of defining the juristic conception of status or to discuss it. A judicial description of the conception will indeed be found in the opinion of Lord *Haldane* in *Salvesen* or *Von Lorang* v. *Administrator of Austrian Property* (1). But what concerns us is not juristic analysis but the meaning of the statute which employs the expression and employs it for the purpose of defining the sort of decree from which an appeal as of right should lie. Under distinct names or legal designations our law knows a number of special conditions or relationships which, independently of their will, give the persons occupying these positions distinct congeries or bundles of rights and liabilities not belonging to the ordinary unmarried man or woman of full capacity and legitimate birth, and each of these is recognized as a status. The condition or relationship forming the status bears a legal name to distinguish the particular legal situation of those who oocupy it from the general rights and duties attaching to the citizen as such.

Sections 37 and 38 of the *Matrimonial Causes Act* 1899 (N.S.W.) contain provisions founded upon ss. 16, 25 and 26 of the English *Matrimonial Causes Act* 1857 and, no doubt, before the enactment of the provisions now contained in the *Married Women's Property Act* 1901)N.S.W.), under their operation a decree of judicial separation would have produced very great changes in the proprietary rights of the spouses and in their contractual and delictual responsibilities to

(1) (1927) A.C. 641, at pp. 652, 653.

strangers. But, since the *Married Women's Property Act* has placed a married woman generally in the position of a *feme sole*, the effect of a decree of judicial separation is almost confined to the rights and liabilities of the husband and wife *inter se*. In addition, however, a husband ceases to be liable for the torts of his wife committed after such a decree has been pronounced. Further, no longer can she pledge his credit for necessaries, unless he has failed in the due payment of alimony when alimony is decreed. There may be some other differences, but the chief changes made by a decree of judicial separation in the situation of husband and wife concern their reciprocal responsibilities.

In support of the competency of the appeal two distinct positions may be adopted. One is that these differences amount to a change in status, that is, that a judicially separated husband and wife occupy a third status, a status between the ordinary status of unmarried men and women and the ordinary status of husband and wife.

The other is that, though a decree of judicial separation does not change the status of the parties, it " affects " their existing status by regulating the rights and liabilities arising from that status.

The answer to the first of these two contentions is that such a third condition is not recognized as a status by our law and that s. 35 (1) (*a*) (3) refers to some status that is known and designated by English law.

The second of the two contentions appears to me to involve more difficulty, but it depends upon the force or meaning to be given to the word " affects " in the sub-section. But, before saying why I think that the contention ought not to prevail, it is desirable to refer to some authorities which bear upon both questions.

In the cases dealing with jurisdiction over dissolution of marriage and over other forms of matrimonial relief a number of pronouncements may be found upon the relation of judicial separation to the status of marriage. In *Niboyet* v. *Niboyet* (1), *Brett* L.J. makes two relevant observations in his dissenting judgment, which, so far as it limits jurisdiction over dissolution of marriage to domicil, now expresses the law, but, so far as it imposes the like limitation on judicial separation, does not. His Lordship said :—" Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community. That relation between

(1) (1878) 4 P.D. 1.

H. C. OF A. 1947. FORD v. FORD. Dixon J.

the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law. The limitations or conditions or effects of such relation and status are different in different countries" (1). Speaking of the rule that domicil alone gives jurisdiction to dissolve a marriage, he said :—" The same rule, I confess, seems to me to imply, for the same reason, to its power to grant any relief which alters in any way that relation between the parties which arises by law from their marriage. It applies, therefore, as it seems to me, to suits for judicial separation and to suits for the restitution of conjugal rights" (2). *Cotton* L.J., whose judgment upon jurisdiction in judicial separation does represent the law but whose judgment does not in relation to dissolution, said, speaking of restitution and of judicial separation :—" A judgment for either of these objects is, in my opinion, not open to the objection mainly relied on in support of the judgment of the Court below, namely, that a decree for dissolution would alter the status of the spouses, and that this depends on the law of their domicil, and ought to be left to the Courts of the country where that may be" (3).

In *Armytage* v. *Armytage* (4), *Gorell Barnes* J. decided that English Courts had jurisdiction to decree a judicial separation at the suit of a wife whose permanent residence was in England against a husband whose temporary residence was there, his domicil, and therefore hers, being out of England. In the course of his judgment he referred to " the principle that a person's status ought to depend on the law of his domicil" (5); his Lordship then quoted (6) from Lord *Watson's* opinion in *Le Mesurier* v. *Le Mesurier* (7) the statement " that there may be residence without domicil, sufficient to sustain a suit for restitution of conjugal rights, for separation or for aliment." He referred (8) to the statement of *Bishop* in his work on the *Law of Marriage and Divorce*, Boston ed. (1881), s. 158, " it may be doubted whether a suit for separation from bed and board involves a question of status"; and also to the statement in *Westlake on Private International Law*, 3rd ed. (1890), s. 47, that the decree of judicial separation " leaves the parties man and wife, but gives to the injured party a protection against some of the consequences of that status." Quoting from *Fraser* on *Husband and Wife*, 2nd ed. (1878), p. 1,294, in reference to actions of separation and aliment, *Gorell Barnes* J. (9) again emphasizes that " different considerations come into play

(1) (1878) 4 P.D., at p. 11.
(2) (1878) 4 P.D., at p. 19.
(3) (1878) 4 P.D., at pp. 21, 22.
(4) (1898) P. 178.
(5) (1898) P., at p. 186.
(6) (1898) P., at p. 187.
(7) (1895) A.C. 517, at p. 531.
(8) (1898) P., at p. 191.
(9) (1898) P., at p. 192.

when the object is *not permanently to affect the status* of the parties, but to obtain immediate protection from cruel treatment, or the means of daily subsistence." His Lordship then proceeds :—" It may be objected that a decree of judicial separation affects the status of the parties, and that a change of status ought on principle only to be effected by the Courts of the domicil " (1). Among the reasons he gives for dismissing this objection, is the fact that a divorce *a mensâ et thoro* " did not dissolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties. The sentence commonly separated the parties until they should be reconciled to each other. The relation of marriage still subsisted, and the wife remained a *feme covert.* A woman divorced by the Court *a mensâ et thoro* and living separate and apart from her husband could not be sued as a *feme sole* (see *Lewis* v. *Lee* (2)). The effect of the sentence was to leave the legal status of the parties unchanged " (3).

After stating the effect of ss. 16, 25 and 26 of the *Matrimonial Causes Act* 1857 (the counterpart of ss. 37 and 38 of the New South Wales Act), *Gorell Barnes* J. concludes :—" I am of opinion that the effect of the said ss. 25 and 26, if they affect a wife's status within the meaning of the term as applied to the principles under consideration, which is doubtful, is not to deprive the Court of the power to grant relief in cases where it would have been granted by the Ecclesiastical Courts " (4).

In some measure his Lordship's conclusion that domicil was not requisite to jurisdiction in separation was influenced by the statutory incorporation of the principles of the ecclesiastical law. In *Anghinelli* v. *Anghinelli* (5), where the decision of *Gorell Barnes* J. (6) was applied if not extended by the Court of Appeal, *Warrington* L.J. summarizes the position thus :—" It is contended that the principle on which domicil, and domicil alone, is said to give jurisdiction is that in the case of a dissolution of marriage the status of the parties is affected, and that the same principle ought to be applied to petitions for judicial separation. I am not, however, prepared to accept the view that a decree for judicial separation does affect the status of the parties, but even if it does, the statue prevents us from taking into consideration questions of international law " (7).

In *Eustace* v. *Eustace* (8) the Court of Appeal held that, while residence of the parties was according to the foregoing decision

(1) (1898) P., at p. 195.
(2) (1824) 3 B. & C. 291 [107 E.R. 742].
(3) (1898) P., at pp. 195, 196.
(4) (1898) P., at p. 196.
(5) (1918) P. 247.
(6) (1898) P. 178.
(7) (1918) P., at p. 256.
(8) (1924) P. 45.

H. C. OF A. 1947. FORD v. FORD. Dixon J.

enough to found jurisdiction, so was the domicil of the parties without residence, at all events without the respondent's residence. In concurring in this result, however, *Atkin* L.J. said :—" I only desire to add that the reason which leads me to hold that domicil gives jurisdiction in suits for judicial separation is that, in my view, the provisions of ss. 25 and 26 of the *Matrimonial Causes Act*, 1857, affect the status of the spouses after decree. So to hold is not inconsistent with the view taken by the Courts hitherto, that residence is also sufficient to found jurisdiction in such cases " (1).

In *Shanks* v. *Shanks* (2), a decision of this Court depending on the refusal of dissolution and the consequential grant of judicial separation *Eustace's Case* (3) was not cited, but *McTiernan* J. said :—" 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 ss. 37 and 38 of the *Matrimonial Causes Act* " (N.S.W.) (4). His Honour does not say that the effect so produced brings such a decree within the proper use of the expression " affects the status of the parties," a matter upon which we have the foregoing opposing statements from Lord *Warrington* (5) and Lord *Atkin* (1). But we have also an examination of the operation and consequences of the same provisions by the Privy Council. For, in *Attorney-General for Alberta* v. *Cook* (6), Lord *Merrivale* deals with them in the course of deciding in the negative the question reserved by *Lord Advocate* v. *Jaffrey* (7), viz. whether a wife judicially separated from her husband could acquire an independent domicil of choice, that is of her own choice. Lord *Merrivale* discusses the former effect of a decree of divorce *a mensâ et thoro*, observing " the status of marriage remained " (8). He then sets out and comments upon the sections and then proceeds :—" The statute does not purport to discharge the wife from her character of wife. It suspends certain obligations of matrimony. Upon a reconciliation the wife, rescinding the suspension, returns home as wife ; upon a departure from the obligation of sexual continence she may as a wife be divorced *a vinculo*. By the practice of divorce in England, if after separation she has cause for divorce against her husband, she may require him as husband to provide for the costs of the suit in which she seeks that relief " (9).

In *Salvesen* or *Von Lorang* v. *Administrator of Austrian Property* (10), Lord *Haldane* mentions the view expressed by the Lord President in

(1) (1924) P., at p. 54.
(2) (1942) 65 C.L.R. 334.
(3) (1924) P. 45.
(4) (1942) 65 C.L.R., at p. 337.
(5) (1918) P., at p. 256.
(6) (1926) A.C., at pp. 462-465.
(7) (1921) A.C. 146.
(8) (1926) A.C., at p. 462.
(9) (1926) A.C., at p. 464.
(10) (1927) A.C., at p. 655.

the Court of Session that judicial separation alters the married status, but, as I understand Lord *Haldane*, he does so only to reject it in favour of the opinion of Lord *Sands* (1). In any case, Lord *Phillimore* says emphatically :—" There are two classes of decisions affecting the matrimonial status : those which decide that a putative marriage is or is not valid, judgments of declarator or of nullity, and those which put an end to an unquestioned marriage, judgments of dissolution of marriage or, in popular language, divorce " (2). He makes it clear enough that he does not regard judicial separation as " affecting status," when he speaks thus of British conception of matrimonial jurisdiction internationally considered " as to the general principles of international law upon this subject as viewed by British Courts it seems to me pretty clear that for the purpose of pronouncing upon the status of parties as well as for the purpose of affecting that status the Court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively " (3).

Perhaps it should be noticed, too, that *Pilcher* J. in *Hutter* v. *Hutter* (4) uses the expression " a declaration which affects status " as an appropriate description of a decree of nullity.

It will be seen from these various judicial statements that a decree for judicial separation is not treated as changing status and that with the notable exception of Lord *Atkin* (5) the current of opinion is against regarding it as " affecting status." The truth is that the words " affecting status " are so vague as to be susceptible of an almost indefinite extension of meaning and, therefore, of application. It might be said that anything that produced the least consequence upon the rights or liabilities or any of them which arise from a status " affect " that status. But the meaning of the words in s. 35 (1) (*a*) (3) is clearly more definite and restricted. It could hardly have been intended that, whenever a Supreme Court reviewed a decision between husband and wife enforcing, refusing to enforce or varying as by a separation order any of the rights or obligations arising from marriage, an appeal here should lie as of right.

The word " affect " was not intended to cover consequential or incidental effects produced by orders based upon marriage, alienage or bankruptcy. It refers to something affecting the existence or validity of the status, to a judicial order where the status is or may be established or denied, continued or ended, confirmed or prejudiced.

(1) (1927) A.C., at p. 656.
(2) (1927) A.C., at p. 664.
(3) (1927) A.C., at p. 670.
(4) (1944) P. 95, at p. 107.
(5) (1924) P., at p. 54.

H. C. OF A. 1947. FORD v. FORD.

A decree for judicial separation does not fall within the real meaning of the words as used in the sub-section.

For these reasons, I think the appeal is incompetent.

McTIERNAN J. In connection with the objection that this appeal is not competent it is necessary to consider the question whether a decree for a judicial separation pronounced by the Supreme Court of New South Wales affects the status of the wife under the State laws relating to marriage or divorce. Such a decree has the effect which ss. 37 and 38 of the *Matrimonial Causes Act* 1899 (N.S.W.) attribute to it. The long title of this Act is " An Act to consolidate the Acts relating to Divorce and Matrimonial Causes." Section 4 says : " There shall be vested in the Supreme Court jurisdiction in respect of divorces *a mensâ et thoro* suits of nullity of marriage suits for dissolution of marriage suits for restitution of conjugal rights suits for jactitation of marriage and in all causes suits and matters matrimonial (except in respect of marriage licenses) ". This statute is plainly a law relating to marriage and divorce. Part VII. deals with judicial separation. The grounds upon which the decree may be obtained by a husband or wife are set out. These are adultery, cruelty, desertion (s. 31). If the petitioner has the requisite New South Wales domicil he or she may obtain the decree on certain grounds, which are also grounds upon which a petition for dissolution may be presented (s. 32). A decree for a judicial separation may also be pronounced in all cases in which the petitioner's case, if for dissolution of the marriage, has failed or the petition has been dismissed, but a case for judicial separation has been established and, in addition, in all cases in which a decree for a divorce *a mensâ et thoro* might at any time prior to the passing of the *Matrimonial Causes Act* 1857 (Imp.) have been pronounced in England (s. 33). There is therefore a difference between the grounds upon which the Supreme Court may pronounce a decree for a judicial separation and the grounds upon which the Ecclesiastical Courts pronounced a decree for a divorce *a mensâ et thoro*. The *Matrimonial Causes Act* 1899 also gives a wider effect to a decree for a judicial separation than a divorce *a mensâ et thoro* had. Section 37 (1) provides that a decree for a judicial separation shall have the same effect as a decree for a divorce *a mensâ et thoro* would have had in England prior to the passing of the English Act of 1857 " and such other effect as herein mentioned " that is to say the effect given to the decree by s. 37 (2), (3), (4), (5) and s. 38. These provisions are as follows :—" 37 (2) In every case of a judicial separation the wife shall from the date of the decree and whilst the separation continues be considered as

a feme sole with respect to property of every description which she may acquire or which may come to her or devolve upon her. (3) Such property may be disposed of by her in all respects as a feme sole and on her decease the same shall in case she dies intestate go as the same would have gone if her husband had been then dead. (4) If after a decree of judicial separation a wife again cohabits with her husband all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use subject however to any agreement in writing made between herself and her husband when separate. (5) The provisions of this section shall be deemed to extend to property to which such wife has become or shall become entitled as executrix administratrix or trustee since the decree of separation and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix. 38. (1) In every case of a judicial separation the wife shall whilst so separated be considered as a feme sole for the purposes of contract and wrongs and injuries and suing and being sued in any civil proceeding. (2) The husband shall not be liable in respect of any engagement or contract entered into or for any wrongful act or omission by the wife or for any costs incurred by her as plaintiff or defendant. (3) Where upon any such judicial separation alimony is decreed or ordered to be paid to the wife and the same is not duly paid by the husband he shall be liable for necessaries supplied for her use. (4) Nothing herein contained shall prevent the wife from joining at any time during such separation in the exercise of any joint power given to herself and her husband."

The provisions of these sections were copied from ss. 25 and 26 of the English *Matrimonial Causes Act* 1857.

The latter sections were part of the law before the passing of the *Married Women's Property Acts* in England. They were repealed by the *Supreme Court of Judicature (Consolidation) Act* 1925 (Imp.), but provisions of the same kind were enacted by s. 194 of that Act and these were amended by s. 5 (1) and the First Schedule of the *Law Reform (Married Women and Tortfeasors) Act* 1935 (Imp.). It seems, therefore, that the provisions contained in ss. 25 and 26 of the English statute of 1857 were not regarded as surplusage after the *Married Women's Property Acts* were passed. Sections 37 and 38 of the New South Wales *Matrimonial Causes Act* 1899 were also in force in this State before the passing of the *Married Women's Property Acts* (N.S.W.).

A decree for a judicial separation pronounced under the New South Wales statute does not " affect " the status of husband or wife in the sense that it changes married into unmarried. But the word

H. C. OF A. 1947. FORD v. FORD. McTiernan J.

"affect" is not used in that narrow sense in s. 35 of the *Judiciary Act* 1903-1946: *Shanks* v. *Shanks* (1). In *Daniel* v. *Daniel* (2), *Griffith* C.J. explained the meaning of status in s. 35 in this statement: "I apprehend that the term 'status' means something of this sort: a condition attached by law to a person which confers or affects or limits a legal capacity of exercising some power that under other circumstances he could not or could exercise without restriction" (3). Note L. entitled "Status and Contracts" which is appended to Chapter 5 of *Maine's Ancient Law* with notes by Sir *Frederick Pollock* (pp. 184, 185), contains the statement that status "according to the best modern expositions, includes the sum total of a man's personal rights and duties (*Salmond, Jurisprudence* (1902), pp. 253-257) or, to be verbally accurate, of his capacity for rights and duties (*Holland, The Elements of Jurisprudence*, 9th ed. (1900), p. 88)." *Rich* and *Williams* JJ. said in *Shanks* v. *Shanks* (4): "'Affect' and 'status' are both words of wide import and should be given a liberal meaning."

The meaning of the term "status" is illustrated by a citation from the judgment of Lord *Westbury* in *Taylor* v. *Meads* (5): "When the Courts of equity established the doctrine of the separate use of a married woman and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent *personal status*, and to make her in equity a *feme sole* . . . . With respect to separate property, the *feme coverte* is by the form of trust . . . invested with the rights and powers of a person who is *sui juris*."

If these expositions of the term "status" are right, ss. 37 and 38 of the New South Wales Act affect the status of the wife. Section 37, at any rate before the passing of the *Married Women's Property Act*, affected the status of a wife in a way comparable with the result of the equitable doctrine of the separate use. The effect of s. 25 of the English *Matrimonial Causes Act* (it was copied by s. 37 of the New South Wales *Matrimonial Causes Act*) is explained by Sir *John Romilly* in the case of *In re Insole* (6): "Does not that say that it (the wife's property) shall be disposed of by her in all respects as if she were a *feme sole*? She may leave it to whomsoever she pleases, and if she dies intestate, it is to go just as if her husband were dead—which excludes him; in other words, she may leave it to whom she pleases, or she may assign it to whom she pleases. The meaning of that clause is that, as soon as the judicial separation takes place, the wife may dispose of all the property which, in the

(1) (1942) 65 C.L.R. 334.
(2) (1906) 4 C.L.R. 563.
(3) (1906) 4 C.L.R., at p. 566.
(4) (1942) 65 C.L.R., at p. 335.
(5) (1865) 4 DeG. J. & S. 597, at pp. 603, 604 [46 E.R. 1050, at p. 1053].
(6) (1865) L.R. 1 Eq. 470, at p. 473.

ordinary sense of the word, comes to her, exactly as if she were not married, subject always to what may take place in case she shall return to live with her husband."

The *Married Women's Property Acts* do not release the marriage, but they affect the status of a married woman by rendering her discovert in many senses. Broadly, under the common law relating to marriage there was a merger of the wife's legal status in her husband's. The *Married Women's Property Acts* gave a married woman an independent personal status. The effect of a decree for a judicial separation under the *Matrimonial Causes Act* is to give the wife a new personal status upon the making of the decree. It may be that it is necessary to take into account the provisions of the *Married Women's Property Acts* before the precise extent to which a decree for a judicial separation, having the effect attributed to it by ss. 37 and 38, affects the pre-existing status of the wife. But whatever be the extent of the effect of the decree, there is a modification of the status of a wife under ss. 37 and 38 when the decree is pronounced. It is sufficient to refer to one authority to establish that proposition. In the case of *In re Wingfield & Blew* (1), *Vaughan Williams* L.J. said: "I wish to say with respect to the conclusion which *Warrington* J. arrived at that he seems to have construed s. 26 of the *Matrimonial Causes Act*, 1857, *as if that section, instead of defining the status of a wife after an order was made for a judicial separation in the way in which it has done* (the italics are mine), had really put the wife exactly in the same position as she would have been in under the law prior to the passing of the Act. I do not think that that is the result of s. 26. I do not think, for instance, with respect to s. 26 that it could be said that after an order for judicial separation the authority of the wife to pledge her husband's credit continued in respect of necessaries which the alimony allowed could not have been supposed to cover. The words of the section are very strong . . . In my opinion the effect of that section is in every case of a judicial separation absolutely to do away with the right of the wife to pledge her husband's credit whilst she is so separated, and I think that it is not possible to limit that by saying that she is to have a right to pledge his credit in respect of some necessaries which become necessaries by reason of the husband's conduct towards her, as, for instance, by reason of his commencing proceedings for a dissolution of marriage." These observations apply to s. 38 of the New South Wales Act.

The conclusion that a decree for a judicial separation depending for its effect upon either the English *Matrimonial Causes Act* 1857 or the New South Wales *Matrimonial Causes Act* 1899 affects the

(1) (1904) 2 Ch. 665, at pp. 677, 678.

H. C. OF A. 1947. FORD v. FORD. McTiernan J.

status of a wife is supported by other authority. In *Eustace* v. *Eustace* (1), the President, Sir *Henry Duke*, said: "I think *the change in the status of a woman for which ss.* 25 *and* 26 *of the Act provide* (the italics are mine), was not only unknown to the Ecclesiastical Courts but was such as none of the Courts of the realm could previously have decreed." Lord *Atkin* said in the same case: "I agree with the judgment which has been delivered by the President. I only desire to add that the reason which leads me to hold that domicil gives jurisdiction in suits for judicial separation is that, in my view, *the provisions of ss.* 25 *and* 26 *of the Matrimonial Causes Act*, 1857, *affect the status of the spouses after decree* (the italics are mine). So to hold is not inconsistent with the view taken by the Courts hitherto, that residence is also sufficient to found jurisdiction is such cases" (2).

But there are limits, of course, to the statutory effect given by ss. 25 and 26 and the corresponding sections of the New South Wales Act to a decree for a judicial separation. In *Attorney-General for Alberta* v. *Cook* (3), it was held that these provisions do not so enlarge the effect of a decree for a divorce *a mensâ et thoro* as to enable the wife to acquire a separate domicil when there is a decree for a judicial separation. This case is not an authority for holding that a decree for a judicial separation having the effect attributed to it by those provisions does not affect the status of the wife.

If the meaning of the words "affects the status of any person under the laws relating to . . . marriage, divorce" is restricted there are questions to be resolved in connection with an appeal in respect of a decree nisi for dissolution of marriage. In *Norman* v. *Villars* (4), Lord Chancellor *Cairns* said that until a decree nisi is made absolute "it is inoperative to alter the wife's status." *Brett* L.J. said that the decree absolute does not relate back to alter the wife's status in the interval between the two decrees (5). See also *Fender* v. *St. John-Mildmay* (6).

The headnote of the former case is: "The status of a married woman is not affected by the pronouncing of a decree nisi for the dissolution of the marriage. She continues to be subject to all the disabilities of coverture until the decree is made absolute" (7). Nobody in that case argued that the decree nisi gave the plaintiff the complete status of an unmarried woman. The word "status" is used to include her condition of coverture. The contrary of the second proposition is true in regard to a decree for a judicial separation. Lord *Cairns* contrasted the effect of a decree nisi with the

(1) (1924) P., at p. 51.
(2) (1924) P., at p. 54.
(3) (1926) A.C. 444.
(4) (1877) 2 Ex. D. 359, at p. 363.
(5) (1877) 2 Ex. D., at p. 365.
(6) (1938) A.C., at pp. 16, 24.
(7) (1877) 2 Ex. D. 359.

effect of a decree for a judicial separation. He used these words: "Then it was argued that, as upon a decree for judicial separation the wife may sue as a feme sole, so on a decree nisi for dissolution she should have at least as high a right. That might perhaps, be a good argument to address to the legislature to induce them to give her such a right. But as yet the legislature have not done it; they have not given the parties any change of status until the decree, absolute" (1). The Lord Chancellor had in mind, I should think, the provisions of s. 26 of the English Act of 1857 which are like those of s. 38 of the New South Wales Act. I infer from this statement that the Lord Chancellor would have regarded the conferring of the right to sue as a *feme sole* upon a wife as something that affected her status.

The question of the application of the provisions of s. 35 of the *Judiciary Act* would also arise in connection with suits for restitution of conjugal rights, if a judgment does not affect status within the meaning of the section unless it changes from married to unmarried. The Court has heard and determined appeals as if they were of right in such suits. Instances are *Wirth* v. *Wirth* (2); *Smythe* v. *Smythe* (3); *Woodlands* v. *Woodlands* (4); *Ainslie* v. *Ainslie* (5). Indeed, the Court has heretofore acted upon the view that there is an appeal as of right from a decree for a judicial separation. The Court plainly did so in *Ryan* v. *Ryan* (6). The point that the appeal was not competent was not taken in that case. It is not satisfactory to dispose of the case by saying that the appeal was heard and determined *per incuriam*. This is a good precedent for the present appeal. The case was not mentioned in the argument of the present case. In *Shanks* v. *Shanks* (7), there was an appeal from a judgment given upon the hearing of two consolidated suits. The suits were a suit by a wife for judicial separation on the ground of cruelty and a suit, subsequently instituted by the husband, for the dissolution of the marriage on the ground of adultery. The judgment contained a decree for a judicial separation in the wife's suit and an order dismissing the husband's suit. There was one notice of appeal which was expressed to be against the whole of the judgment of the Supreme Court and the orders and decrees pronounced by the Supreme Court in the consolidated suits. The fourth ground of appeal was that there was no evidence to support the trial judge's finding of cruelty upon which the decree for a judicial separation was founded. There was an objection that the appeal was incompetent. It was made on the

(1) (1877) 2 Ex. D., at p. 363.
(2) (1918) 25 C.L.R. 402.
(3) (1922) 30 C.L.R. 165.
(4) (1924) 35 C.L.R. 446.
(5) (1927) 39 C.L.R. 381.
(6) (1914) 18 C.L.R. 601.
(7) (1942) 65 C.L.R. 334.

H. C. OF A. 1947. FORD v. FORD. McTiernan J.

ground that the dismissal of the petition for the dissolution of the marriage did not affect the status of any person under the laws relating to marriage or divorce. The objection was overruled. *Rich* and *Williams* JJ., after stating that the words " affect " and " status " are words " of wide import " and should be given " a liberal meaning," added : " 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 " (1). Their Honours thought, as the appellant had an appeal as of right from the dismissal of the suit for divorce, it was unnecessary to consider whether the grant or dismissal of a suit for judicial separation came within s. 35. It seemed to me to be necessary to consider the question whether the appeal which the appellant made from the decree for a judicial separation was competent before the Court could dispose of it. The dismissal of the appeal against the order dismissing the suit for dissolution could not, in my opinion, dispose of the appeal against the decree for a judicial separation. I expressed the opinion that the appeal was competent. The order of the Court was that the appeal was dismissed. The appeal against the decree for a judicial separation was dismissed by the order. But it was not dismissed on the ground that it was not competent.

In my opinion the precedent in *Ryan* v. *Ryan* (2) should be followed. It is not clearly wrong. That at least is shown by the citations which I have made from *In re Wingfield & Blew* (3) and *Eustace* v. *Eustace* (4) regarding the effect of a decree for a judicial separation on the status of a wife. In my opinion the appeal is competent.

WILLIAMS J. The preliminary point is whether there is an appeal of right to this Court from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal from a decree in the matrimonial causes jurisdiction of that Court, dismissing a suit by a wife for judicial separation. The relevant provisions of the *Matrimonial Causes Act* 1899 (N.S.W.), have been set out in previous judgments and I shall not repeat them. The *Judiciary Act* 1903-1946, s. 35 (1) (*a*) (3), provides that there shall be an appeal of right without leave from a final judgment which affects the status of any person under the laws relating to marriage or divorce. The order under appeal is a final order. The question is whether the order affects the status of the appellant. It was contended for the appellant that there are three status : That of an unmarried person, that

(1) (1942) 65 C.L.R., at p. 335.
(2) (1914) 18 C.L.R. 601.
(3) (1904) 2 Ch. 665.
(4) (1924) P. 45.

of marriage, and an intermediate status of persons who are married but judicially separated. Support for the existence of this third status is found in the statements of the President Sir *Henry Duke* and of *Atkin* L.J., as he then was, in *Eustace* v. *Eustace* (1). *Atkin* L.J. said (2) that ss. 25 and 26 of the English *Matrimonial Causes Act* 1857 (which correspond with ss. 37 and 38 of the *Matrimonial Causes Act* 1899) affect the status of the spouses after decree. But this view would appear to be opposed to the current of English authority. There are statements tending to the contrary in *Armytage* v. *Armytage* (3); *Anghinelli* v. *Anghinelli* (4), and *Attorney-General for Alberta* v. *Cook* (5). In the last-mentioned case Lord *Merrivale*, delivering the judgment of the Privy Council, said with reference to the decree for judicial separation that:—"The status of marriage remained" (6). Then, after discussing the effect of ss. 25 and 26 of the *Matrimonial Causes Act* 1857, he said:—"Words could not well have been better chosen than those in ss. 25 and 26 to confine within precise limits the inroads intended to be made upon the pre-existing legal relationship of husband and wife . . . The statute does not purport to discharge the wife from her character of wife. It suspends certain obligations of matrimony. Upon a reconciliation a wife, rescinding the suspension, returns home as wife; upon a departure from the obligation of sexual continence she may as a wife be divorced a vinculo" (7).

"Affect" and "status", are both words of wide import and should be given a liberal meaning. (*Shanks* v. *Shanks* (8)). A decree absolute for the dissolution of marriage has the fullest effect upon the status of the spouses for it changes their status from that of married to unmarried persons. "A declaration by a competent court that a marriage, whether void or voidable, is, in fact, a nullity is, of course, a declaration which affects status" (*Hutter* v. *Hutter* (9)). A decree nisi for dissolution of marriage does not change the status of marriage, but it affects the status because it is an essential step in the enforcement of a statutory right to have the marriage dissolved. A decree wrongfully dismissing a petition for dissolution of marriage is a judgment which affects the status because it deprives the petitioner of his statutory right to have the marriage dissolved.

The effect of a decree for judicial separation is to modify in several important respects the rights and liabilities of the spouses towards

(1) (1924) P., at pp. 51, 54.
(2) (1924) P., at p. 54.
(3) (1898) P., at pp. 191, 196.
(4) (1918) P., at pp. 254, 256.
(5) (1926) A.C. 444.
(6) (1926) A.C., at p. 462.
(7) (1926) A.C., at p. 464.
(8) (1942) 64 C.L.R., at p. 335.
(9) (1944) P., at p. 107.

H. C. OF A. 1947. FORD v. FORD. Williams J.

each other and in relation to the public. It therefore has an effect under the laws relating to marriage or divorce. The wrongful dismissal of a suit for such a decree also has an effect under such laws because it deprives the petitioner of his right to these modifications.

But the *Judiciary Act* requires that the judgment should affect the status of a person under the laws relating to marriage or divorce. It is not sufficient that the judgment should merely affect the rights or liabilities of a person under these laws. A decree for judicial separation is based on the marriage continuing to subsist. The status of marriage is therefore not affected.

For these reasons, I am of opinion that there was no appeal of right in this case. I am also of opinion that there are no grounds for granting special leave to appeal. I would therefore dismiss the appeal.

Appeal dismissed for want of jurisdiction. Application for special leave to appeal refused.

Solicitor for the appellant, *G. M. Stafford.*

Solicitor for the respondent, *Adrian C. R. Twigg.*

J. B.