[HIGH COURT OF AUSTRALIA.]

EMMA AMELIA DAVIES AND ANOTHER . APPELLANTS;

AND

DAVID DAVIES . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 25; *April* 8; *May* 12.

Isaacs, Higgins and Gavan Duffy JJ.

Husband and Wife—Parent and child—Maintenance—Agreement by wife renouncing right to maintenance—Public policy—Marriage Act 1915 (*Vict.*) (*No.* 2691), *secs.* 83, 84, 87, 93—*Justices Act* 1915 (*Vict.*) (*No.* 2675), *sec.* 139.

Practice—Supreme Court of Victoria—Special case stated by Court of General Sessions—No decision on merits—Power to refer case back to be heard—Justices Act 1915 (*Vict.*) (*No.* 2675), *sec.* 147.

Sec. 83 of the *Marriage Act* 1915 (Vict.) provides (*inter alia*) that where any husband has left his wife without means of support or where any father has left his children without adequate means of support, any justice may upon complaint thereof on oath being made by such wife or by the mother of such children, issue his summons to such husband or father to show cause why he should not support such wife or children. Sec. 84 provides that at the hearing of such complaint, whether the defendant is then present or not, any two justices shall inquire into the matter of the complaint; "and if they are satisfied that the wife or the children (as the case may be) are in fact without means of support and that the husband or the father is able to maintain her or them or to contribute to her or their maintenance, such justices (*a*) shall make an order in writing directing him to pay either weekly or monthly at their discretion and to such person or in such manner for her or their use as such justices think fit such moderate sum or allowance as they consider proper;" &c.

Held, that the provisions of those sections are for the benefit of the public, and that the rights conferred by them cannot be renounced.

Held, therefore, that an agreement between a husband and a wife whereby the wife purported to relieve the husband of his obligation to support her did not prevent a Court of Petty Sessions from making an order under sec. 84 against the husband for the maintenance of the wife.

Held, also, that an agreement between the husband and the wife whereby she purported to relieve the husband of his obligation to support the child of the marriage did not prevent the Court of Petty Sessions from making an order under the same section against the husband for the maintenance of the child on the application of the wife.

Christie v. *Christie*, 25 V.L.R., 97; 21 A.L.T., 43, commented on.

Sec. 147 of the *Justices Act* 1915 (Vict.) provides that in any case of appeal "the Court of General Sessions before which the same is heard and determined shall if so required by any party to such appeal state the facts specially for the determination of the Supreme Court thereon, in which case that Court may determine the same," &c.

On an appeal to the Court of General Sessions from orders of a Court of Petty Sessions against a husband for maintenance of his wife and his child, the Chairman of General Sessions held that an agreement of the above nature precluded the Court of Petty Sessions from making either order, and without going into the merits he quashed both of them. On a special case stated by the Chairman of General Sessions, the Supreme Court affirmed his decision. On appeal to the High Court,

Held, that the Court of General Sessions was not right in quashing either of the orders, and that the Supreme Court should have remitted the case to that Court to be heard and determined accordingly.

Coughlin v. *Thompson*, (1913) V.L.R., 304; 35 A.L.T., 1; *Dobson* v. *Sinclair*, 8 V.L.R. (L.), 69; 3 A.L.T., 106; and *Russell* v. *Shire of Leigh*, 5 V.L.R. (L.), 199; 1 A.L.T., 18, discussed.

Per Isaacs J.: Sec. 93 of the *Marriage Act* 1915, which provides that an order for maintenance is to be transmitted to the clerk of the peace and that the Court of General Sessions, "whether an appeal against the same has been entered or not, may at any time quash confirm or vary such order either in whole or in part at its discretion and may substitute a new order in lieu thereof," gives the husband or parent a right to ask a Court of General Sessions to review the matter in his presence without the formalities and conditions of ordinary appeals, but does not give the Court of General Sessions a constant supervisory control over the order.

Quære, *per Higgins* J., whether the Court of General Sessions has power to quash or vary an order of Petty Sessions by virtue of facts which have occurred since the order.

Decision of the Supreme Court of Victoria (*Hodges* J.) reversed.

APPEAL from the Supreme Court of Victoria.

On the hearing before the Court of General Sessions at Melbourne of two appeals (which were heard together) by David Davies,

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against two orders of a Court of Petty Sessions, one for the maintenance of his wife, Emma Amelia Davies, and the other, made on the application of Mrs. Davies, for the maintenance of their daughter, Margaret Olive Davies, the learned Chairman stated the following special case for the Supreme Court :—

This was an appeal by the husband, David Davies, against an order for the maintenance of his wife, Emma Amelia Davies. There was also an appeal by the same appellant against an order for the maintenance of his child, Margaret Olive Davies. I found the following facts. By consent the appeals were heard together. Counsel for the respondent took the objection that the appeals were out of time and should not be entertained.

The parties were married in August 1910 and lived together until they separated in October 1911.

The cause of separation arose through the fault of the husband. I did not hear the evidence of the husband, but I have no hesitation in finding on the facts before me that it was the conduct of the husband that led to the breaking up of the home.

An agreement was drawn up—Exhibit C. The wife under this agreement did in fact receive the sum of £200 and the proportion of the furniture provided for her by that agreement. At the time when Exhibit C was signed the wife was well advanced in pregnancy, as both parties well knew. The child was born early in 1912, and since her birth had been living with and had been supported by her mother.

Under Exhibit C the husband made twenty-three weekly payments, and then apparently went to England leaving no address and making no further payments. The wife made diligent inquiries, but could find no trace of him. She carried on a business in St. Kilda which combined laundry work and work of a florist, and was able to maintain herself and child by very strenuous work. The said business was started with portion of the £200 paid by the husband under the agreement. Subsequently, in October 1916, the wife, having at last been able to serve summonses on her husband, obtained an order in the Court of Petty Sessions at Northcote against her husband for the payment of maintenance at the rate of £12 a month, and also an order for £4 a month for the child.

The husband did not appear in the Court below, and was not served with the order until December 1917, when, having refused to obey the orders or give security, he was lodged in gaol. The husband, having been arrested in New South Wales on 26th December 1917, gave notice of appeal on 26th February 1918, and in my opinion there has been no undue delay or such delay as I in my discretion would have held to be fatal to this hearing.

The wife on 18th December 1917 instituted proceedings in the County Court to recover the sum of £236, being the instalments due under Exhibit C (the agreement for separation) up to 2nd October 1916, and on 8th March 1918 she recovered judgment for £236 with costs. The husband gave notice of appeal against this judgment, but never prosecuted the appeal. His counsel at the hearing before me undertook to at once consent to the sum (which was paid into Court) being taken out, and undertook to pay all further instalments accrued due under Exhibit C and which might from time to time accrue due.

At the close of the evidence given for the respondent, counsel for the husband asked for a direction that the appeals should be allowed on the ground that in view of the parties having come to a binding agreement (Exhibit C) the justices had no power to make the order appealed against.

I hold that as Exhibit C was still in full force and the parties had made their own terms thereunder, and as the deed had in fact been performed by the payment of the £200 and the acceptance of the furniture, and as the wife had now got all the arrears due under the deed up to 2nd October 1916, and as there was a *bonâ fide* undertaking to observe the deed in future and as it was made in contemplation of birth of child, the appeals should be allowed, and I quashed the orders but without costs.

The question for the opinion of the Court is: Was I right in quashing the said orders?

The agreement, Exhibit C, which was dated 10th October 1911, was in the following terms:—

"We, David Davies and Emma Amelia Davies, hereby agree to

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live separate and apart at the request of the said David Davies upon the following terms and conditions :—

"1. I, David Davies, hereby agree to pay to the said Emma Amelia Davies the sum of two hundred pounds within two days from the date hereof.

"2. I, Emma Amelia Davies, shall have all the furniture in the house at Power Street, Hawthorn, with the exception of the bedroom furniture in the front bedroom of such house.

"3. I, David Davies, will pay to the said Emma Amelia Davies the sum of one pound per week for her maintenance, to commence from the 16th day of October 1911 and payable weekly, the first payment to be made on 16th October 1911.

"4. I, Emma Amelia Davies, agree to maintain myself out of the said moneys and to make no further claim against the said David Davies for maintenance or otherwise.

"5. We hereby agree the one with the other not to molest or otherwise interfere with each other in any way."

The special case was heard by *Hodges* J., who made an order affirming the decision of the Court of General Sessions.

From that decision Mrs. Davies now, by special leave, appealed to the High Court both on her own behalf and on behalf of Margaret Olive Davies.

Starke and *Ham* (with them *Eager*), for the appellants. The only question for the justices on a claim for maintenance under secs. 83 and 84 of the *Marriage Act* 1915 is whether the wife or child is left without means of support. The question of whether the husband had good cause for not maintaining his wife or child does not arise. It is in the public interest that a wife or child should not be left without means of support, and therefore the wife cannot free her husband of the obligation imposed by the *Marriage Act* to maintain her and her child. The decision in *Christie* v. *Christie* (1), that an agreement by a wife purporting to relieve her husband of his obligation to support her is an answer to a claim by her for maintenance, is bad. [Counsel referred to *Chantler* v. *Chantler* (2); *Male* v.

(1) 25 V.L.R., 97; 21 A.L.T., 43. (2) 4 C.L.R., 585.

Male (1); *Renton* v. *Renton* (2); *Weiler* v. *Weiler* (3); *R.* v. *Collins*; *Ex parte Collins* (4); *Usher* v. *Usher* (5); *Kennedy* v. *Kennedy* (6); *Balcombe* v. *Balcombe* (7); *Russ* v. *Carr* (8); *Ross* v. *Ross* (9); *Hallihan* v. *Hallihan* (10).] As the Chairman of General Sessions did not go into the merits, the case should go back to the Court of General Sessions. In *Coughlin* v. *Thompson* (11) it was held, on a case stated by a Court of General Sessions under sec. 139 of the *Justices Act* 1890 (see sec. 147 of the *Justices Act* 1915), that the Supreme Court has no jurisdiction to send the case back for rehearing. That case was wrongly decided. There is nothing in the section which prevents the case from being sent back.

Hayes, for the respondent. In the undertaking by the wife not to make any further claim on the husband there is an implied covenant to support herself and her child. The bringing of proceedings for maintenance is a breach of the undertaking not to molest the husband. Until set aside, the agreement for separation regulates the rights of the parties. An agreement between husband and wife by which the wife contracts herself out of the rights conferred by secs. 83 and 84 of the *Marriage Act* is not against public policy (*Christie* v. *Christie* (12); *Graham* v. *Graham* (13); *Dawkins* v. *Dawkins* (14)). No burden is cast upon the public if a wife makes such a contract. The provisions of the sections are merely for the benefit of the wife.

[HIGGINS J. referred to *Hunt* v. *Hunt* (15).]

Usher v. *Usher* (5) is distinguishable, for the separation agreement contained no covenant against molestation. The finding of the Chairman of General Sessions is in fact a finding that the wife had adequate means of support. The covenant not to molest is, until set aside, a bar to the wife taking these proceedings; if there is a breach of the agreement the wife has her remedy. (See *Fearon* v.

(1) (1912) V.L.R., 455; 34 A.L.T., 123.
(2) 25 C.L.R., 291.
(3) 25 C.L.R., 109.
(4) 7 V.L.R. (L.), 74; 2 A.L.T., 118.
(5) 27 V.L.R., 163; 22 A.L.T., 231.
(6) (1907) P., 49.
(7) (1908) P., 176.
(8) (1909) V.L.R., 78; 30 A.L.T., 131.
(9) (1909) V.L.R., 318; 30 A.L.T., 220.
(10) (1913) V.L.R., 443; 35 A.L.T., 70.
(11) (1913) V.L.R., 304; 35 A.L.T., 1.
(12) 25 V.L.R., 97; 21 A.L.T., 43.
(13) 25 V.L.R., 101; 21 A.L.T., 63.
(14) 8 A.L.R. (C.N.), 49.
(15) 31 L.J. Ch., 161, at p. 165.

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Earl of Aylesford (1).) As to the child, there must be something more than a failure to support. The husband must know that the child requires maintenance, and must have an opportunity of supporting it.

Ham, in reply, referred to *Dobson* v. *Sinclair* (2); *Ah Fan* v. *Sturt* (3); *R.* v. *Pilgrim* (4); *Henry* v. *Harper* (5); *Falconer* v. *Falconer* (6).

[HIGGINS J. referred to *Clunes United Co.* v. *Clunes Borough Council* (7).

[ISAACS J. referred to *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board* (8).]

Cur. adv. vult.

May 12.

The following judgments were read :—

ISAACS J. The question raised by this appeal is very short, but very important. It is whether a husband or a father can escape his statutory obligation of maintaining his wife or his children, by an agreement with his wife for any consideration which would in law support an ordinary contract. If he can, then a contract by deed between husband and wife, without any consideration whatever in fact, would have the effect of relieving the husband of his obligation both to the wife and to his infant children. And it was so argued on behalf of the respondent, the husband and father. In the Court of General Sessions and in the Supreme Court it was held that the respondent's argument was right.

The decisions up to the present may be briefly referred to. *Chantler* v. *Chantler* (9) shows that (1) a husband may leave his wife or children without means of support, even where he does not desert them in the ordinary sense, by merely leaving them in his house and making no provision for their maintenance; and (2) if without his consent the child is taken away from his home, where he is willing to support it, and he refuses to maintain it elsewhere, he cannot be said to leave it without means of support. The view

(1) 14 Q.B.D., 792.
(2) 8 V.L.R. (L.), 69; 3 A.L.T., 106.
(3) 2 V.L.R. (L.), 201.
(4) L.R. 6 Q.B., 89.
(5) 29 V.L.R., 667; 25 A.L.T., 228
(6) (1910) V.L.R., 489; 32 A.L.T., 100.
(7) 2 W. W. & aB. (L.), 96.
(8) (1912) A.C., 788.
(9) 4 C.L.R., 585.

first referred to has been reaffirmed by this Court in *Renton* v. *Renton* (1); *Weiler* v. *Weiler* (2). The strongest and the only direct authority in respondent's favour is *Christie* v. *Christie* (3), where *Madden* C.J. held that, where husband and wife enter into an agreement relieving the husband of the obligation of maintaining the wife, the jurisdiction of justices to make an order is abolished. A less direct authority is *Graham* v. *Graham* (4), where *Holroyd* J. held that a wife after obtaining an order of justices could release her husband from performing it. The learned Judge was greatly pressed by the argument that the agreement was invalid, but on the whole thought it was not, but his careful words are to be noticed (5): "As far as I can judge the deed was a good answer to the application of the wife; it was a good answer to the charge of disobedience of this *particular maintenance order*." His Honor was apparently carefully avoiding the affirmance of the doctrine in *Christie's Case*, and was leaving open the question of the wife's right to get a further order.

The point is whether the opinion of *Madden* C.J. in *Christie's Case* (3) was right. This depends on whether the enactment is one merely for the private benefit of the mother, or whether it is one of public policy for the benefit of the community.

There are two principles well known to the law, each represented by a maxim. The one which is invoked by the respondent is *Cuilibet licet renuntiare juri pro se introducto.* The other is *Privatorum conventio juri publico non derogat.* The latter principle is thus expressed by Lord *Watson*, speaking of the enactment in *Anctil* v. *Manufacturers' Life Insurance Co.* (6): "The rule of the Code appears to them" (their Lordships) "to be one which rests upon general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties." The principle was again referred to and applied in *Equitable Life Assurance Society of the United States* v. *Reed* (7), by Lord *Dunedin*, and was stated and applied in the judgment delivered by *Rich* J. for this Court in *Wirth* v. *Wirth* (8).

(1) 25 C.L.R., 291.
(2) 25 C.L.R., 109.
(3) 25 V.L.R., 97; 21 A.L.T., 43.
(4) 25 V.L.R., 101; 21 A.L.T., 63.
(5) 25 V.L.R., at p. 104.
(6) (1899) A.C., 604, at p. 609.
(7) (1914) A.C., 587, at p. 595.
(8) 25 C.L.R., 402.

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In my opinion it is impossible to read Part III. of the *Marriage Act* 1915 in any other light than that of an enactment of public policy. In the first place, it is part of the *Marriage Act* itself dealing with marriage, judicial separation and divorce. The Act as a whole concerns itself with a subject than which nothing is more vital to the preservation and well-being of society at large. The community is interested, not merely in the status and moral conduct of its married citizens, but also in the performance by them of the primary duties they owe to each other and to the children they bring into the world. It is important to all that the burdens which the individual undertakes in this regard shall not be thrown on the rest of the community so far as it is in the power of that individual to bear them personally. The general moral sense of obligation to aid the helpless in our midst is fittingly accompanied by seeing that that obligation is not unnecessarily increased by the failure of those whose primary duty it is to render that aid or to avoid the necessity of rendering it from arising. The course of legislation (1890, 1901 and 1913) shows the advancing legislative recognition of this principle. Part III. is the welding together of all this modern legislation, and its inartistic arrangement is the result of the method on which it has been built up. It is only by attentively reading and considering its provisions as a whole, and not only so, but by reading and considering them as part of a scheme contained in the whole Act—such as in relation to Part IV.,—that we can gather their true and full import. For instance, sec. 83 cannot be properly construed without reference to sec. 87, among other sections. When read with the whole context, sec. 83 means this:—It deals with a man's relation to (1) his wife and (2) his children, legitimate or illegitimate. As to both wife and children, it concerns itself with his having already deserted them or left them without adequate means of support. But as to a wife it uses the word "unlawfully," and whether this word applies not only to "desertion" but also to "leaving without adequate means of support" is immaterial. The meaning of the word "unlawfully" varies according to the context. Here, having regard to the context, especially the concluding words of sec. 87, it means without reasonable justification by reason of the wife's *conduct*. It does not, and cannot consistently

with the rest of the Part, include an agreement on her part to be left to starve. If there be a real and *bonâ fide* agreement to live apart, acted on, its effect is not to deprive desertion of unlawfulness, but to make desertion impossible until cohabitation is resumed (*Buckmaster* v. *Buckmaster* (1)), and even the husband's failure to perform his agreement does not amount to desertion (*Pape* v. *Pape* (2)). But the word " unlawfully " cannot mean that if there be reasonable cause for desertion or refusal of maintenance the jurisdiction of the justices is excluded. The final words of sec. 87 are opposed to that construction, for they provide that " if any reasonable cause is shown for such desertion or refusal of maintenance as aforesaid, the justices may in their discretion decline to make any order." But that necessarily implies a power, notwithstanding the reasonable cause—that is, notwithstanding the lawfulness of the act complained of—to make an order. Sec. 83, in short, as to the wife means, when it is read with secs. 84 and 87, that the justices, on complaint by or on behalf of a wife that she has been unjustifiably deserted or left without adequate means of support, and on proof that she is in fact without means of support and that her husband is able to maintain her or contribute to her maintenance, *shall* make a reasonable order, if they find she has not been in fault ; but, if the husband has had reasonable cause for his desertion or refusal, *may* weigh the circumstances, and, if they think fit, either make or decline to make the order. The mandatory word " *shall* " is used in sec. 84, which refers to *actual* desertion or refusal to maintain ; but in sec. 88, where the desertion or refusal is only *intended*, and where reasonable cause may possibly exist, the word " may " is used, and consequently there is no need for the discretionary qualification at the end of sec. 87.

It is unnecessary to analyse with particularity the various provisions of the Part in order to show their character of public policy. It is sufficient to say that their intent in this respect must be the same with respect to the wife as it is with respect to children ; that as to the children no question of " unlawfulness " occurs ; that the procedure indicates compulsion for public objects, as, for instance, warrant, imprisonment, hard labour, the use of the word " offender "

(1) L.R. 1 P. & M., 713. (2) 20 Q.B.D., 76.

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in sec. 91, the application of the penalty by sec. 92, the public maintenance of illegitimate children (sec. 95), and the provision for an indictable offence in secs. 97 and 98. It is a strong case for the application of the principle enforced by the Privy Council and this Court in the cases referred to.

An agreement of the wife, therefore, cannot be in itself a bar to the jurisdiction of the justices in any case. An agreement may, however, prevent "desertion" from arising at all, or it may in any case be evidence either of absence of unlawfulness or reasonable cause, or sufficiency of maintenance actually provided.

With regard to the child, the case is *à fortiori*. The difficulty is to see any standing ground whatever for the contention that the child should not be provided for. The only suggestion on behalf of the father is that he agreed with the wife three months before the child was born that she would not make any further claim on him "for maintenance or otherwise." It is said those words "or otherwise" have the magical effect of depriving the child of any right of sustenance by its father. That any person can, when contracting for himself alone, bind another, or, however purporting to contract, can bind contractually a person not yet in existence as to his independent rights, is a doctrine unknown to the common law of England. The case as to the child is not really arguable.

The jurisdiction of the justices in Petty Sessions, therefore, was not ousted either as to the wife or the child.

But sec. 93 of the Act enables the Court of General Sessions to deal with such an order of Petty Sessions. Some discussion took place on the meaning of the section, and I think it means this:—In ordinary cases coming within sec. 136 of the *Justices Act* 1915 an appeal is provided to General Sessions, but then the appeal is subject to conditions (sec. 137). And so also in any other case of appeal to General Sessions (sec. 138). But by sec. 139 a special power of appeal is given to General Sessions with respect to orders of justices under Parts III. and IV. of the *Marriage Act*. As to Part III. the order of the Petty Sessions may, "whether an appeal has been entered or not, be at any time quashed confirmed or varied or an order may be substituted therefor by a Court of General Sessions as provided in the said Act." Sec. 93 of the *Marriage Act*

repeats that. The object of that provision appears to be as follows :— In an ordinary case an appealable conviction or order is made in the presence of the party aggrieved, or on notice to him, which he disregards at his peril. If he desires a review of the order, conditions are prescribed, and one is that he must appeal in a certain time. But the special provisions of Parts III. and IV. of the *Marriage Act* necessarily include cases where the husband or father is absent and may know nothing of the proceedings for an indefinite time after the order is made. In fact the first he may know of it is when he is arrested. The Legislature therefore gives him, by sec. 139 of the *Justices Act* and sec. 93 of the *Marriage Act*, the right to ask a Court of General Sessions to review the matter in his presence, and without the formalities and conditions of ordinary appeals. Further, sec. 93 carefully provides for the event that even the Court of General Sessions may not be able to meet. For instance, a husband in gaol may be able to show so glaring a case of injustice that it should be remedied by his release *instanter*. And so the final words of sec. 93 expressly reserve the alternative procedure of application to the Governor in Council for release. Sec. 93, however, does not, in my opinion, mean that there is a constant supervisory control by the Court of General Sessions over the order.

In the present instance, the Court of General Sessions properly exercised the jurisdiction given by the section. The respondent after arrest applied to that Court to quash the order of Petty Sessions. But the order of General Sessions, though within its jurisdiction, being erroneous, the question arises as to the proper order to be now made. That depends on what order the Supreme Court ought to have made.

In *Coughlin* v. *Thompson* (1) it was held that, in dealing with a case under sec. 139 of the *Justices Act* 1890, the Supreme Court has no power to remit the case for rehearing to the Court of General Sessions, and it was decided that *Dobson* v. *Sinclair* (2) was right, and that *Russell* v. *Shire of Leigh* (3), so far as inconsistent with the view stated, was wrong. In *Russell's Case* the Court of General Sessions made a mistake not in its actual decision on the merits, but

(1) (1913) V.L.R., 304 ; 35 A.L.T., 1. (2) 8 V.L.R. (L.), 69 ; 3 A.L.T., 106.
(3) 5 V.L.R. (L.), 199 ; 1 A.L.T., 18.

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a mistake on the way. The error having been corrected by the Supreme Court, which had no power and no means of primarily deciding the merits, it ordered the case to be sent back to the Court of General Sessions, and that a continuance should be entered and the appeal proceeded with. In *Dobson* v. *Sinclair* the case was heard outright by the Court of General Sessions, and a wrong decision given. The Supreme Court having held the decision to be wrong and that the original conviction must be affirmed, there was nothing for the General Sessions to do.

There is an essential difference between sending a case back to be *heard* for the first time, and sending it back to be *reheard*. There is no inconsistency between *Russell's Case* (1) and *Dobson's Case* (2). Both are right. This case resembles *Russell's Case*. The Court of General Sessions erred on the way. The full consideration of the case was intercepted, and, the error being corrected, the law requires that the case be continued and proceeded with to its lawful conclusion.

The appeal should be allowed, and the case remitted to the Court of General Sessions with the opinion that the Chairman of General Sessions was not right in quashing the orders ; the case to be heard and determined consistently with this opinion. Respondent to pay the costs in the Supreme Court and in this Court.

[*Note.*—See *Follit* v. *Koetzow* (3) and *Griffiths* v. *Evans* (4). —*I.A.I.*]

HIGGINS J. In my opinion, the question which was asked by the learned Chairman of General Sessions ought to have been answered in the negative ; and the appeal should be allowed.

We are relieved of some difficulty in dealing with the matter so far as it involves procedure by Mr. *Hayes's* admission that the Chairman intended his order quashing the order of Petty Sessions to be subject to the determination of the Supreme Court on the case stated.

It is assumed on both sides that the so-called "appeal" to General Sessions is an "appeal" as to which a case may be stated

(1) 5 V.L.R (L.), 199 ; 1 A.L.T., 18.
(2) 8 V.L.R. (L.), 69 ; 3 A.L.T., 106.
(3) 2 E. & E., 730 ; 29 L.J. M.C., 128.
(4) 46 L.T., 417 ; 30 W.R., 427.

under sec. 147 of the *Justices Act*. It is also assumed that the Court of General Sessions has power to quash or vary an order of Petty Sessions by virtue of facts which have occurred since the order. According to sec. 185 of the *Justices Act* the Court of General Sessions corresponds to Quarter Sessions in England, and an appeal to Quarter Sessions is in the nature of a writ of error (*Dickinson's Quarter Sessions*, 6th ed., p. 614). The appellant may adduce fresh evidence, but not fresh grounds (*ibid.*, pp. 642, 907 (*u*)). But my decision is based on these assumptions, as the subject has not been argued. The material dates and facts are: 10th October 1911, separation deed signed by husband and wife; early in 1912, child born; March 1912, husband left for England and his payments under the deed ceased; October 1916, order of Petty Sessions for payment of maintenance, £12 per month for the wife, £4 per month for the child; December 1917, order of Petty Sessions served on husband; 18th December 1917, proceedings in County Court for instalments under deed as up to 2nd October 1916; 26th February 1918, notice of appeal to General Sessions; 8th March 1918, judgment of County Court for instalments £236; 26th April 1918, appeal allowed by General Sessions, the husband undertaking to observe the deed in future and consenting to the £236 being paid out of Court to the wife.

It will be noticed that the order of Petty Sessions was fully justified at the time that it was made. The justices were fully satisfied under sec. 84 of the *Marriage Act* that both wife and child were "*in fact* without means of support," whatever promises had been made by the husband in the deed; and it was the duty of the justices—they "*shall* make an order"—to order payment unless in the exercise of their discretion they found any "reasonable cause" for the refusal of maintenance (sec. 87). The deed of separation is not in itself an answer to the claim for maintenance of the wife; it cannot, as it were, be treated as affording a plea in bar; but if in fact the justices found that the provision made for the wife by the deed was adequate and was being carried out, they would be justified in finding that the wife was not left "in fact" without means of support. The learned Chairman, however, seems to have taken the view that as the deed of separation was in full force and

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the parties had made their own terms thereunder, the justices had no power to make the order ; and a case before the late Chief Justice of Victoria certainly favours this view (*Christie* v. *Christie* (1)). If and so far as that case lays down such a doctrine, I am unable to agree with it ; but in that case there had been no failure to carry out the provisions of the deed. It was held, in fact, in *Usher* v. *Usher* (2), that a deed of separation is no answer to the summons for maintenance if the husband has not in fact paid the allowance. The rights of wife and children to maintenance under secs. 83 *et seqq.* of the *Marriage Act* are not based on contract or dependent on contract between the parties : the rights are based on the interest of society that wife and children be supported by the husband and father and be not left without maintenance. It is a principle of the law that when a man marries he contracts an obligation to support his wife—that the wife is entitled to be supported according to the estate and condition of the husband (*Read* v. *Legard* (3)) ; and in England the *Vagrancy Act* (5 Geo. IV. c. 83, secs. 3 and 4) enabled the justices to enforce this obligation by committal to the house of correction. As Lord *Westbury* pointed out in *Hunt* v. *Hunt* (4), anyone is at liberty to renounce a right conferred by law for his own sole benefit ; but he cannot renounce a right conferred for the benefit of society. No husband, no father, can by contract with his wife relieve himself of his duty to the State, to the community, to maintain the wife. This is a duty which Parliament recognizes as higher than a mere monetary liability to the wife, for the Act enables the justices to require surety for the payment, and to commit the husband to gaol until the order has been obeyed (sec. 84), or if he afterwards fail to make any payments (sec. 91).

The position as to the order for maintenance of the child is still stronger. I assume that the deed of separation is valid, for the contrary has not been argued. But how can the contract of the wife affect the child's right to invoke the Act for maintenance? Even on its face, the contract in the deed is for one pound per week "for her" (the wife's) "maintenance" ; and the wife agrees to maintain herself—"maintain myself"—and to make no further

(1) 25 V.L.R., 97 ; 21 A.L.T., 43.
(2) 27 V.L.R., 163 ; 22 A.L.T., 231.
(3) 6 Ex., 636, at p. 642.
(4) 31 L.J. Ch., at p. 175.

claim. The right of the child—whether born or unborn at the time of the deed—cannot be bartered away by the mother. Esau, being adult, could bargain away his birthright, but not Esau's mother. (Compare also the English Poor Law, 43 Eliz. c. 2, sec. 7).

As matters stand now under the order of General Sessions, approved by the Supreme Court on case stated, neither child nor mother has any provision for future maintenance. The undertaking given by the husband to the Court of General Sessions to pay all future instalments accruing due cannot, so far as I can see, be enforced by General Sessions. Undertakings are enforced by process of contempt; but the Court of General Sessions has no power to punish for contempts except in the cases and the manner provided by sec. 192 of the *Justices Act* (per *Cussen* J. in *In re Dunn* (1)). In that case it was said that the Supreme Court, like the Court of Queen's Bench, has power to punish contempts of inferior Courts; but I hardly think that such a doctrine, though applicable to contempts having the nature of tampering with a juror or interfering with fair trial, can be applied to contempts in the nature of failure to observe an undertaking or promise made to the inferior Court.

In my opinion, the appeal should be allowed.

GAVAN DUFFY J. This is an appeal from an order of *Hodges* J. affirming the decision of the Chairman of the General Sessions at Melbourne sitting under the provisions of sec. 93 of the *Marriage Act* 1915.

The question for our determination is whether the learned Chairman was right in holding that the agreement made between David Davies and his wife Emma Amelia Davies precluded the making of two orders against the husband, one for maintenance of his wife and the other for maintenance of his child.

The case against the wife was put in various ways. First, it was said that a wife living apart from her husband and receiving an allowance from him under an agreement made between the spouses was not "unlawfully" left by him without means of support. In my opinion the word "unlawfully" in sec. 83 (*a*) of the *Marriage Act*

(1) (1906) V.L.R., 493; 28 A.L.T., 3.

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1915 qualifies the word "deserted" and not the word "left." This is a grammatical reading of the sub-section, and presents the law as it existed under the provisions of sec. 42 of the *Marriage Act* 1890, which is intended to be reproduced in sec. 83 of the *Marriage Act* 1915, and indeed as it has existed since the passing of 4 Vict. No. 5 in New South Wales in 1840. Next, it was said that in such circumstances the wife was not without means of support, and that the parties having by their agreement fixed the amount to be paid by the husband for the wife's maintenance, the justices were not at liberty under the provisions of Part III. of the *Marriage Act* 1915 to make an order for the payment of any further sum. This contention seems to me to be founded on a misconception of the duties of justices under the provisions of secs. 83 and 84. If complaint is made on oath that the husband has left his wife without means of support, a summons should issue under sec. 83. On the hearing of the complaint the justices under sec. 84 should not concern themselves with anything except the questions submitted for their decision by that section. It says that the justices present shall inquire into the matter of the complaint, and if they are satisfied that the wife is in fact without means of support, and that the husband is able to maintain her or to contribute to her maintenance shall make an order for the payment of such sum or allowance as they think proper. The justices must inquire whether the wife is in fact without sufficient means of support, although the husband may be already making payments for her maintenance. If such payments in fact furnish the wife with sufficient means of support the justices should make no order; if not, they should make an order for the payment of such further sum as they think proper unless the circumstances in their opinion justify the exercise of the discretion given them by sec. 87. Lastly, it was said that the agreement between husband and wife contained a stipulation that she should maintain herself by the moneys which her husband agreed to pay her and that she would make no further claim against him for maintenance or otherwise. In *Hunt* v. *Hunt* (1) Lord *Westbury* L.C. said:—"If it" (voluntary separation between husband and wife) "is not to be regarded as a civil offence, or an offence against

(1) 31 L.J. Ch., at p. 175.

society, then the power to institute a suit for the restitution of conjugal rights is nothing in the world more than a private remedy and a private right belonging to the husband. The general maxim applies, *Quilibet potest renunciare juri pro se introducto.* I beg attention to the words '*pro se*,' because they have been introduced into the maxim to show that no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of. But if this voluntary separation is a state of things which at the consent of the parties may be created, and created without offence, then it falls within the scope and ambit of the ordinary power of contracting, and there can be no difficulty upon principle or upon the ground of the policy of the law as to the validity of such a contract."

In the present case counsel for the husband argued that if voluntary separation is not regarded as an offence against society the spouses must be at liberty to adjust by agreement the terms and conditions of the separation. The answer to this argument is to be found in the judgment of my brother *Isaacs*, and it is this: The spouses are not at liberty to introduce into their agreement terms and conditions inconsistent with the provisions of Part III. of the *Marriage Act* 1915, because those provisions are not merely designed for the advantage of the individual wives, who may seek their protection, but also for the advantage of the public at large. Part III. is portion of a code enunciating a public policy with respect to the celebration and dissolution of marriages, and the obligations existing between the spouses, and between parents and their children; the proceedings to obtain a maintenance order need not be taken by the person to be maintained, but may be taken by any reputable person on her behalf, and the machinery provided for securing orders and the sanctions provided for their enforcement are such as are usually provided only in the case of duties and obligations owed to the community as distinguished from those owed to private individuals.

In my opinion the learned Chairman was wrong in holding that the agreement precluded him from making the inquiry prescribed by sec. 84, and if necessary making the order thereby authorized. For the reasons I have stated, I think that the learned Chairman

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was also wrong in holding that the agreement precluded the wife from enforcing the claim which she made on behalf of her child. I may add that, even if she could preclude herself from making a claim on behalf of her child, there is nothing in the agreement which can properly be read as doing so.

Appeal allowed. Case remitted to Court of General Sessions with the opinion of this Court that the Chairman of General Sessions was not right in quashing the order. Case to be heard and determined consistently with this opinion. Respondent to pay costs in the Supreme Court and in this Court.

Solicitors for the appellants, *Maddock, Jamieson & Lonie.*
Solicitor for the respondent, *M. V. O'Neill.*

B. L.

[HIGH COURT OF AUSTRALIA.]

VOCKLER . . . . . APPELLANT;

AND

KING AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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MELBOURNE, *June* 16.

Barton, Isaacs, Gavan Duffy and Rich JJ.

Gaming and Betting—Advertisement—Information as to horse-races—Intent to induce application to house—Betting-house—Gaming and Betting Act 1912 (*N.S.W.*) (*No.* 25 *of* 1912), *sec.* 47.

Sec. 47 of the *Gaming and Betting Act* 1912 (N.S.W.) provides (*inter alia*) that whosoever publishes or causes to be published any advertisement "(*b*) with intent to induce any person to apply to any house, office, room, or place,