[HIGH COURT OF AUSTRALIA.]

COOPER . . . . . APPELLANT;
DEFENDANT,

AND

COOPER . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1941.

MELBOURNE, *Mar.* 12; *June* 4.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Husband and Wife—Maintenance—Wilful neglect to provide reasonable maintenance for wife—Provision for maintenance in deed of separation—"Reasonable maintenance"—"Wilful neglect"—Married Women's Protection Act 1922 (*W.A.*) (*No.* 28), *secs.* 2*, 5*, 11*.

In 1937 a wife obtained an order of justices under the *Married Women's Protection Act* 1922 (W.A.) granting her a separation from her husband. At the request of the parties, no order for maintenance was made in those proceedings. They negotiated at arms' length, each being represented by a separate solicitor, and a maintenance deed was entered into. The husband at all times carried out the provisions of the deed. Subsequently the wife applied for summary protection under sec. 2 of the *Married Women's Protection Act*, alleging that her husband was guilty of wilful neglect to provide reasonable maintenance for her.

Held, by *Rich* A.C.J., *Starke* and *Williams* JJ. (*McTiernan* J. dissenting), that even if the provision made for the wife under the deed was less than a

* The *Married Women's Protection Act* 1922 (W.A.) provides as follows:—Sec. 2: "Any married woman whose husband during the preceding six months shall have been guilty of . . . (*d*) wilful neglect to provide reasonable maintenance for her or any of her children, may apply for summary protection under this Act and the same may be ordered accordingly." Sec. 5: "Any order for protection under this Act may . . . (*c*) direct the husband to pay to the applicant . . . such weekly or other periodical sum as the court shall, having regard to the means both of the husband and the wife, consider reasonable for the maintenance of herself." Sec. 11: "On proof, on any application under this Act, that the husband has omitted to supply reasonable maintenance wilful neglect shall be presumed, unless the husband shall prove the contrary."

court would consider reasonable, if it were making an order under sec. 5 of the Act for the maintenance of the wife, the evidence as a whole established that the husband was not guilty of wilful neglect to provide reasonable maintenance for his wife.

APPEAL from the Supreme Court of Western Australia.

In October 1937 Sarah Cooper obtained an order of justices under the *Married Women's Protection Act* 1922 (W.A.) whereby she was granted a separation from her husband, Reginald Frederick Cooper, and the custody of the child of the marriage. No order was made as to maintenance, but liberty to apply was reserved to both parties. On 22nd October 1937 the parties entered into a maintenance deed whereby the husband covenanted with the wife to pay her thirty shillings per week for the support and maintenance of the child and to pay for his clothing, education and medical expenses, and to pay her weekly sums by way of maintenance commencing at four pounds per week and increasing, over a period of twelve years, by gradual steps to eight pounds ten shillings per week. The deed further provided for a life estate to the wife with remainder to the child of the premises where they were living and for the transfer to her of the furniture and other effects in the premises. The terms of this deed are more fully set out in the judgments hereunder. The husband carried out the provisions of the deed.

On 4th June 1940 Sarah Cooper complained under the *Married Women's Protection Act* 1922 to a court of summary jurisdiction that her husband, Reginald Frederick Cooper, had been guilty of wilful neglect to provide reasonable maintenance for her on 3rd June 1940, and applied for summary protection.

The court found that the husband was guilty of wilful neglect to provide reasonable maintenance for his wife, and ordered him to pay the sum of fifteen pounds per week for her maintenance, future payments under the deed above mentioned to be deemed payments under the order. The husband appealed to the Full Court of Western Australia, which, by a majority (*Northmore* C.J. and *Wolff* J., *Dwyer* J. dissenting), dismissed the appeal.

From that decision the husband appealed to the High Court.

The facts relating to the means of the husband, and the needs and means of the wife, are set out in the judgments hereunder.

Reilly, for the appellant. Sec. 2 of the *Married Women's Protection Act* 1922 enables a wife to apply for summary protection, and sec. 5 gives power to order maintenance in appropriate cases. The deed entered into by the parties curtails the wife's rights under these

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sections. *Davies* v. *Davies* (1) is distinguishable, because the provisions of the *Maintenance Act* 1928 (Vict.) are different in terms from the *Married Women's Protection Act* 1922 (W.A.). The appellant was not guilty of wilful neglect to provide reasonable maintenance. The magistrate gave no reasons for giving more than the respondent was entitled to under the deed. At common law, the wife could only pledge the husband's credit according to the standard of living set up by the husband (*Harrison* v. *Grady* (2)). Under sec. 2 "reasonable maintenance" cannot exceed reasonable necessaries under the standards allowed at common law. Courts are to be guided by the same principles and practice as those on which alimony is awarded by the divorce courts (*Cobb* v. *Cobb* (3); *Stephenson* v. *Stephenson* (4)). "Reasonable maintenance" as used in sec. 5 has not the same meaning as the words appearing in sec. 2. The latter section intends that a wife shall not be allowed to be destitute. That is, it means reasonable maintenance having regard to the wife's means, and is equivalent to reasonable means of support under the Victorian Act (*Woods* v. *Woods* (5)). The cases do not determine any principle that the jurisdiction cannot be ousted (*Diggins* v. *Diggins* (6); *McCreanney* v. *McCreanney* (7); *Burton* v. *Burton* (8); *Iles* v. *Iles* (9)). There was no wilful neglect by the appellant (*Jones* v. *Jones* (10)). [He was stopped.]

R. D. Lane, for the respondent. The object of the *Married Women's Protection Act* 1922 is to afford an easily accessible and inexpensive remedy to the wife to obtain maintenance. The evidence showed that the respondent had not sufficient means to pay her debts, and, although the appellant knew this, he refused to pay any more than what he was paying under the deed. The court should have regard to the appellant's assets and income in arriving at what is a reasonable amount of maintenance for the wife (*Christie* v. *Christie* (11)). Where there is a deed, and it is alleged that it was induced by fraud, the court should have regard to that allegation and inquire into it. What is reasonable maintenance is defined by Lord *Merrivale* in *Gilbey* v. *Gilbey* (12)—See also *Kettlewell* v. *Kettlewell* (13); *Gardiner* v. *Gardiner* (14); *Browne* v. *Browne* (15); *Davies* v. *Davies* (1).

(1) (1919) 26 C.L.R. 348.
(2) (1865) 13 L.T. 369, at p. 370.
(3) (1900) P. 294.
(4) (1925) 133 L.T. 399.
(5) (1925) V.L.R. 258; 34 A.L.T. 104.
(6) (1927) P. 88.
(7) (1928) 138 L.T. 671.
(8) (1929) 142 L.T. 165.
(9) (1931) 145 L.T. 71.
(10) (1929) 142 L.T. 167.
(11) (1899) 25 V.L.R. 97, at p. 99; 21 A.L.T. 43.
(12) (1927) P. 197, at p. 200.
(13) (1898) P. 138.
(14) (1925) 25 S.R. (N.S.W.) 274; 42 W.N. 75.
(15) (1924) 24 S.R. (N.S.W.) 575; 41 W.N. 155.

Reilly, in reply. "Wilful neglect" implies the element of misconduct. The *Married Women's Protection Act* 1922 is only available for an offence within six months from date of complaint, and no public policy is involved as there is in the *Maintenance Act* 1928 (Vict.). *Matthews* v. *Matthews* (1) is distinguishable, because in that case the deed made no provision for maintenance, but for a lump sum only.

Cur. adv. vult.

June 4.

The following written judgments were delivered :—

RICH A.C.J. The judgment in this case was held up to enable the parties to negotiate with a view to a settlement. Unfortunately they have failed to agree.

The relevant facts are that in 1937 an order was made by the justices under sec. 5 (*a*) of the *Married Women's Protection Act* 1922 (W.A.), which had the effect of a decree of judicial separation (sec. 10). The order also gave the respondent the control of the son of the marriage (sec. 5). Subsequently the parties, through their legal advisers, negotiated about the amount of maintenance to be paid by the appellant. The result of these negotiations was the deed of 22nd October 1937, which provided for the maintenance of the son and also for the maintenance, by weekly payments on a sliding scale, of the respondent. The deed also provided that the appellant should as and from the date of his death charge his estate with such weekly payments, so that, should he predecease the respondent, such payments would continue until her decease. The deed further provided for a life estate to the respondent with remainder to the son in the premises where they were living and for the transfer to her of the furniture and other effects in these premises. On 4th June 1940 the respondent lodged a complaint under the Act already in statement that the appellant had been guilty of wilful neglect to provide reasonable maintenance for her. On the hearing of this complaint the justices made an order for the payment by the appellant of the sum of £15 per week for the maintenance of the respondent. An order nisi to review this decision was obtained, which on its return was discharged by the Supreme Court of Western Australia. This order is the subject of the appeal to this court.

The first ground of appeal—that the respondent had by her execution of the deed already mentioned waived her right to apply for maintenance under the Act or to apply for maintenance in excess of that provided by the deed—is untenable. An application under

(1) (1932) P. 103, at p. 106.

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the Act may be made at any time for maintenance or for the increase or diminution of any amount previously ordered or for the alteration, variation or discharge of any such order (secs. 5 and 12).

The crucial question for determination in this case is whether the appellant was guilty of wilful neglect in omitting to supply the respondent with reasonable maintenance. I find it difficult to predicate wilful neglect in view of the provisions made by the deed. The phrase connotes a deliberate and intentional act of a culpable nature. Now, some time after separation, the parties being at arms' length and the respondent being separately represented, negotiations were entered upon for the settlement of maintenance. In a letter dated 25th August 1937 the respondent's solicitor stipulated that the provision for maintenance should be for his client's life, and should increase in the event of substantial improvement in the financial position of the appellant. Clause 1 (*a*) of the deed was intended to meet these stipulations, and that clause together with the gift of the house and furniture apparently satisfied the respondent and her solicitor, and the deed was executed. In all the circumstances I consider that the facts prove that the appellant was not guilty of wilful neglect within the meaning of sec. 11 of the Act, and I agree with *Dwyer* J. in thinking that the facts did not warrant the order made by the justices.

During the course of the argument the appellant's counsel stated that his client intended to put the house referred to in the deed in thorough repair. That intention should, I think, be carried into effect.

The appeal should be allowed and the orders of the justices and of the Supreme Court except as to costs should be discharged. The circumstances justify this court in ordering the appellant to pay the costs of this appeal.

STARKE J. The *Married Women's Protection Act* 1922 of Western Australia provides (sec. 2) that any married woman whose husband during the preceding six months shall have been guilty (*inter alia*) of wilful neglect to provide reasonable maintenance for her or any of her children may apply for summary protection under the Act, and the same may be ordered accordingly. An order for protection under the Act (sec. 5) may direct the husband to pay to the applicant such weekly or other periodical sum as the court shall, having regard to the means both of the husband and the wife, consider reasonable for the maintenance of herself and also of all children (if any) whose custody is granted to her, such sum to be secured in such manner (if any) as may be directed by the court. And on proof on any

application under the Act (sec. 11) that the husband has omitted to supply reasonable maintenance, wilful neglect shall be presumed, unless the husband shall prove the contrary.

In June of 1940 Sarah Cooper complained to a court of summary jurisdiction having jurisdiction under the Act that her husband, Reginald Frederick Cooper, had been guilty of wilful neglect to provide reasonable maintenance for her on 3rd June 1940 and applied for summary protection. The complaint was heard in June and July 1940 before a court of summary jurisdiction, which found that R. F. Cooper, the husband, had been guilty of wilful neglect to provide reasonable maintenance for his wife on 3rd June 1940, and ordered that R. F. Cooper pay to the Clerk of Petty Sessions at Perth the sum of fifteen pounds per week for the maintenance of his wife, and that all future payments under a deed of maintenance dated 22nd October 1937 should be deemed payment under the order and be offset accordingly, the first payment under the order to be made on 5th July 1940, and in default of each instalment six days' imprisonment. R. F. Cooper was also ordered to pay £18 13s. costs, and in default of payment thirty days' imprisonment. On appeal to the Supreme Court of Western Australia this order was affirmed by a majority of the judges who heard the appeal. An appeal is now brought to this court from the judgment of the Supreme Court.

No objection has been taken to the competency or the regularity of the proceedings in the courts below. Consequently, all that falls for consideration is whether the wife proved that her husband had omitted to supply her with reasonable maintenance, and, if so, whether the husband proved that it was not due to wilful neglect on his part.

The evidence disclosed that in August of 1937 the wife lodged a complaint under the *Married Women's Protection Act* 1922, alleging desertion on the part of her husband and that the husband had consented to an order that his wife should live separate and apart from him and that she should have the legal custody of the child of the marriage. No order was made as to maintenance, but the parties were given liberty to apply, which gave the parties an opportunity of themselves coming to an agreement. In fact, they entered into the deed of maintenance dated 22nd October 1937 already mentioned. By the terms of this deed, the husband covenanted with his wife as follows :—(*a*) To pay the sum of thirty shillings per week clear of all deductions for the support and maintenance of the child of the marriage until he attained twenty-one years of age and after that age so long as he lived with the complainant

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and engaged in study. Further, the husband covenanted to pay for all the child's clothing, education, and medical expenses. (*b*) To pay certain weekly sums by way of maintenance which increased from four pounds per week to eight pounds ten shillings per week. The sums which the husband covenanted to pay, material to this case, are :—1. The sum of five pounds per week from 30th June 1939 to 30th June 1940. 2. The sum of five pounds ten shillings per week from 30th June 1940 to 30th June 1943. 3. The sum of six pounds ten shillings per week from 30th June 1943 to 30th June 1946. 4. The sum of seven pounds ten shillings per week from 30th June 1946 to 30th June 1949. 5. The sum of eight pounds ten shillings per week from 30th June 1949 and thereafter during the lifetime of his wife. And the husband also covenanted that as and from his death his estate should be charged with the payment of these weekly payments. Further, the husband assigned or agreed to assign to the wife for life, remainder to the child, certain property known as 32 Leura Street, free of encumbrances, and also gave over or agreed to give over and assign to his wife all his right, title and interest to the furniture and chattels contained in and about the premises known as 32 Leura Street.

About May of 1940 the wife, despite this deed, applied for maintenance under the order giving liberty to apply in the proceedings of August 1937, but the Supreme Court held that proceedings under that complaint were exhausted, but that the deed of October 1937 did not preclude the wife from taking fresh proceedings to obtain a maintenance order. Hence the complaint of June 1940.

The wife prior to her marriage was a nurse. The husband was a solicitor, but at the time of the complaint he had given up practice and was engaged in commercial ventures. The wife gave evidence and deposed in substance that she was not in good health, that she had not sufficient room in the house in Leura Street to keep a maid, and in any case the wages of such a maid would be thirty shillings per week and keep, which would cost one pound per week, that the house was in a poor locality and badly in need of repair, that the allowance to her was inadequate to maintain her and provide a comfortable home suitable to the station of life of herself and her husband, who, she said, was then a very wealthy man who owned motor cars and trotting horses. But the wife admitted that since June 1939 she was also in receipt of £3 per week in her own right from an estate known as the Molloy estate. The husband also gave evidence, directed mainly to his financial position, but I shall not traverse it in detail. It will be enough to state the magistrates' view of the evidence. " The defendant " (the husband) " admits on

his statement a net thirty pounds per week in excess of income over outgoings, and he also admits the earning capacity of the Rex Hotel as ten pounds per week, making a total absolutely net income of forty pounds per week that he should receive. That is £2,080 per annum. Now, adding to that the personal items shown in the statement of outgoings :—

Federal income tax	£678
State income tax	555
Financial emergency tax	246
Hospital fund tax	29
Reggie Cooper's maintenance ..	143
Life assurance	65
Half travelling expenses	52
Half donations	39
Medical expenses	104
Half telephone charges	39

that would make a total net income for the purposes of our deliberations of £4,030. If we add to that £156 per annum that Mrs. Cooper receives from the Molloy estate and £78, the annual value of her house and furniture, we get a total of £4,264." These are strange calculations. In estimating the income of the husband, regard should be had only to the disposable amount which remains in his hands after paying the expenses of earning it, including income and other taxes : See *Rayden and Mortimer* on *Divorce*, 3rd ed. (1932), p. 212. The magistrate, however, proceeded :—" But . . . we do not propose to restrict our finding to a proportionate amount of the total income. We have to get back to the Act, which says that the wife is entitled to a reasonable sum for maintenance : that is what we are concerned with. We have taken into consideration the fact that she had an income of three pounds per week from the Molloy estate and the house and thirty shillings as the maintenance for the boy, and we consider that the complainant is entitled to a further fifteen pounds a week from her husband inclusive of the moneys payable under the deed in order to maintain herself in the degree of comfort that we think she is entitled to and in order to discharge her obligations to her husband and her son by occupying a comfortable home in a suitable locality." That is, the wife should have £780 per annum and her house and the control of thirty shillings per week or £78 per annum for the maintenance of the son.

The evidence showed that the taxable income of the husband for the purposes of Federal income tax averaged about £4,000 per annum for the years 1936-1937, 1937-1938, and 1938-1939, but this

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does not give his disposable income. Federal income tax, which amounted to about £680 per annum, was payable by the husband, but he could not deduct it from his assessable income. Nor could he deduct the amounts payable for the maintenance of his wife and son under the deed of maintenance. And there were some other expenses, such as losses in connection with his racing transactions, which were disallowed as deductions for the purposes of taxation and yet might legitimately be considered for the purposes of ascertaining the husband's disposable income. Roughly, however, I should think that the husband's free or disposable income about the year 1939-1940 was in the neighbourhood of £3,000 per annum. His commercial ventures were somewhat speculative in their nature, such as the conduct of hotels, flats, farms ; his liabilities on mortgage were heavy, in the neighbourhood of £90,000, involving interest payments of some £4,600 per annum. Moreover, the existing war conditions were affecting the returns from his properties, and taxation was being so heavily increased that it was becoming confiscatory in character, especially on income from property. Taking these factors into consideration, I should think it unlikely that the husband's free or disposable income in and after the year 1940 would reach £2,000. The order of the magistrate gives the complainant £780 per annum for her maintenance, which is an increase on the provision of the deed of maintenance for the period from 30th June 1940 to 30th June 1943 of £494 per annum. It would reduce the estimate of the free and disposable income of the husband to about £1,500 per annum in times of great stress and anxiety.

Some English cases were referred to, which were decided under the *Summary Jurisdiction (Married Women) Acts* 1895-1925 (58 & 59 Vict. c. 39 ; 10 & 11 Geo. V. cc. 33, 63 ; 15 & 16 Geo. V. c. 51) ; for instance, *Cobb* v. *Cobb* (1) ; *Stephenson* v. *Stephenson* (2). No hard and fast rule exists under those Acts, and the allowance to the wife cannot in any case exceed two pounds per week : See 58 & 59 Vict. c. 39, sec. 5. It was said, however, that they apply the rule of the ecclesiastical courts in relation to alimony and maintenance to the Acts, but in view of the limitation of the allowance it was a very restricted and a very unsuitable application of the rule and quite inapplicable to the Act of Western Australia. It is safer to go back to the words of the *Married Women's Protection Act* 1922 itself, as did the magistrate in the present case.

Now, whatever amount this court might have considered reasonable for the maintenance of the wife, having regard to the means both of her husband and herself, still we have the concurrent findings

(1) (1900) P. 294.

(2) (1925) 133 L.T. 399.

of the magistrate and the majority of the learned judges of the Supreme Court that fifteen pounds per week was reasonable in all the circumstances of the case. In my opinion, this court ought not to interfere with that conclusion. It is reasonably open on the evidence; it is a conclusion which the magistrate and the learned judges, viewing the evidence reasonably, might properly reach.

But the question remains whether the husband did not affirmatively prove (sec. 11) that he was not guilty of wilful neglect in failing to provide reasonable maintenance for his wife. In my opinion "wilful neglect," for the purposes of the Act, is intentionally or purposely omitting to provide maintenance for his wife with knowledge that would indicate to any reasonable man who considered the matter that the omission would leave his wife without reasonable maintenance having regard to the means of both himself and his wife: See *In re Young and Harston's Contract* (1); *R.* v. *Downes* (2); *Bennett* v. *Stone* (3); *Adami* v. *Maison de Luxe Ltd.* (4); *Gould* v. *Mount Oxide Mines Ltd.* (*In Liquidation*) (5).

It is clear enough that the deed of maintenance was negotiated by the parties when at arms' length, and with competent advice on either side. There was some suggestion of misrepresentation before the magistrates, but they refused to entertain the suggestion. The husband under the deed agreed to pay and did pay maintenance to his wife upon a graduated but ascending scale. From June 1940 it was £286 per annum, but she also received £156 per annum, as the husband knew, from the Molloy estate, or an aggregate sum of £442 per annum. She had also been provided by the husband with a home in Leura Street. Moreover, the wife had the control of thirty shillings per week, which the husband provided for his son, and he also paid for his clothes, medical expenses, and maintenance, and says that he gave him one pound per month pocket money. There is nothing in the evidence which suggests that the husband knew that the wife was in need of money for herself or for the repair of her home. The wife's case was founded upon the suggestion that the husband's income had increased greatly since the deed of maintenance, that he was a wealthy man with an income of some £4,000 per annum, who could and should afford greater sums for her maintenance than provided by the deed. But the husband established, I think, that his free or disposable income was nothing like £4,000 per annum, indeed, as I have said before, it is unlikely that since the war his free and disposable income would reach £2,000 per annum.

(1) (1885) 31 Ch. D. 169, at p. 174.
(2) (1875) 1 Q.B.D. 25.
(3) (1903) 1 Ch. 509.
(4) (1924) 35 C.L.R. 143, at p. 150.
(5) (1916) 22 C.L.R. 490, at pp. 528, 529.

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It may be that the deed of maintenance does not absolve the husband from the duty imposed upon him by the *Married Women's Protection Act* 1922, but still in considering whether he has been guilty of wilful neglect it is a legitimate consideration that he and his wife had agreed, under the circumstances stated, upon the maintenance that should be paid to her. And it should not be ignored that his income, owing to the war, was falling rapidly, and that he had "terrific commitments to meet in taxation which fell due in May or June" for the financial year ended 30th June 1939. Any reasonable man might, in circumstances such as I have stated, have thought that a wife, with an income of £442 and a home, was provided with reasonable maintenance. In my opinion, the facts established in this case prove that the husband was not guilty of wilful neglect in his failure to provide reasonable maintenance for his wife. This aspect of the case does not appear to have greatly exercised the minds of the magistrate or the learned judges of the Supreme Court. I rather think that their decisions were based upon the statutory presumption rather than a critical examination of the question whether the husband had rebutted that presumption.

During the argument before this court, it was stated that the husband did not know that his wife's home was out of repair and that he was willing to improve it. May I express the hope that he will stand by this statement. Better still, I would suggest that the house be sold, if possible, and another acquired as a home for his wife and son more modern in arrangement and in a better and more suitable locality.

The appeal should be allowed, and the order of the Supreme Court, and also the order of the magistrate, discharged. The husband, I think, should bear the costs of his wife in all courts.

McTIERNAN J. The order which is called in question in this appeal was made against the appellant upon an application by his wife, the present respondent, for the relief described as summary protection in sec. 2 of the *Married Women's Protection Act* 1922 of Western Australia. That section provides that a wife may apply for such relief upon a number of grounds, including the ground that the applicant's husband is guilty of wilful neglect to provide reasonable maintenance for her. The respondent proceeded upon that ground, alleging that the appellant was guilty of such neglect on 3rd June 1940.

The matters which the court may deal with on an application for summary protection are separation, custody, and maintenance (sec. 5). The third part of this section says that the court may

direct the husband to pay to the applicant such weekly or other periodical sum as the court shall, having regard to the means both of the husband and the wife, consider reasonable for her maintenance. The order now in question deals only with maintenance. It directs the appellant to pay fifteen pounds per week for the maintenance of the respondent, and contains a condition that all future payments made under a deed of maintenance entered into between the parties on 22nd October 1937 are to be deemed payments under the order and to be offset accordingly.

When the proceedings began in which this order was made there were in force orders for separation and the custody of the only child of the marriage, a son, who when these orders were made in October 1937 was thirteen years of age. No order for maintenance was then made, but very shortly afterwards the parties entered into the deed of maintenance mentioned in the present order. The deed recites the orders for maintenance and custody, and contains covenants by the appellant to pay sums of money for the maintenance of the child and the respondent. He covenanted to pay one pound ten shillings per week during the minority of the child for his support and maintenance as long as he lived with the respondent, and in addition to pay for his education, clothing and any medical attention he received. The deed contains provisions for the maintenance of the respondent, beginning at the rate of four pounds per week and increasing year by year to eight pounds ten shillings per week, at which rate it was expressed to be payable from 30th June 1949 until the respondent's death. The payment of the maintenance was charged on the applicant's estate from the date of his death if he predeceased the respondent. The deed also gave the respondent a life interest in the cottage in which the parties lived before the appellant left the respondent, and the furniture in that house. There was a covenant on her part that she would keep him indemnified against all liabilities in respect of her maintenance, and from all claims and demands on account thereof. On 4th June, when the order which is the subject of this appeal was made, the sum of five pounds per week was payable to the respondent for her maintenance under the deed, and from 30th June 1940 until the end of the following year the rate at which the maintenance was payable was five pounds ten shillings per week.

The respondent became dissatisfied with the provision made for her maintenance. She claimed that it was inadequate for her needs, which were increased by sickness, and that the cottage was not a suitable home for herself and her son. The respondent also alleged that the appellant had misrepresented his financial position

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when the terms of the deed were being discussed. The justices held that this allegation could not be gone into. If it were shown that the respondent was induced to take less than was adequate for her needs by a false representation that the appellant could not afford to pay more, that would, in my opinion, be relevant to the case whether he wilfully neglected to provide reasonable maintenance.

Two issues arose for decision: first, whether the appellant had provided reasonable maintenance for the respondent; and, secondly, if he had not done so, whether the omission amounted to wilful neglect. The appellant relies upon the deed and his performance of it for a finding in his favour on these issues. He also relies upon it as a bar to the jurisdiction of the justices to deal with the respondent's application upon which the order, the subject of this appeal, was made. In my opinion there is no substance in this objection. There is nothing in the present Act or the deed enabling any distinction to be drawn which would exclude the principles applied in *Davies* v. *Davies* (1)—See also *Bakewell* v. *Bakewell* (2); *Iles* v. *Iles* (3). A fresh discussion of those principles is not necessary for the purposes of this case. Moreover, the observations of Lord *Merrivale* in *Matthews* v. *Matthews* (4) are in point:—" As to the first point, the language of the Act of Parliament supplies the test. The question before the magistrate was not whether this was an agreement which would be good at common law between independent parties and would exclude subsequent proceedings. What he had to determine was whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife, and in order to determine that he had, of course, to look at what had taken place between the parties, and to look at the agreement and to see what the husband had done and was doing, but he still had to determine judicially whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife. That depended on two things: First, whether he had failed to maintain her; secondly, whether he had done it wilfully. The magistrate took the view that although the husband had made a composition with his creditors and was living under the shelter of his father's protection, he was wilfully neglecting to provide some maintenance for his wife, and the magistrate found what sum he could certainly provide. I will come to that again in a moment. The learned magistrate in my judgment applied his mind to the right question and gave to the agreement between the parties its proper value, which was evidential value and

(1) (1919) 26 C.L.R. 348.
(2) (1928) 28 S.R. (N.S.W.) 94, at p. 103.
(3) (1931) 145 L.T. 71.
(4) (1932) P., at pp. 106, 107.

not value by way of estoppel, and giving the proper effect to the agreement, that is, coming to the conclusion that it left it open to him to determine the question in the case and did not exclude the jurisdiction of the court, he considered the husband's position."

Another ground of attack is that there was a mistrial of the issues in the case. The irregularity suggested is that the justices misapplied the provisions of the Act by considering evidence tending to prove what were the husband's means in adjudicating upon the issue whether the maintenance, which in fact the respondent was receiving, was reasonable. It would, in my opinion, be difficult to imagine evidence that would be of greater assistance to the justices in reaching a right conclusion on that issue. The objection taken to the evidence postulates an equality of condition among wives that has no reality in the social system in relation to which the Act was passed. The Act provides no support for this objection. The duty which the Act enforces against a husband is to provide his wife with reasonable maintenance. It is not limited to bare necessaries.

Sec. 11 provides that on proof on any application under the Act that the husband has omitted to supply reasonable maintenance wilful neglect shall be presumed, unless the husband shall prove the contrary. The order is attacked on the ground that this initial onus was not discharged. The evidence on this issue consisted of two parts: one relating to the wife's needs: the other tending to prove the means and position of the appellant. The evidence proved that the parties had been married for many years, the only child, a boy, being sixteen years of age at the time proceedings began. He attended a secondary school in Perth and resided with the respondent in the cottage provided for her under the deed. Since the deed was entered into the respondent had fallen into ill health. She was suffering from a disease of the heart and gall stones. In consequence, she was able to go out of doors but infrequently, and had not been able to take a holiday for over two years. No domestic servant was engaged to assist her, although when the respondent was too ill to go about she hired casual help. But there was no bedroom available in the cottage for a domestic servant. She estimated that the wages and cost of maintaining a servant in the house would be two pounds ten shillings per week. The respondent attended to her son, and incurred miscellaneous expenses on his behalf not provided for in the fixed category in the deed. Her sickness involved her in substantial weekly payments for medicines. Because of her state of health, the respondent could not travel to the city by the public conveyances without taking someone with her in case she

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collapsed. When she desired to attend church, which was a mile distant from the house, she was under the necessity of walking, because of the absence of any means of transportation. The evidence which the respondent gave about the appellant's means and position was that he was a solicitor conducting an office proper to the practice of his profession in Perth. He owned two motor cars, which the respondent said were "a Packard and the other a beautiful red car, a sedan." His pastimes were motoring and horse-racing. He had three trotting horses that he bought in New Zealand and took to Perth together with a trainer. Before the parties separated, the respondent said, "we went to everything." The appellant had been patron of the Hunt Club. In addition to the sum of five pounds per week, which the appellant was paying the respondent at the time of the proceedings, it has been observed that he provided her with the cottage and furniture referred to in the deed. It contained a lounge, dressing room and one bedroom. At the back, adjoining the wash-house, there was a room six feet by nine feet in which the son slept. The space between his bed and the dressing table was two feet six inches. The walls of the cottage were cracked, and, generally, it was in a bad state of repair. The bath was made of cement, and the bath heater was burnt out. The smoke from the fire in the wash-house filled that room and filtered into the son's bedroom. The valuation put on the cottage was £680. The respondent paid the rates and taxes. The rental value given by witnesses varied from seventeen shillings per week to twenty-seven shillings and sixpence per week. It was stated that if it were let the tenant would be a man earning four pounds to five pounds per week, that is, approximately, the basic or lowest wage level. Since the execution of the deed the respondent has become entitled to an annuity equivalent to three pounds per week under the will of her husband's grandfather. It is plain that her reasonable needs included not only what she required to live on, but help in the household, means to enable her to hire transport when reasonably necessary, and a more suitable house. These needs could not be met out of the money she was receiving under the deed. It was quite uncertain what was the net return that she would derive from the cottage if it were let. It needed substantial repairs. The evidence disclosed that since the complaint was issued the appellant offered to assist the respondent financially, but she refused the offer. There was ample justification for the finding by the justices that the maintenance provided by the appellant for his wife was not reasonable. Indeed, they stated in the course of their finding—and the statement was not attacked—that "it has not been disputed that the respondent is

unable to make ends meet." The result was that the onus of proving that the appellant was not guilty of wilful neglect to provide the respondent with reasonable maintenance fell upon the appellant (sec. 11).

The next question for consideration is whether, upon the whole of the evidence, the justices were in error in finding that the onus was not discharged. The question then arises, What is the meaning of the term "wilful neglect" in sec. 2 of the Act? The word "neglect" in this section describes the omission by a husband to fulfil his duty to provide reasonable maintenance for his wife. He may fail in his duty either by omitting to provide his wife with any maintenance or by providing her with an amount of maintenance which is less than a reasonable amount. In the former case, if, being in a position to pay maintenance, he chooses not to provide it, his neglect is clearly wilful. In the second case, if he is able to provide the reasonable amount of maintenance and chooses not to provide her with that amount, he is also guilty of wilful neglect. It should be observed that sec. 7 of the Act provides that no order shall be made on the application of a married woman if it shall be proved among other things that she is of drunken habits or has committed adultery. But there was no such suggestion in this case, or that the conduct of the respondent was not at all times above reproach. The question arose in *R.* v. *Downes* (1) whether a parent should be convicted under sec. 37 of Act 31 & 32 Vict. c. 122 of the offence of wilfully neglecting to provide medical aid for his child to the detriment of his health. Lord *Coleridge* said: "By wilful neglecting, I understand an intentional and deliberate abstaining from providing the medical aid, knowing it to be obtainable" (2). *Bramwell* B. said: "But the statute imposes an absolute duty upon parents whatever their conscientious scruples may be. The prisoner, therefore, wilfully —not maliciously—but intentionally, disobeyed the law" (3). In *In re Young and Harston's Contract* (4) *Bowen* L.J. said: "That" (meaning wilful) "is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." There can be no question here but that

(1) (1875) 1 Q.B.D. 25.
(2) (1875) 1 Q.B.D., at p. 30.
(3) (1875) 1 Q.B.D., at p. 30.
(4) (1885) 31 Ch. D., at pp. 174, 175.

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the appellant intentionally refused to pay more by way of maintenance than the inadequate amount which the respondent received from him under the deed at the time the proceedings began. The fact that he entered into the deed and paid her such amounts in performance of the covenant thereunder is not in itself sufficient to exculpate him from the charge of wilful misconduct (*Matthews* v. *Matthews* (1)). As she was presently in need of a larger provision than he was paying to her, the fact that the deed operated during his life and charged the appellant's estate with the payment of maintenance after his death did not disentitle her to enforce her statutory right to obtain an order for the payment of a reasonable amount of maintenance. In the course of his evidence the appellant did not combat the respondent's evidence as to her needs and her inability to meet them with the means at her disposal. His evidence was devoted to showing that his financial position was such that he could not provide more than she was receiving under the deed. But his evidence affords no ground for saying that his refusal to pay more was not intentional and deliberate. It really proves that his refusal to do so was wilful. The evidence showed that the appellant's taxable income, according to his Federal assessment notice, for the year ending 30/6/1939 was £3,998. This income was arrived at after the deduction of £555 for State taxation. The amount of the Federal tax was £678. His net income for that financial year, therefore, after deducting taxation, was £3,177. In the course of his evidence the appellant gave particulars of the properties which he owned and of his current income and outgoings. From this evidence it appeared that he owned valuable properties, including at least three hotels, rent-producing buildings in the city of Perth, and farming lands. He admitted that his gross weekly income was £194, and produced a statement of outgoings amounting to £164 per week. This evidence related to the current year. It is evident that he was at pains to bring into his expenditure every possible item to present a conservative estimate of his income. But taking up his evidence at its face value there is a surplus of thirty pounds per week. To this sum, however, there is to be added the sum of ten pounds per week, the profit which, on his own admission, he expected to derive from the Rex Hotel, but which was omitted from his statement of his weekly income. There is thus an admitted surplus of £40 per week, out of which he was paying to the respondent the sum of £5 per week. It was not shown that for any reason he was prevented from paying such part of the surplus as would increase the maintenance which he was giving his wife to a reasonable amount.

(1) (1932) P., at p. 106.

The evidence failed to rebut the presumption which was raised against him by sec. 11. The justices were, in my opinion, justified by the evidence in finding that the respondent had established her complaint that the appellant was guilty of wilful neglect to provide her with reasonable maintenance.

The next and final objection which is made to the order the subject of this appeal is that the sum ordered to be paid was excessive, having regard to the provisions of sec. 5 (*c*) of the Act. These provisions do not prohibit the justices from awarding maintenance in excess of any specified amount. In that respect they are unlike the corresponding provisions of the English Act: See *Summary Jurisdiction* (*Married Women*) *Act* 1895. These provisions prescribe a maximum of two pounds per week. Like a summary order made under the English Act an order under the Western-Australian Act has while in force the effect in all respects of a judicial separation (*Married Women's Protection Act*, sec. 10). In *Cobb* v. *Cobb* (1) Sir *F. H. Jeune* considered the principles upon which maintenance should be assessed under the English legislation. The President said :—" I do not wish to lay down any hard and fast rule ; but I think those courts " (courts of summary jurisdiction) " may be well content to deal with questions of allowance on the principles, which, though not applied with absolute rigidity in this Division, are nevertheless generally recognized and accepted here as a practical guide in cases of judicial separation, the rule being that where there are no children of the marriage or where, if there are children, the wife has not to support them, she, if she has no means of her own, shall be allotted one-third of the husband's net income, or, if she has means apart from her husband, then her income is to be made up to one-third of the joint incomes. I do not mean this to be taken as a hard and fast rule " (2). The removal of the prohibition against awarding more than two pounds per week permits of the application by the justices, even in the case where the combined income of the parties is large, of the principles which apply in assessing maintenance in the case of judicial separation. In the case of *Stephenson* v. *Stephenson* (3) the principles which should govern the assessment of maintenance in the courts of summary jurisdiction were again explained. In that case the court refused to set aside an order of the justices awarding the maximum allotment of two pounds per week. It appeared that the wife, who was employed intermittently, had earned over £100 in the year before the order was made, and that the husband's weekly earnings

(1) (1900) P. 294.
(2) (1900) P., at p. 295.
(3) (1925) 133 L.T. 399.

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were £5 3s. 10d. Lord *Merrivale* made these observations:— "Regard must be had to two facts regarding that decision," (*Cobb* v. *Cobb* (1)) "namely (1) that the court was careful to point out that it does not lay down a hard and fast rule and (2) that the rules with regard to alimony and maintenance applied by the ecclesiastical courts were brought into operation with regard to persons of fixed incomes and usually of some wealth, and the court apportioned that income and that wealth in ordinary cases so as to provide one-third of the joint incomes for the maintenance of the wife. But the ecclesiastical courts never held themselves bound by hard and fast rules. The position of the parties and the circumstances were borne in mind and cases of departure from the ordinary rule not infrequently occurred. What we have to decide in this case is whether the justices have made an award in such a way that it is demonstrated that they have exercised no judicial discretion. For my part I am not able to say any such thing having regard to the precarious nature of the wife's employment, to the possible effect on it of the husband's desertion and to the admission by the husband that he was able to provide an allowance of £2 10s. a week if he chose. In this exceptional case I think there were grounds on which the justices in the exercise of a judicial discretion might have made the order which is appealed from (2)."

In the present case the justices expressly said that the award of maintenance which they made was not based on a particular portion of the combined income. They found that the appellant's net income amounted to forty pounds per week. They also computed his gross annual income without deducting the outgoings of which he gave particulars or the amounts which he was liable to pay for Federal, State and other taxes. The gross income was computed at £4,030. The justices observed that if they took the amount of the appellant's means at that figure, and added to it the respondent's income, the combined income would be £4,264 and one-third of this sum would be £1,420, that is to say, at least twenty-seven pounds per week. For the purposes of this calculation they took the respondent's income as consisting of her annuity of three pounds per week and seventy-eight pounds, at which they determined the annual rental of the cottage. It is not to be supposed that the justices considered that the gross income of £4,020, which they stated was computed without any deduction for taxation, (the particulars of which are given) was the basis of their assessment. I cannot see any ground for attributing to the justices the error of supposing that the appellant should have at his disposal for the

(1) (1900) P. 294.

(2) (1925) 133 L.T., at p. 400.

support of his wife and himself the moneys which they said he was bound to pay for taxation. After saying that the combined gross income was £4,264, and that one-third of that sum was £1,420, the justices said, and it seems to me that this is their definitive statement: "We do not propose to restrict our finding to a proportionate amount of the total income." By the total income it is evident that they meant the total net income of the appellant and respondent, because the sum awarded, namely, fifteen pounds per week, was a sum somewhat in excess of one-third of the total net income. The sum of fifteen pounds was very much less than one-third of the combined gross incomes. The justices added:—"We have to get back to the Act, which says the wife is entitled to a reasonable sum for maintenance. That is what we are concerned with. We have taken into consideration the fact that she has an income of three pounds per week from the Molloy estate and the house, one pound ten shillings as the maintenance of the boy, and we consider that the complainant is entitled to a further fifteen pounds a week from her husband, inclusive of the moneys payable under the deed, in order to maintain herself in the degree of comfort that we think she is entitled to, and in order to discharge her obligations to her husband and to her son by occupying a comfortable home in a suitable locality."

There is nothing in the reasons of the justices which shows that they erred in the exercise of their discretion, nor is the amount of maintenance, having regard to the combined net incomes, so excessive as to lead to the conclusion that the justices did so err in assessing it or that it is unreasonable.

The appeal should, in my opinion, be dismissed with costs.

WILLIAMS J. The appellant, who is the husband of the respondent, has appealed to this court against an order for maintenance made against him in her favour by justices under the *Married Women's Protection Act* 1922 (W.A.) on 4th July 1940, and confirmed on appeal by a majority of the Supreme Court of Western Australia on 11th November 1940.

The appellant deserted his wife in 1937. In October of that year an order of the justices was made under sec. 5 (*a*) and (*b*) of the Act relieving her from any obligation to cohabit with him, and granting to her the legal custody of the one child of the marriage, then aged thirteen years. As the parties were negotiating with respect to the amount of maintenance to be paid to the respondent, no order was made under sec. 5 (*c*), but liberty to apply was reserved. On 22nd October 1937 they entered into a deed which provided a home

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and maintenance for the respondent and the child, the relevant details of which are set out in the judgment of my brother *Starke*.

On 4th June 1940 the respondent filed a complaint under the Act, sec. 2 (*d*), alleging wilful neglect to provide her with reasonable maintenance during the preceding six months. On that complaint the justices made the order already mentioned. It directed the appellant to pay fifteen pounds per week from 5th July for her maintenance, all future payments under the deed to be deemed to be payments under the order and to be offset accordingly. At the date of the complaint, the respondent had become entitled to an annuity of three pounds per week during her life out of the estate of the appellant's grandfather, in addition to the allowance of five pounds per week under the deed, which automatically increased to five pounds ten shillings per week on 1st July. The house in Hollywood in which she has the life estate requires the expenditure of about £50 to place it in good repair. No request has, however, been made to the appellant to carry out such repairs.

In my opinion the mere existence of the deed would not be a bar to the respondent making the complaint. It does not contain any express covenant not to do so. Even if it did, the Act is one to which the maxim *privatorum conventio juri publico non derogat* would apply (*Davies* v. *Davies* (1); *Hyman* v. *Hyman* (2); *Matthews* v. *Matthews* (3)). The Western-Australian Act is based upon the English *Summary Jurisdiction (Married Women) Act* 1895-1925, so that the last-mentioned case is directly in point.

Sec. 11 of the former Act provides that, on proof that the husband has omitted to supply reasonable maintenance, wilful neglect shall be presumed unless the husband shall prove to the contrary. The initial onus was therefore on the respondent to prove that the appellant during the relevant period omitted to do so. The onus then shifted to the appellant to establish he had not been guilty of wilful neglect. In England the burden of proving wilful neglect is on the applicant, but cases are seldom decided by the failure of one party to discharge the onus, as it is usually possible for the court, on the whole evidence, to decide a question of fact affirmatively.

In deciding whether the husband has omitted to provide reasonable maintenance for his wife within the meaning of sec. 11, the means of both the husband and the wife constitute one of the circumstances which should be taken into account; but the mere fact that the amount the husband is allowing his wife at the moment is less than the court would itself consider reasonable, if it was

(1) (1919) 26 C.L.R. 348. (2) (1929) A.C. 601.
(3) (1932) P. 103.

making an order under sec. 5 (*c*), does not establish an omission to supply reasonable maintenance under sec. 11, where there are other relevant circumstances.

There is no fixed rule which determines what is reasonable maintenance. In *Cobb* v. *Cobb* (1) the court held the amount should be fixed in accordance with the ordinary practice of the Divorce Court, under which the wife is allowed one-third of the joint income. The joint income in the present case was about £43, and the respondent was allowed about forty-two per cent. But this practice is not inflexible; and in *Gilbey* v. *Gilbey* (2), where an allowance was fixed for the wife of a wealthy man for her life, the test applied was whether the proposed maintenance would have been an adequate portion if the petitioner had become the widow of the respondent.

It is only the disposable income of the husband, after meeting all his liabilities for taxes, which should be considered (*Sherwood* v. *Sherwood* (3)).

The justices did not adopt this method of calculating the appellant's disposable income; and neither they nor the Full Court appear to have paid any attention to the value to the respondent of the provision for her life. But, as Lord *Merrivale* pointed out in *Gilbey* v. *Gilbey* (4), this is an important matter to be taken into consideration: See also *Maidlow* v. *Maidlow* (5).

Substantial reasons therefore exist for attacking the finding that the appellant had omitted to supply reasonable maintenance; but it is unnecessary to pursue this question further because, taking that finding into consideration, I am of the opinion that the evidence as a whole proves that the appellant was not guilty of wilful neglect to maintain his wife.

The meaning of wilful neglect has been considered in cases decided under the English Act. In *Jones* v. *Jones* (6) Lord *Merrivale* said that the husband "must have been guilty of that wilful neglect to maintain that was misconduct to justify such an order." In *Weatherley* v. *Weatherley* (7) he said that "what seems requisite before a husband can be found guilty of a wilful breach of his duty to maintain his wife, is that there must be a refusal to maintain, which has no explanation reasonable in common sense and good faith." These definitions agree in substance with the meaning attributed to the words "wilful neglect and default" in cases relating to alleged breaches of duties by directors and auditors of

(1) (1900) P. 294.
(2) (1927) P. 197.
(3) (1929) P. 120.
(4) (1927) P., at p. 201.
(5) (1914) P. 245, at p. 249.
(6) (1929) 142 L.T., at p. 169.
(7) (1929) 142 L.T., at p. 165.

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companies and by trustees (*Gould* v. *Mount Oxide Mines Ltd. (In Liquidation)* (1); *In re City Equitable Fire Insurance Co. Ltd.* (2); *In re Munton*; *Munton* v. *West* (3); *In re Vickery*; *Vickery* v. *Stephens* (4); *Dalrymple* v. *Melville* (5)). These authorities show that wilful neglect imports an intention to act or omit to act in a way which the person charged knows, or ought if he is not recklessly careless to have known, will amount to a breach of duty.

Having regard to the provisions of secs. 2 (*d*), 5 (*c*) and 11 of the Act the present question is whether the evidence establishes that the appellant was not guilty of such a breach of duty, in that it shows that there was no such intentional omission on his part to provide reasonable maintenance for his wife.

In the case of contracts in restraint of trade, made between parties at arms' length, the court is slow to hold a restriction, which they themselves have agreed upon, to be unreasonable. It considers the parties are usually the best judges of what is reasonable (*English Hop Growers Ltd.* v. *Dering* (6); *Vancouver Malt and Sake Brewing Co.* v. *Vancouver Breweries Ltd.* (7)).

In *Diggins* v. *Diggins* (8) Lord *Merrivale* said:—"It must not be supposed that there is an unlimited right in a wife under the amended statute, wherever she has entered into a deed, at her volition to proceed to the justices to get the terms of the deed reviewed. That would be contrary to good sense, and I do not doubt, if any case arise where a wife who has entered into a deed proceeds in disregard of it to seek something different from the justices, that she will meet with an answer which will prevent the possibility of further question. If she does not meet with it at first instance, she may meet with it here."

The court, therefore, should be very slow to interfere where the parties have agreed upon the maintenance to be paid by the husband to the wife. Indeed, I have not been able to find any case under the Act of 1895 in which the justices have made an order where a deed existed providing for current payments which the husband was making (*Dewe* v. *Dewe*; *Snowdon* v. *Snowdon* (9); *McCreanney* v. *McCreanney* (10); *Iles* v. *Iles* (11)). So, too, an order under the *Vagrancy Act* 1824 may be made in England in favour of the wife where there is an existing order under the Act of 1895, but only

(1) (1916) 22 C.L.R. 490.
(2) (1925) Ch. 407.
(3) (1927) 1 Ch. 262.
(4) (1931) 1 Ch. 572.
(5) (1932) 32 S.R. (N.S.W.) 596; 49 W.N. 206.
(6) (1928) 2 K.B. 174, at p. 181.
(7) (1934) A.C. 181, at p. 189.
(8) (1927) P., at p. 92.
(9) (1928) P. 113.
(10) (1928) 138 L.T. 671.
(11) (1931) 145 L.T. 71.

where it has not been complied with (*Shaftesbury Union* v. *Brockway* (1); *Birmingham Union* v. *Timmins* (2); *Batty* v. *Lee* (3)).

The best test to determine what is reasonable maintenance is what the parties themselves consider to be adequate.

No order was made under sec. 5 (*c*) in 1937, at the request of the parties. They then negotiated at arms' length, each being represented by a separate solicitor. The result was the deed of October 1937. It was obviously intended to fix the respondent's maintenance for all time. Even if the appellant's income was subsequently decreased by a falling off in his business or by increased taxation, he would still be bound to pay the weekly sum agreed upon. Although any income derived from personal exertion would cease upon his death, her rights against his estate would continue unabated. No order made by the justices could extend beyond this date, so that it was a great benefit to her to obtain covenants to endure during her life, instead of having to rely on the success of an application to some court under some *Testator's Family Maintenance Act*, if she survived him. An order under such an Act could only operate on property owned by the appellant at the date of his death, so that if he chose to settle all his property in his lifetime his estate would be beyond the reach of the court; or he could remove himself and his assets to some country where there was no such Act. The deed would also operate although the respondent remarried after his death, whereas an order under such an Act would almost certainly be confined to her widowhood. The position therefore was that, at the date the complaint was lodged, the widow was in receipt of substantial and increasing benefits under the deed which should have been sufficient, especially having regard to her own means, to have afforded her reasonable maintenance according to the scale of living she seems to have enjoyed after her marriage. The appellant was making the payments for which he was liable thereunder regularly, and providing for the maintenance of his son. The respondent has a weak heart, but she is not incapacitated. Her health appears to be about the same as it was at the date of the deed. Her substantial complaint is that she ought to have a home in a better locality and be able to employ a permanent housekeeper and have a car. The respondent can let the home. Its rental value is thirty-five shillings a week. Allowing five shillings a week for outgoings, she would then have a net income of ten pounds a week for herself, which should be ample to enable her to live in reasonable comfort, if she desires to give up housekeeping and obtain that rest

(1) (1913) 1 K.B. 159. (2) (1918) 2 K.B. 189.
(3) (1938) 159 L.T. 575.

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and change of air which she says is necessary for her health. It may be that, if the respondent had requested the appellant to pay for some extraordinary expenditure, not in the contemplation of the parties at the date of its execution, and he had refused to do so, he would have been guilty of omitting to supply reasonable maintenance in spite of having regularly made the payments provided for by the deed. In the present case the required repairs for the house might be such an expenditure. The appellant said he was willing to pay for these repairs, and, in my opinion, it would be advisable in his own interests to do so and subsequently to keep the house in repair. Indeed, it would be preferable if, with her consent and the sanction of the court, he bought a more modern house in a better locality and settled it upon her and the child in lieu of the present home.

When a husband is regularly making the payments under a deed of separation which the parties considered reasonable at the time, and which the court can see are substantial, and such that the husband would be justified in believing he was making reasonable provision for his wife, it would require a very strong case to justify a finding that he had been guilty of wilful neglect.

It was suggested on behalf of the respondent that this was an exceptional case, because the appellant had induced the respondent to agree to the amounts provided in the deed by understating his real income. There is no real evidence of this. In any event, the respondent has not attempted to repudiate the deed. On the contrary, she wants to maintain it and at the same time obtain an additional allowance under an Act the benefits of which are confined to the joint lives.

The appeal should be allowed.

As the respondent is seeking to maintain an order in her favour made by the justices, I agree that the appellant should be ordered to pay the respondent's costs of the appeal and of the proceedings in the court below (*Earnshaw* v. *Earnshaw* (1); *Fletcher* v. *Fletcher* (2)).

Appeal allowed. Orders of justices and of the Supreme Court discharged. In lieu thereof order that the appellant pay the respondent's costs in this court and in the Supreme Court and also her costs of the hearing of this complaint before the justices assessed at £18 3s., in default of payment of the last-mentioned costs by 20th June 1941 thirty days imprisonment.

Solicitors for the appellant, *Dwyer & Thomas*.
Solicitor for the respondent, *R. D. Lane*.

O. J. G.

(1) (1896) P. 160.

(2) (1927) 138 L.T. 135.