[HIGH COURT OF AUSTRALIA.]

FRANK HORACE SAYWELL . . . . APPELLANT;
RESPONDENT,

AND

MURIEL MINDIN SAYWELL . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1942.

SYDNEY, *April* 28.

MELBOURNE, *May* 21.

Rich, Starke and Williams JJ.

*Matrimonial Causes—Judicial separation—Permanent alimony—Annual sum secured to wife—Duration—Dum sola et dum casta vixerit clause—Protective trusts—Trustee—Officer of Court—Matrimonial Causes Act* 1899-1929 (*N.S.W.*) (*No.* 14 *of* 1899—*No.* 5 *of* 1929), *secs.* 5, 39,* 40, 43,* 45.*

Where a decree is made for judicial separation the Court may, by virtue of sec. 43 of the *Matrimonial Causes Act* 1899-1929 (N.S.W.), make an order under sec. 39 of the Act that the husband secure to the wife a gross or annual sum of money.

*Held*, in the circumstances of the particular case, that the deed securing payment of an annual sum to a wife who had obtained a decree of judicial separation—(*a*) should not be subject to determination on the death of the

* The *Matrimonial Causes Act* 1899-1929 (N.S.W.) provides as follows:—Sec. 39: "(1) The Court may on any decree for dissolution of marriage order the husband to secure to the wife for any term not exceeding her life and to the satisfaction of the Court such gross or annual sum of money as it deems reasonable. (2) The Court shall in making such order have regard to the wife's fortune (if any) to the ability of the husband and the conduct of the parties. (3) The Court may settle and approve or refer it to the proper office of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties. (4) The Court may in such case if it see fit suspend the pronouncing of its decree until such deed or instrument has been duly executed." Sec. 43: "Where a decree is made for judicial separation the Court may make all such orders in respect of alimony to the wife as it could make if the decree made was for dissolution of marriage." Sec. 45: "The Court may in all cases in which it makes any decree or order for alimony direct the same to be paid either to the wife herself or to any trustee on her behalf to be approved by the Court and may direct any securities to be given and may impose any terms or restrictions which seem expedient and may appoint a new trustee if for any reasons it appears to the Court expedient to do so."

H. C. OF A. 1942. SAYWELL v. SAYWELL.

husband; (*b*) should contain a *dum casta*, but not a *dum sola*, clause; and (*c*) should contain protective trusts modelled upon sec. 45 of the *Trustee Act* 1925 (N.S.W.) in the event of the wife being deprived of the right to receive the annual sum or any part thereof.

*Per Rich* and *Williams* JJ.: Sec. 45 of the *Matrimonial Causes Act* 1899-1929 (N.S.W.), which is expressed to be applicable to all cases in which the Court makes any decree or order for alimony, applies to all orders whether made under sec. 39 or sec. 40 of the Act.

*Blunden* v. *Blunden*, (1910) 10 S.R. (N.S.W.) 793, at p. 799; 27 W.N. 188, at p. 190, to the contrary, disapproved on this point.

The propriety of the appointment of officers of a court as sole trustees of funds and securities lodged in court, discussed.

Decision of the Supreme Court of New South Wales (*Bonney* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

A wife, Muriel Mindin Saywell, was granted a decree for judicial separation by the Supreme Court of New South Wales in its Matrimonial Causes Jurisdiction on 14th February 1940. At that time she had been married for seven years and was aged fifty-three years while her husband, Frank Horace Saywell, was aged sixty-three years. There were not any children of the marriage.

On 20th August 1940 the Registrar in Divorce made an order under sec. 39 of the *Matrimonial Causes Act* 1899-1929 (N.S.W.) that the husband, who was in affluent circumstances, secure payment to the wife during her life and to the satisfaction of the Court of the sum of £1,200 per annum, payable calendar monthly as from that day; and, whilst she continued to occupy a certain house rent free and he paid the outgoings in respect of such house, the said sum was to be reduced to £1,040 per annum. He also ordered, as to the nature and form of the security to be given, that, in the first instance, this be left in the hands of the parties' legal representatives, and that in default of an agreement an appointment be taken out before the Registrar to fix the security and the proportion of the assets of the husband to be charged therewith, and for this purpose liberty was reserved to apply on two days' notice.

Subsequently the husband filed a petition, No. 14 of 1941, for dissolution of marriage on the ground of his wife's alleged adultery with a named co-respondent. This petition had not been heard at the date of the hearing of this appeal.

The legal representatives of the parties having failed to agree upon the form and nature of the security, an application was made for its settlement by the Registrar. Upon a reference to the Court, the Judge in Divorce delivered two judgments: (*a*) one on 1st

August 1941, in which he decided that the order made by the Registrar, being an order which could have been made on a decree for dissolution, was within the ambit of the Court's jurisdiction under sec. 43, and he determined that the Court has power in a suit for judicial separation to order the husband to secure an annual sum to the wife for the whole of her life so as to continue even if her husband should die in her lifetime or secure a divorce in her lifetime (*Saywell* v. *Saywell* (1)); and (*b*) the other on 30th January 1942, in which he directed that the Registrar's order should be varied by adding after the words "during her life" the words "or if a decree absolute be pronounced in suit No. 14 of 1941 in which the present respondent is petitioner and the present petitioner is respondent and one Jack Stewart is co-respondent then until such decree absolute."

On the reference it was argued for the husband: (*a*) that an order made under sec. 39 was not an appropriate form of order in this case; (*b*) that if sec. 39 was appropriate, the order should be made subject to determination on the wife's adultery, i.e., it should be subject to a *dum casta* condition; and (*c*) that it should be subject to determination on the husband's death. The Judge in Divorce rejected contentions *a* and *c* because neither of them came within the original grounds for appeal, and he thought that the appeal was a belated afterthought to which resort was had long after the date of the order by the Registrar and long after negotiations had proceeded consistently on the basis of that order, and not until the husband had decided to launch against his wife a suit for divorce on the ground of adultery notwithstanding, according to the husband's confession, his own concurrent immorality with two women at the age of sixty-three or sixty-four years.

The husband appealed to the High Court against the order made on 30th January 1942.

Further material facts appear in the judgments hereunder.

*Snelling*, for the appellant. The order appealed against, which was made under sec. 39 of the *Matrimonial Causes Act* 1899-1929 (N.S.W.), is a final order which settles the rights of the parties. The respondent has the power, if she thinks fit, at any time to alienate the benefit of the order. Orders under that section were originally designed for dissolution proceedings. The application of sec. 39, in its full extent, to a judicial separation leads to conclusions which are very undesirable. It is not contested that in a suit for judicial separation the Court, by virtue of the provisions of sec. 43,

(1) (1941) 58 W.N. (N.S.W.) 159.

H. C. OF A. 1942.

SAYWELL v. SAYWELL.

may exercise to the full extent the powers conferred by secs. 39 and 40. The characteristics of an order under sec. 40 are to be found in *Shearn* v. *Shearn* (1), *Watkins* v. *Watkins* (2), *Harrison* v. *Harrison* (3), *Norton* v. *Norton* (4), and *Gardiner* v. *Gardiner* [*Nos.* 1 *and* 2] (5). Under the order appealed against the Court has no control whatsoever in respect of subsequent changes in circumstances, e.g., the death of the husband; adultery by the wife; the continuance or otherwise of the marriage state. This is important, because the benefit of the order is alienable. The Court is not limited to the facts as existing at the date of the making of the order. For the proper protection of the husband a *dum casta* clause should be inserted, and also there should be protective trusts to prevent the wife alienating or disposing of the benefit of the order. The order should terminate upon the dissolution of the marriage or the death of the husband.

*Badham*, for the respondent. The Court below had power to make the order appealed against. It has not been shown that that power was wrongly exercised, that is, that the Judge departed from a proper judicial discretion; therefore this Court, as a court of appeal, should not interfere with the order. If the Court says that in a suit for judicial separation the order for alimony should contain a *dum casta* clause, then to the extent that that makes an alteration in the discretion it partly destroys sec. 43, because the whole effect of the sections now under consideration is to put on the same footing suits for dissolution of marriage and suits for judicial separation so far as the power to exercise discretion is concerned. The only question is on the facts. The limited *dum casta* clause was inserted in view of the particular circumstances of this case. The appointment of another or other trustees in lieu of the trustee designated would necessitate the redrafting of the order.

*Cur. adv. vult.*

May 21.

The following written judgments were delivered :—

RICH J. In this matter the respondent obtained a decree of judicial separation from her husband, the appellant, and subsequently the Registrar made an order for alimony securing the payment to the wife " during her life and to the satisfaction of the Court " of a certain annual sum of money. The form and nature of the security were to be fixed by the Court in the event of disagreement by the

(1) (1931) P. 1, at p. 3.
(2) (1896) P. 222, at pp. 228, 229.
(3) (1888) 13 P.D. 180.
(4) (1916) 16 S.R. (N.S.W.) 461, at p. 466; 33 W.N. 175, at p. 177.
(5) (1933) 33 S.R. (N.S.W.) 400; 50 W.N. 142, 144.

legal representatives of the parties. Following upon this order the husband filed a petition for dissolution of marriage on the ground of his wife's alleged adultery, and this suit is now pending. Upon the wife pressing for the settlement of the security ordered by the Registrar the husband appealed by way of reference under rule 198 of the *Divorce Rules*. On the hearing of this reference the learned Judge gave judgment on a preliminary question of jurisdiction, and decided that the order made by the Registrar was "within the ambit of the Court's jurisdiction under sec. 43 of the *Matrimonial Causes Act* 1899, New South Wales." With that decision I venture to agree.

The *fasciculus* of the sections contained in Part VIII. of the Act forms a code dealing with alimony in all its branches. No distinction is there drawn, as in former times, between alimony while the marriage tie continues and maintenance when it is unloosed. Secs. 39 and 40 are assimilated to or absorbed into sec. 43 : Cf. *Norton* v. *Norton* (1). The contrast between secs. 39 and 40 is between "securing" and "payment." No doubt sec. 40 points to the case where the husband has no settled means but is in receipt of weekly wages or annual income. The discretion conferred on the Court under secs. 39 and 43 is very wide. The Court is empowered to make all such orders "as it deems reasonable." And I do not think that the principles and rules of the ecclesiastical courts (sec. 5) restrict in this regard the discretion of the Court. These principles and rules are in the nature of a stop-gap and are only applicable "subject to the provisions herein contained."

Having dealt with the preliminary question his Honour proceeded to hear the appeal on the merits. On this hearing counsel for the husband contended : "(*a*) that an order made under sec. 39 is not an appropriate form of order in this case ; (*b*) that if sec. 39 is appropriate, the order should be subject to termination on the wife's adultery, i.e., it should be subject to a *dum casta* condition ; and (*c*) it should also be subject to termination on the husband's death." His Honour, thinking that the appeal was belated and that grounds *a* and *c* were not contained in the original grounds of appeal, rejected the first and third grounds and proceeded to deal with the second ground only, and ordered that the Registrar's order should be varied by adding after the words "during her life" the words "or if a decree absolute be pronounced in suit No. 14 of 1941 in which the present respondent is petitioner and the present petitioner is respondent and one Jack Stewart is co-respondent then until such decree is made absolute." With that variation the Registrar's order was confirmed.

(1) (1916) 16 S.R. (N.S.W.), at p. 470.

H. C. OF A. 1942. SAYWELL v. SAYWELL. Rich J.

The question of delay on the part of the husband does not, I think, abrogate the Court's power to deal with this matter, which is not an originating but an administrative proceeding, or derogate from the Court's duty to consider every matter pertinent to the settlement of the form of order applicable to the circumstances of the case. Whatever terms "the Court deems reasonable" should be embodied in orders under secs. 39 and 43 of the Act. But the consequences of a decree for judicial separation differ from those which follow from a decree for dissolution of marriage in this among other respects that the parties are still husband and wife; and it is always possible that proceedings for dissolution may be taken in the future. This of itself supplies some reason why the provision made for the wife should be in such a form as not to be necessarily conclusive for all purposes if such proceedings should be taken. The present is a case in point, and the qualification or limitation in the order under consideration making it dependent only on the result of the pending divorce petition is not sufficient, and a *dum casta* clause should be inserted in the order limited, I suggest, in its operation to the joint lives of the husband and wife. The inclusion of a *dum casta* clause is a discretional matter (*Horniman* v. *Horniman* (1)), taking into consideration all the circumstances of the particular case. Accordingly the rights of both parties should be safeguarded. As the provision for the wife under sec. 39 is alienable a cesser clause or other restrictive or protective clauses should form part of the order to ensure that the maintenance is continued during her life. On the other hand, the husband should be protected against claims the wife might in certain events make against him in his lifetime or against his estate after his death.

The draft form of order follows a precedent apparently in use in the Registrar's office. A clause in it I view with some concern. The clause in question purports to constitute the Registrar sole trustee of the bond the subject of the security for the payment of the sum to be settled and imposes on his successors in office similar duties. In my opinion officers of a court should not be constrained to become sole trustees of funds and securities lodged in court. It is a precedent or practice which should not be followed. The clauses I have suggested and the appointment of a trustee instead of the Registrar fall within the scope of sec. 45 of the Act. And with all respect to the opinion expressed in *Blunden* v. *Blunden* (2), I consider that this section, which is expressed to be applicable to all cases in which the Court makes any decree or order for alimony, is equally available to orders whether made under sec. 39 or sec. 40.

(1) (1933) P. 95, at p. 101.
(2) (1910) 10 S.R. (N.S.W.) 793, at p. 799; 27 W.N. 188, at p. 190.

In my opinion the appeal should be allowed and the order in question varied by the elimination of the qualification as to the pending divorce suit to which I have already referred, the insertion of a *dum casta* clause, cesser and other restrictive clauses, and by the further elimination of the clause appointing the Registrar and his successors trustees, and in lieu thereof substituting a clause appointing unofficial and independent persons or companies or the Public Trustee trustees of the funds.

The appellant's husband must pay the costs of the appeal.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales in its Matrimonial Jurisdiction.

In February 1940 the Court decreed a judicial separation between the respondent (the wife) and the appellant (the husband). In July 1940 the respondent moved before the Registrar in Divorce for an order :—(*a*) That the appellant secure to the satisfaction of the Court to the respondent for her life a gross or annual sum of money in such amount as the Court should deem reasonable. (*b*) That the Court should settle and approve or refer to the proper officer of the Court to settle and approve of a deed or instrument to be executed by all necessary parties to secure the said gross or annual sum.

In August 1940 the Registrar ordered that the appellant secure payment to the respondent during her life, to the satisfaction of the Court, the sum of £1,200 per annum payable each calendar month as from the date of the order, and further that whilst the respondent continued to occupy the house at 60 Albyn Road, Strathfield, rent free, and the appellant paid the outgoings in respect of the said house the said sum should be reduced to £1,040, and that the nature and form of the security, in case the parties differed, should be settled by the Registrar.

In January 1942, on a reference to the Court, the order of the Registrar was affirmed, with the addition after the words " during her life " of the words " or if a decree absolute be pronounced in suit No. 14 of 1941, in which the present respondent " (the appellant here) " is petitioner, and the present petitioner " (the respondent here) " is respondent, and one Jack Stewart is co-respondent, then until such decree absolute." And this appeal is from the judgment or order of 30th January 1942.

The order providing for the annual sum depends for its validity upon the provisions of secs. 39 and 43 of the *Matrimonial Causes Act* 1899 of New South Wales, and the appellant did not, before this Court, challenge the authority of the Supreme Court to make the order. By sec. 39 the Court is empowered on any decree for

H. C. OF A. 1942.

SAYWELL v. SAYWELL.

Starke J.

divorce to order the husband to secure, to its satisfaction, to the wife, such gross or annual sum of money for any term not exceeding her life as it should deem reasonable. But this provision did not extend to decrees for judicial separation (*Burrowes* v. *Burrowes* (1) ).

But sec. 43 provides that where a decree is made for judicial separation the Court may make such order in respect of alimony to the wife as it can make if the decree made were for dissolution of marriage. In my opinion, this provision gave the Court power to apply the provision of sec. 39 to the case of judicial separation. *Norton* v. *Norton* (2) so decided, and the limited operation which seems to have been given to secs. 39 and 43 in *Gardiner* v. *Gardiner* [*Nos.* 1 *and* 2] (3) unduly restricts the effect of these sections. But it is entirely discretionary with the Court whether the powers contained in secs. 39 and 43 or those contained in sec. 40 should be exercised in the particular case, and if those contained in secs. 39 and 43 be exercised, then it is equally clear that the nature and form of the security is also a matter of discretion depending upon the circumstances of the case (*Shearn* v. *Shearn* (4) ). The rules upon which the ecclesiastical courts acted will often afford assistance to the Court, but it is just as well to remember that the powers conferred by secs. 39 and 43 are dependent upon the statute itself and that no practice or rule of the ecclesiastical courts can take away from a court or a judge a discretion given by an Act of Parliament (*Turk* v. *Turk* (5) ; *Woolley* v. *Broad* (6) ). And it is equally important to remember that a gross or annual sum ordered to be secured pursuant to secs. 39 and 43 is property alienable and chargeable by the wife, unless the deed which secures it provides against alienation (*Harrison* v. *Harrison* (7) ; *Maclurcan* v. *Maclurcan* (8) ; *Watkins* v. *Watkins* (9) ), and " is final, irrevocable, and unalterable, though it is made in the exercise of a wide discretion " (*Turk* v. *Turk* (10) ; *Blunden* v. *Blunden* (11) ).

In the present case the appellant is a wealthy man with assets of the value of £100,000, or thereabouts, with an income of £4,000 per annum, or thereabouts. The case therefore lends itself to the application of the provisions of secs. 39 and 43. The nature and form of the security, however, require consideration. Ordinarily it seems that the order merely directs that a gross or annual sum be

(1) (1929) 141 L.T. 201 ; 45 T.L.R. 401.
(2) (1916) 16 S.R. (N.S.W.) 461 ; 33 W.N. 175.
(3) (1933) 33 S.R. (N.S.W.), at p. 404 ; 50 W.N., at p. 144.
(4) (1931) P., at pp. 5-7.
(5) (1931) P. 116, at p. 118.
(6) (1892) 2 Q.B. 317, at p. 318.
(7) (1888) 13 P.D. 180.
(8) (1897) 77 L.T. 474.
(9) (1896) P., at p. 227.
(10) (1931) P., at p. 123.
(11) (1910) 10 S.R. (N.S.W.), at p. 798 ; 27 W.N., at p. 190.

secured and leaves the form of the security to be settled in chambers (*Medley* v. *Medley* (1) ). But in case the parties are in conflict as to the nature and form of the security the Court must give some direction. The Registrar, on the undertaking of the appellant, and *ad interim*, so as to protect the respondent pending the reference proceedings, directed the appellant to bring into Court Government bonds amounting in value to £15,500 to abide the further order of the Court. Apparently the appellant was content that these bonds should be appropriated as a security for the annual sum already mentioned, and the Registrar and his successors nominated by an instrument to hold and enforce the security. This procedure was adopted in another case, but I should have thought the nomination of the Registrar and his successors was somewhat undesirable, and that it would be better to appoint some other person than an officer of the Court to hold and enforce the security. However, that is a matter for the consideration of the Supreme Court itself. The appellant's concern is with the terms of the instrument securing the annual sum. He desires the condition *dum sola et casta vixerit* to be inserted in the instrument. Had the parties remained on amicable terms, the appellant might well have made provision for his wife in her lifetime, and certainly might be expected to have done so by his will. The conduct, the means, the social position of the parties and the future of the respondent must all be considered. There are no children of the marriage. Having regard to this fact and the large fortune of the appellant it is right that he, who is responsible for the separation from his wife, should provide a portion for her without regard to the contingency of her remarriage. In my opinion, the insertion of the *dum sola* clause would be unjust to the respondent, defeat her expectations of the marriage and be unreasonable in all the circumstances. There is more to be said for the insertion of the *dum casta* clause. Despite judicial observations to the effect that an innocent wife should not be insulted by even the suggestion that she might become unchaste, the question is not one of nice taste or good feeling, but whether the insertion of the clause is prudent and reasonable having regard to the position of the parties and all the circumstances of the case. The parties are at arms' length, the husband is accusing his wife of unchastity, and the Court has made a condition as to chastity limited to a particular case. Moreover, security given pursuant to the powers contained in secs. 39 and 43 is unalterable. So, viewing the matter without emotion of any sort, the insertion of the *dum casta* clause in the instrument securing an annual sum to the respondent appears to me, in this case, to be not only a reasonable but a prudent step.

(1) (1882) 7 P.D. 122, at p. 126.

H. C. OF A. 1942. SAYWELL v. SAYWELL. Starke J.

The appellant also contended that the provision for the respondent should be for their joint lives, thus terminating with his death. But such a condition would be wholly unreasonable and unfair. The respondent would be at the mercy of her husband, who might not, and probably would not, make any provision for her maintenance after his death. Finally, as an annual sum secured pursuant to secs. 39 and 43 is alienable, it would appear prudent and reasonable to protect both the wife and the husband from acts and events whereby the wife would be deprived of the right to receive the annual sum or any part thereof (*Watkins* v. *Watkins* (1) ). Such a provision is common enough in wills and settlements and might be modelled on the "protective trusts" clause contained in the *Trustee Act* 1925, sec. 45, but having regard to the fact that there are no children of the marriage.

The appeal should be allowed, the variation inserted by the order of 30th January 1942 discharged, the cause remitted to the Supreme Court so that a proper instrument may be settled and approved and executed by all necessary parties for the purpose of securing the annual sum mentioned in the Registrar's order of 20th August 1940 and containing a *dum casta* clause and provisions protecting the respondent against acts or things whereby she would be deprived of the right to receive the said annual sum or any part thereof.

WILLIAMS J. The respondent to this appeal, Muriel Mindin Saywell, was granted a decree for judicial separation by the Supreme Court of New South Wales in its Matrimonial Causes Jurisdiction on 14th February 1940. At that time she had been married for seven years and was aged fifty-three years, while her husband, the appellant, was aged sixty-three years. There were no children of the marriage.

On 20th August 1940 the Registrar made an order under sec. 39 of the *Matrimonial Causes Act* 1899 (N.S.W.) that the husband secure payment to the wife during her life and to the satisfaction of the Court of the sum of £1,200 per annum payable calendar monthly as from that day; and, whilst she continued to occupy the house at Albyn Road, Strathfield, rent free and he paid the outgoings in respect of such house, the said sum was to be reduced to £1,040 per annum. He also ordered, as to the nature and form of the security to be given, that in the first instance this be left in the hands of the parties' legal representatives and that in default of an agreement an appointment be taken out before him to fix the security and the proportion of the assets of the respondent (husband)

(1) (1896) P., at pp. 229-231.

to be charged therewith. For this purpose liberty was reserved to apply on two days' notice.

Subsequently the appellant filed a petition, No. 14 of 1941, for dissolution of marriage on the ground of his wife's alleged adultery with a co-respondent named Jack Stewart, but this suit has not yet been heard.

The legal representatives of the parties having failed to agree upon the form and nature of the security, the respondent applied for its settlement by the Registrar. Upon a reference to the Court the learned Judge in Divorce delivered two judgments: one on 1st August 1941 in which he decided that the Court has jurisdiction to make an order under sec. 39 where a decree for judicial separation has been made, and the other on 30th January 1942 in which he directed that the Registrar's order should be varied by adding after the words " during her life " " or if a decree absolute be pronounced in suit No. 14 of 1941 in which the present respondent is petitioner and the present petitioner is respondent and one Jack Stewart is co-respondent then until such decree absolute."

On the reference the appellant attempted to argue three points: (*a*) that an order made under sec. 39 was not an appropriate form of order in this case; (*b*) that if sec. 39 was appropriate, the order should be made subject to determination on the wife's adultery; and (*c*) it should also be subject to determination on his death.

His Honour's decision on the preliminary point has not been attacked, so that we have not heard argument on the question whether the Court has jurisdiction after a decree for judicial separation to make an order under sec. 39, but I feel no doubt that his Honour came to a correct conclusion. I also agree with him that the Registrar's decision in the exercise of his discretion to make an order under the section should not be reviewed. The evidence shows the appellant has very substantial free capital assets producing a large income, a proper proportion of which can readily be made available by way of security, so that he is in a position to make and secure an adequate allowance for his wife, and the case seems to be pre-eminently one in which to make an order under the section.

Points *b* and *c* relate to the nature and form of the security and are of general importance, as it is evident that different considerations arise where a wife has been granted a divorce from where she has been granted a decree for judicial separation.

The Act must be construed as a whole. Sec. 5 provides that in all suits and proceedings other than proceedings to dissolve any marriage the Court shall proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may

H. C. OF A. 1942. SAYWELL v. SAYWELL. Williams J.

be conformable to the principles and rules on which the ecclesiastical courts of England acted and gave relief before the passing of the Imperial Act 20 & 21 Vict. c. 85, but subject to the provisions contained in and the rules and orders under the Act. The express provisions of the Act relating to permanent alimony, more correctly described as maintenance after a decree has been made for divorce, occur in Part VIII., secs. 39 to 46 inclusive. Sec. 43 provides that where a decree is made for judicial separation the Court may make any such orders in respect of alimony to the wife as it can make if the decree made was for dissolution of marriage. By virtue of this section the Court can make an order under sec. 39 when it grants a decree for judicial separation, but in making such an order the Court, in addition to the matters specifically referred to in sub-sec. 2 which relate mainly to *quantum*, should bear in mind sec. 5 of the Act and have regard to considerations arising from the fact that the decree does not dissolve the status of husband and wife. Under ecclesiastical law "permanent alimony for a judicially separated wife is and always has been inalienable by her. The Court which ordered it never lost control over it and she could not by assignment or otherwise deprive herself of her right to it so long as she and her husband lived separate and apart from each other" (*Watkins* v. *Watkins* (1), per *Lindley* L.J.). It was never ordered for the life of the petitioner (*Tangye* v. *Tangye* (2) ). After a marriage has been dissolved on the ground of the wife's adultery, but the Court makes an order for her maintenance out of money settled by the husband although she is the guilty party, it is usual for the clause *dum sola et casta vixerit* to be inserted (*Ollier* v. *Ollier* (3) ; *Woodcock* v. *Woodcock and Codeside* (4) ).

Where a decree for a divorce is made on the petition of an innocent wife, and it has been the conduct of the husband which has wrecked the marriage, it may well be proper in many cases to make an absolute order in favour of the wife for her life without the introduction of a *dum casta* or a *dum sola vixerit* clause, so that the courts have refused to lay down any hard and fast rule, and the reported decisions include cases where an absolute provision has been made for the wife for life, where the life estate has been made subject to a *dum casta* or a *dum sola* clause or to both, and where the provision has been made to cease on the husband's death. But, in the case of a divorce, the marriage bond is completely dissolved, the parties are completely and finally separated, all privity between them is

(1) (1896) P., at p. 226.
(2) (1914) P. 201, at p. 208.
(3) (1914) P. 240.
(4) (1914) 111 L.T. 924.

ended, and the wife has no further claim upon her husband during his life or upon his estate after his death; whereas, in the case of a judicial separation, the status of marriage still exists, and the wife is still entitled to certain rights and immunities against her husband in addition to any order that may have been made in her favour under sec. 39 (for instance, under secs. 37 (3) and 38 (3) of the Act), and if she has alienated the provision which has been made for her under the section or it has become insufficient for her proper maintenance she can apply for an order under the *Testator's Family Maintenance Act* 1916-1934 upon his death. The husband has certain rights against his wife, one being that if she commits adultery he is entitled to present a petition to have the marriage dissolved. At common law he would also be relieved from any further liability to maintain her.

As an order under sec. 39 is final, unalterable and alienable, considerable weight should be given to the fact that the wife has chosen not to have the marriage contract dissolved but to keep it on foot with all its rights and liabilities other than those which have been suspended by the decree.

Where, as in the present case, the husband is in affluent circumstances and there are no children, there is no reason to insert a *dum sola* clause and thereby deprive an innocent wife who has survived her husband of the benefit of the order upon remarriage; but it would appear to be reasonable to provide that the allowance should be made dependent upon the wife living a chaste life, so that if she committed adultery the husband would not lose his common-law right to be discharged from any further obligation for her maintenance; and if he was granted a divorce the question of her right to any subsequent maintenance could be reconsidered on the basis that she was a guilty wife. She should not be placed in a position to misconduct herself while still his wife, and then, when he had divorced her, to remain in the same financial position as though she had divorced him. Assuming the decree for judicial separation continued until his death and she survived him, she would reap the benefit of covenants to endure during her life, instead of having to rely upon the success of an application to the Court under the *Testator's Family Maintenance Act*. An order under the 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 order under sec. 39 would also operate although the respondent remarried after his death, whereas an order under the

H. C. OF A. 1942.

SAYWELL v. SAYWELL.

Williams J.

*Testator's Family Maintenance Act* would usually be confined to her widowhood.

Moreover, the husband ought not to be placed in the position that his wife could alienate voluntarily or involuntarily an allowance, the real purpose of which was to maintain her in reasonable comfort having regard to her age, health and position in society as his wife.

It would, therefore, be proper to provide that the life estate should continue only so long as she lived a chaste life and to direct that it be held on protective trusts within the meaning of sec. 45 of the *Trustee Act* 1925 (N.S.W.); so that if the life estate was alienated voluntarily or involuntarily it should thereupon determine and be held for the residue of her life upon the discretionary trusts therein provided; except that, as there are no issue, the trustee, in the event of the husband predeceasing her, should be given a discretion whether to pay the income to her or any such person as the husband should nominate in his will or if he made no such nomination to any of his statutory next of kin.

As in the present case I can see no reason to depart from these general principles, which, in my opinion, should govern the making of an order under the section in the case of a decree for judicial separation, the variation which his Honour ordered does not go far enough; so that it should be deleted and in lieu thereof a complete *dum casta* clause should be inserted, the life estate should be made subject to the protective trusts already mentioned, and a proper trustee or trustees, preferably a corporation such as one of the trustee companies or the Public Trustee, should be appointed.

In my opinion sec. 39 itself is wide enough to authorize the settlement of a deed in this form; but if it is not, sec. 45 can be called in aid. In *Blunden* v. *Blunden* (1) the Full Court of New South Wales expressed the view that sec. 45 did not apply to orders made under sec. 39, but the section is expressly made applicable in all cases in which the Court makes a decree or order for alimony, which must include an order under sec. 39, so that, in my opinion, this view is incorrect and should not be followed.

The appeal should be allowed.

*Appeal allowed. Discharge the order made by the Supreme Court of New South Wales in its Matrimonial Causes Jurisdiction on 30th January 1942 in so far as it ordered that the order of the Registrar made on 20th August 1940 should be varied by adding after the words "during her life" the words "or if a decree absolute be pronounced*

(1) (1910) 10 S.R. (N.S.W.), at p. 799; 27 W.N., at p. 190.

*in suit No.* 14 *of* 1941 *in which the present respondent is petitioner and the present petitioner is respondent and one Jack Stewart is co-respondent then until such decree absolute" and in lieu thereof remit the cause to the said Court in its said jurisdiction in order that it may settle and approve or refer to the proper officer of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties for securing to the petitioner the annual sum the subject of the order herein made on 20th August* 1940 *such deed or instrument to include a dum casta clause and protective trusts modelled upon sec.* 45 *of the Trustee Act* 1925 *in the event of the petitioner being deprived of the right to receive the annual sum or any part thereof. The appellant to pay the respondent's costs of this appeal.*

Solicitors for the appellant, *Alfred J. Morgan & Son.*
Solicitors for the respondent, *Manning, Riddle & Co.*

J. B.