Appeal 530. 51 WN Pt. 1. 531
4 AP. 6. FLR. 476
65 SR. 366



[HIGH COURT OF AUSTRALIA.]

REDGRAVE . . . . . APPELLANT;
PETITIONER,

AND

REDGRAVE . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 12, 13; *May* 10.

Dixon, Williams and Webb JJ.

*Matrimonial Causes—Divorce—Permanent alimony—Annual sum—Security on husband's property—Personal covenant of husband—Matrimonial Causes Act* 1899-1929 (*N.S.W.*) (*No.* 14 *of* 1899—*No.* 5 *of* 1929), *ss.* 39, 40.*

The security for permanent alimony which the Supreme Court of New South Wales may order on the dissolution of a marriage may consist in whole or in part of a personal covenant by the husband or by the husband on behalf of himself his executor and administrator, to pay such annual sum as under s. 39 of the *Matrimonial Causes Act* 1899-1929 the court may think it just to order.

Dicta of *Hill* J. in *Shearn* v. *Shearn*, (1931) P. 1, at p. 4, disapproved.

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

* The *Matrimonial Causes Act* 1899-1929 (N.S.W.) provides, *inter alia*, "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 officer 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.

40 (1) The Court instead of ordering the husband to secure to the wife a gross or annual sum may make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court thinks reasonable.

(2) If the husband afterwards from any cause becomes unable to make such payments the Court may discharge or modify the order or temporarily suspend the same as to the whole or any part of the money ordered to be paid and again revive the same order wholly or in part as to it seems fit.

(3) If the wife marries again the Court may upon proof of that fact discharge the said order or if there be infant children in the wife's custody may vary the order."

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APPEAL from the Supreme Court of New South Wales.

Maud Mary Redgrave, whose marriage with Lancelot Mervyn Redgrave, on 28th June 1919, was, on 22nd September 1949, dissolved on her petition on the ground of desertion, applied under the *Matrimonial Causes Act* 1899-1929 (N.S.W.) for an order that the respondent pay to her by way of permanent alimony such periodical sums of money as the Court thought fit. Upon the hearing of the motion the Registrar gave leave to the petitioner for it to be amended to include an application for a secured order. After hearing evidence the Registrar, in pursuance of the powers conferred by s. 39 of the Act, ordered that the respondent secure to the petitioner for her life and to the satisfaction of the Court an annual sum of £286, the Registrar to settle and approve of proper deeds or instruments to be executed by all necessary parties and a trustee to be appointed either by agreement of the parties or, in default of agreement, by the Registrar. It was further ordered (i) that the respondent should give security over his real property being the whole of the land in Certificate of Title, Volume 5920, Folio 126, and over the sum of £1,250 in cash, which cash might be invested by the said trustee; (ii) that the deed creating such security should provide, *inter alia*, for the payment of the annuity to be charged on the whole of the said security and separately on the real property by an encumbrance under the *Real Property Act* 1900 (N.S.W.); and (iii) that in the event of the respondent's death before the completion of the above-mentioned instruments his estate should be bound with payment of £5 10s. 0d. per week to the petitioner during her life.

Both the petitioner and the respondent being dissatisfied with the order, the matter was, at their request, referred to a judge.

*Edwards* J. confirmed the Registrar's order except that the annual sum was reduced to £260 and a life assurance policy was substituted for the sum of £1,250 cash ordered to be secured by the Registrar's order.

From that decision the petitioner appealed, and the respondent cross-appealed, to the High Court.

Further material facts appear in the judgment hereunder.

*F. C. Hutley*, for the appellant. The appellant has a primary right to secured alimony. Regard should be had to the words "instead of" in s. 40 of the *Matrimonial Causes Act* 1899-1929 (*Blunden* v. *Blunden* (1)). As is shown by *Shearn* v. *Shearn* (2),

(1) (1910) 10 S.R. (N.S.W.) 143, 793; 27 W.N. 16, 188.

(2) (1931) P. 1.

the Court has a discretion and can, on occasion, decline to make the order asked for by the wife, but the circumstances under which the Court will decline to make an order is that it is not in the interests of the wife who asks for the order. In determining whether a secured order should be made the Court's powers under s. 39 are a vital consideration. The proposition established in *Medley* v. *Medley* (1) that an order to secure is different from an order to pay, is not disputed. A covenant to pay is a security which the Court can order the respondent to execute. The Court can "secure" an annual sum to the appellant by ordering the respondent to execute in favour of trustees for the appellant any instrument which, according to ordinary commercial understanding, amounts to a security: for example, a mortgage, encumbrance, promissory note, bill of exchange, share transfer, &c. That wide meaning is the natural meaning of security (*Deering* v. *Bank of Ireland* (2)). The judge in *Shearn* v. *Shearn* (3) did not apply his mind to the possibility that security could consist of a personal covenant. The statement in *Shearn* v. *Shearn* (4), if construed as meaning that the Court cannot order a husband to covenant in the manner suggested above, is contrary to *Smith* v. *Smith* (5); *Shorthouse* v. *Shorthouse* (6); *Hyde* v. *Hyde* (7); and *Bond* v. *Bond* (8). The dictum in *Walker* v. *Walker* (9) is doubtless due to the fact that *Shorthouse* v. *Shorthouse* (10) was not brought under the notice of the judge, nor was he asked to order the respondent to enter into a covenant to pay. A covenant to pay is a security. It is not disputed that under s. 39 an order to pay is invalid, but an order to covenant to pay is different. The view that a respondent cannot be ordered to execute securities containing personal covenants, or securities simply consisting of personal covenants is unsound. The income or expected income from the property has no relation to the amount to be awarded to the appellant (*Blyth* v. *Blyth* (11); *Blunden* v. *Blunden* (12); *Smith* v. *Smith* (13)). Recourse may be had to the capital of a secured fund in order to maintain payments (*May* v. *Bennett* (14); *Carmichael* v. *Gee* (15); *Smith* v. *Smith* (13); *Hyde* v. *Hyde* (16)). Reversions may be resorted to (*Harrison* v. *Harrison* (17)). *Harries*

(1) (1882) L.R. 7 P.D. 122.
(2) (1886) 12 App. Cas. 20, at p. 26.
(3) (1931) P. 1.
(4) (1931) P., at p. 4.
(5) (1923) P. 191, at p. 202.
(6) (1898) 78 L.T. 687, at p. 688; 79 L.T. 366.
(7) (1948) 1 All E.R. 362.
(8) (1929) N.Z.L.R. 909.
(9) (1922) V.L.R. 526, at p. 528.
(10) (1898) 78 L.T. 687; 79 L.T. 366.
(11) (1943) P. 15.
(12) (1910) 10 S.R. (N.S.W.) 143, 793; 27 W.N. 16, 188.
(13) (1923) P., at p. 203.
(14) (1826) 1 Russ. 370 [38 E.R. 144].
(15) (1880) 5 App. Cas. 588, at p. 593.
(16) (1948) 1 All E.R., at p. 364.
(17) (1887) L.R. 12 P.D. 130, 145.

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v. *Harries* (1), under which regard is had to the second marriage, is inapplicable to applications for secured alimony. The ability of the husband means the capacity of the husband. The meaning of " ability " is discussed in *Rayden* on *Divorce*, 5th ed. (1943), p. 430. The amount awarded to the appellant should be sufficient for her reasonable maintenance having regard to her age, health and condition in life.

*W. B. Perrignon*, for the respondent. Sections 39 and 40 of the *Matrimonial Causes Act* 1899-1929 (N.S.W.) are mutually exclusive. An applicant wife cannot have an order under both sections. There is not any power in the Court to order the husband to secure under s. 39 and to make payments as well (*Smith* v. *Smith* (2); *Medley* v. *Medley* (3); *Shearn* v. *Shearn* (4); *Mackenzie's Divorce Practice*, 5th ed. (1935), p. 148). The word " secure " is essentially different from the word " pay " (*Medley* v. *Medley* (5)). There is not any power either under s. 39 or under s. 40 to order a husband to make a lump sum payment to his wife in full satisfaction of permanent alimony (*Twentyman* v. *Twentyman* (6)). Section 39 envisages that the income from capital the subject of security and not the capital itself should constitute the fund from which the annual sum is payable to the wife. If capital itself were to be payable then a different structure of words altogether would have been used. In s. 40 the words " order . . . for payment " are used and these are quite different from the words " order . . . to secure " and show that regard was being had in the drafting of s. 39 to the income-producing capacity of the capital. *Naish* v. *Naish* (7) was wrongly decided. The propositions, including the words " . . . if it fails to yield the expected income she can not call upon her husband to make good the deficiency ", are referred to with approval in *Halsbury's Laws of England*, 2nd ed., vol. 10, p. 789. If recourse could be had to capital there would not be any question of a failure to yield any *expected* income. The same view was plainly taken in *Shearn* v. *Shearn* (4). There is not any jurisdiction under s. 39 to order payment of capital to the wife, either directly or by instalments. An order to secure allowing recourse to capital would be in excess of the powers of the Court, since it would amount to an order for payment of capital by instalments. An order under s. 40 is not confined to poor men who have no capital. It applies equally

(1) (1933) 33 S.R. (N.S.W.) 396; 50 W.N. 172.
(2) (1923) P. 191.
(3) (1882) L.R. 7 P.D. 122.
(4) (1931) P. 1.
(5) (1882) L.R. 7 P.D., at p. 124.
(6) (1903) P. 82.
(7) (1916) 32 T.L.R. 487.

to husbands who have a considerable amount of capital, which may be fairly and reasonably locked up in trade (*Jardine* v. *Jardine* (1) ). This principle would cover a case where the husband may have substantial capital tied up in trade and may also require some reserves for seasonal buying and emergencies. Although it would academically be within the Court's power to order that all the husband's capital should be secured, the Court should as a matter of practical reality require to be satisfied that there is ample free capital. In *Saywell* v. *Saywell* (2) it was stated that the husband had " very substantial free capital assets producing large income, a proper portion of which can readily be made available by way of security." The correct approach to s. 39 is (a) the Court should determine the approximate amount of weekly or annual allowance which is fairly justified in all the circumstances, (b) the Court should then determine the approximate amount of free capital available for security, and (c) if the free capital is capable of producing as income the amount mentioned in (a), then it may be an appropriate case for security. If the free capital cannot produce that amount then an order under s. 39 is not appropriate and an order under s. 40 would be made. Such an approach would not be necessary if the Court had power to make a double order, and this " anomaly " has been mentioned in *Walker* v. *Walker* (3), where it was held that there was not any power under a corresponding section to order payment as well as security. The result of this anomaly in New South Wales is to the effect that there are very few cases where an order for security is appropriate and in these cases the husband has had abundant free capital sufficient to produce as income the amount of the gross or annual sum : see *Saywell* v. *Saywell* (4) and *Gardiner* v. *Gardiner* (5). It is a wrong and misdirected approach to s. 39 for the wife to fix an annual amount which would keep her in reasonable comfort and then to estimate the number of years of life remaining to her and to multiply those two figures and claim the product of the multiplication as the amount of capital which ought to be secured. That is what has been done in this case. That procedure is wrong because (a) it ignores the meaning of the word " secure " and the amount of income fairly to be expected ; (b) it predicates a power in the Court to order payment of capital either directly or by allowing recourse to capital if the husband does not pay out of other sources ; (c) it ignores the interests and commitments of the

(1) (1881) 6 P.D. 213.
(2) (1942) 65 C.L.R. 557, at p. 567.
(3) (1922) V.L.R. 526.
(4) (1942) 65 C.L.R. 557.
(5) (1933) 33 S.R. (N.S.W.) 400 ; 50 W.N. 142, 144.

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husband which are entitled to fair consideration; and (d) it is based on a principle which would make the amount of capital to be secured vary with the age and expected life of the wife, which is quite impracticable. On that basis, if the applicant were very young and very healthy the husband's capital would all be absorbed in meeting the order. The inability of the wife to bring an application under the *Testator's Family Maintenance and Guardianship of Infants Act* is not a relevant factor for consideration in deciding whether or not the case is an appropriate one for security, because (a) that approach ignores the primary question of the capacity of the capital to produce income; (b) the wife has voluntarily chosen to place herself in such a legal position as distinct from seeking a judicial separation; (c) it amounts to unjustified legislation by the Court in that the legislature in settling the provisions of that Act chose to omit quite clearly any reference to divorced wives, and (d) the considerations relevant to a claim under the Act are different from the considerations in an application under the *Matrimonial Causes Act* for maintenance. The majority, if not all, the English cases in which security has been ordered have been cases where the amount of the annual sum ordered to be secured has been fixed with reference to the income which could fairly be expected to accrue from the capital tied up: see *Hyde* v. *Hyde* (1) and *Corbett* v. *Corbett* (2). No case, other than cases of consent orders, has been cited where it has appeared that the Court has ignored as irrelevant the question of the income-producing capacity of the capital which is to form the security. *Shearn* v. *Shearn* (3) is a direct authority against such an attitude. The interest of both wife *and* husband must be fairly considered and the Court should make proper allowances for such matters as: (a) the husband's remarriage (*Harries* v. *Harries* (4)); (b) the total dependancy of the husband's present wife upon him; (c) the illness of the second wife; (d) the possibility of issue; (e) the possibility of an application under the *Testator's Family Maintenance and Guardianship of Infants Act* by issue of the first marriage; (f) the fact that the husband must cease working at some stage in his life; (*g*) the possibility of ill-health on the part of the husband preventing him from working; (h) the increased cost of living and of maintaining a wife and a home; and (i) the legislative restrictions on profits in business. One of the most important matters which renders an order for security inappropriate

(1) (1948) 1 All E.R. 362.
(2) (1888) L.R. 13 P.D. 136.
(3) (1931) P. 1.
(4) (1933) 33 S.R. (N.S.W.) 396; 50 W.N. 172.

in this State except in the plainest case, such as *Saywell* v. *Saywell* (1), is that an order under s. 39 is unalterable no matter what financial misfortunes the husband may afterwards suffer. The inability of the Court to vary the order once it is made shows that it is a drastic course to take against a husband in trade and should not be taken in the present case. It is agreed that *Shearn* v. *Shearn* (2) is an example of the Court protecting a wife against her own lack of wisdom. It is unwise for a wife to press for an order for security in a situation where the assets available will not produce income equal to or greater than the amount which the wife seeks as an annual sum for her maintenance. The Court should beware of an application which seeks on the one hand to tie up a great portion of the husband's capital and on the other hand seeks an order for payment of an annual sum which can only be produced by allowing the husband free use of his capital, including the amount sought to be tied up. Even if these submissions be overruled and it be held that the Court may order that capital may be resorted to, this, in the light of the plain meaning of "secure", can only mean that capital may be resorted to where the expected income is not yielded. That is, the Court must first have before it a situation where the available amount of capital can fairly be expected to produce the annual sum required. In those circumstances the Court, as a precaution, may, if these submissions be wrong, order recourse to capital, but that is a secondary stage. Unless there is a fair expectation that the available capital will yield as income the amount of the annual sum thought to be fair to be received by the wife or more, then it is *not* an appropriate case for security. Any other view would amount to an order for payment as distinct from giving security. *Smith* v. *Smith* (3) establishes that there is a vital difference between an order to secure and an order to make periodical payments. It is true that the language of *Warrington* L.J. (4) might be said to suggest that there may be an order for a recourse to capital, but this is not permissible under s. 39, and, in any event, the judge in *Shearn* v. *Shearn* (2) did not regard *Smith* v. *Smith* (3) as establishing that proposition and, furthermore, whether or not capital may be resorted to, there must first be a situation wherein the annual sum to be paid is within the income-producing capacity of the available capital, otherwise any order not based on such a situation really amounts to an order to make periodical payments, which is the feature of an order made under s. 40. In *Shorthouse*

(1) (1942) 65 C.L.R. 557.
(2) (1931) P. 1.
(3) (1923) P. 191.
(4) (1923) P., at p. 198.

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v. *Shorthouse* (1) the only relevant question which arose on appeal was the amount of capital which would be required to be set aside to produce a certain annual sum, and the amount of capital available was amply sufficient to produce as income the sum required. There must have been an express advertance to the question of the income-producing capacity of the available capital. This Court is being asked to ignore the question of how much income the available capital can produce. That is contrary to the direction of the section and is contrary to the procedure adopted in the decided cases. The order from which the respondent appealed was based on a speculation as to the amount of income which he is capable of producing. It has been shown that his business will require building up over a period and that he will require considerable capital therein. That order was made without sufficient reference to these matters, and without any reference to the income-producing capacity of the capital which was ordered to be secured. On behalf of the appellant it has been pointed out that the income-producing capacity of the capital is irrelevant and may be ignored and that it is a matter for the husband whether or not he chooses to pay the annual amount out of his own pocket or whether he will allow the security to be realized. This is tantamount to an admission that what is really being sought is an order for payment as provided for by s. 40, but in this case the wife desires a longer period of benefit than s. 40 allows, and security as well. Making proper allowance for the time required to build up the business, and for the commitments of the husband an order under s. 40 would really be in the interests of the wife since, if she pursues an order for security, it will be found that the capital available is incapable of producing income to the amount of the annual sum which she states that she requires. The wife will, if an order for security be made, be in the same position as that described in *Halsbury's Laws of England*, 2nd ed., vol. 10, p. 789, and in *Shearn* v. *Shearn* (2), namely, that the security will fail to yield the income from which the annual sum is to be paid and she cannot call upon her husband to make good the deficiency.

*F. C. Hutley*, in reply.

*Cur. adv. vult.*

May 10. THE COURT delivered the following written judgment:—

This is an appeal from an order of *Edwards* J. reducing the amount of an annual sum which in a wife's suit the Registrar in Divorce had ordered the husband to secure to her for her life and otherwise confirming the Registrar's order.

(1) (1898) 78 L.T. 687; 79 L.T. 366. (2) (1931) P. 1.

The suit was founded on desertion and, upon an application made by the petitioner shortly after decree absolute it was ordered that the respondent in the suit should secure to the petitioner for her life and to the satisfaction of the court an annual sum of £286, the Registrar of the Court to settle and approve proper deeds or instruments to be executed by all necessary parties and that a trustee should be appointed by agreement of the parties or nominated by the Registrar in default of agreement. The order went on to require the respondent to give security over certain real property and over the sum of £1,250 in cash, which sum might be invested by the trustee. The order made by *Edwards* J. confirmed this order except that the annual sum was reduced from £286 to £260 and that a life assurance was substituted for the sum of £1,250 cash. The petitioner has appealed against this order and the respondent in the suit has cross-appealed.

Both the learned judge and the Registrar, in making their respective orders, exercised the power given by s. 39 of the *Matrimonial Causes Act* 1899-1929. It does not appear very clearly exactly why his Honour reduced the amount of the annual payment by £26, but it is suggested for the appellant (the petitioner) that he would or might not have done so had he not been of opinion that under the section it is not possible to exact a personal covenant as part of the security and that the security must be confined to proprietary rights. The appellant maintains that a view of the provision which excludes the possibility of using a personal covenant as part of the security is erroneous. It is convenient to deal at once with this question of law before going to the facts of the case. Section 39, which comes from s. 32 of the English *Matrimonial Causes Act* 1857 (20 & 21 Vict. c. 85), provides that 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. It is a power to " secure " maintenance to the wife, and it is settled that it does not authorize an order upon him to pay an annual sum so that failure on his part to make the payment would amount to disobedience of the order. In *Medley* v. *Medley* (1) *Lindley* L.J. said :—" At first sight it might appear as if the term ' secure ' would include payment, but when looked at more closely, and when the second Act is taken into consideration, I think it is clear that it does not include payment, but that the sum gross or annual was to be secured so as to provide a fund for the wife." Power to make a personal order for payment

(1) (1882) L.R. 7 P.D. 122, at p. 125.

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against the husband was conferred upon the court in England by the *Matrimonial Causes Act* 1866 (29 & 30 Vict. c. 32). But, as the recitals showed, its application was limited to cases to which the earlier provision was inapplicable. Further, it gave power to order payment only during the joint lives of husband and wife, while the earlier provision enabled the court to secure payment to the wife during her life, although her husband might predecease her. Section 40 of the New South Wales Act represents this provision. The words "instead of" in s. 40 make it clear that the court cannot employ both powers simultaneously in the one case. It was so decided in England by *Jessel* M.R. in *Medley* v. *Medley* (1). But, by the English *Matrimonial Causes Act* 1907, s. 1 (2), it was enacted that an order on the husband for payment to the wife during their joint lives of a monthly or weekly sum for her maintenance and support might be made either in addition to or instead of an order to secure a gross or annual sum to her for a term not exceeding her life. This provision has not been adopted in New South Wales.

The question, therefore, is of some importance whether the court can require the husband to incur a contractual obligation to pay the whole or part of the annual sum which it thinks it is just to order the husband to secure to the wife. It is important not only in the interests of the wife but also of the husband. For if the power to do so exists it may in a proper case justify a course which the court would not otherwise take, namely, to refrain in the husband's interests from securing the whole sum needed by the wife over property of the husband and instead, as to part, to rely on the security of his personal covenant, or, alternatively, to secure the whole over a smaller amount of property, relying on his personal covenant to ensure that a deficiency of income therefrom does not mean that the wife's allowance goes unpaid.

There is nothing in the word "secure" to suggest that personal security is excluded, although no doubt the chief purpose of the provision was to authorize the ordering of a security over property. Most securities for the payment of money given over property include also a personal covenant.

The course of authority, however, appears to place the matter beyond doubt. In *Fisher* v. *Fisher* (2) Sir *Cresswell Cresswell*, as the judge ordinary, having fixed an annual amount for the maintenance of a wife who had obtained a decree of dissolution, ordered that a deed should be prepared by one of the conveyancing counsel of the Court of Chancery to secure the annuity on such fixed

(1) (1882) L.R. 7 P.D. 122.

(2) (1861) 31 L.J.P.M. & A. 1, at p. 3.

property as the respondent has and by his covenant. *Edwards* J. considered that the covenant contemplated by Sir *Cresswell Cresswell* was not a covenant to pay, but merely one on breach of which the trustee or trustees of the deed could realize the security and reinvest the proceeds. His Honour regarded the observations of *Jessel* M.R. in *Medley* v. *Medley* (1) as making this clear. But the distinction which Sir *George Jessel* drew was that between the personal liability imposed by a curial order such as an order made under s. 40 and the securing of a sum under s. 39. The Master of the Rolls was not concerned with the possibility of the security containing a contractual liability constituting a personal obligation. What Sir *Cresswell Cresswell* meant was that a personal covenant to pay should be included in the instrument securing the annual sum over the fixed property of the respondent husband. In *Shorthouse* v. *Shorthouse* (2) Sir *Francis Jeune* P. considered that not more than one-third of the capital in that case belonging to the husband should be withdrawn from the beneficial enjoyment of the husband in order to afford a security for an annual sum for the maintenance of the wife and yet that she should receive an annual sum greater than the income of one-third of his capital would provide. The President decided in these circumstances "that as to the rest the wife must be content with the husband's covenant". His Lordship went on to say that he had consulted *Gorrell Barnes* J. and that he agreed that such an order would be best and most in accordance with the practice of the court. His Lordship said that the proper way, therefore, of deciding the case was to order that one-third of the capital sum should be invested in trust securities and that the husband should covenant to pay any deficit of the annual sum he fixed. An appeal by the husband was dismissed by *Lindley* M.R., *Chitty* L.J. and *Vaughan Williams* L.J. (3).

In *Blunden* v. *Blunden* (4) *Cullen* C.J., *Cohen* J. and *Pring* J. adopted a similar course and ordered a husband to enter into a personal covenant binding himself and his executors to pay the annual maintenance to his wife while an encumbrance existed over the property upon which the annual sum was secured. In New Zealand, too, a personal covenant has been required as part of the security (*Bond* v. *Bond* (5) ).

On the other side, however, is a dictum of *Hill* J. in *Shearn* v. *Shearn* (6). In contrasting an order made under the provisions

(1) (1882) L.R. 7 P.D., at p. 124.
(2) (1898) 78 L.T., at p. 688.
(3) (1898) 79 L.T. 366.
(4) (1910) 10 S.R. (N.S.W.), at p. 799; 27 W.N., at p. 191.
(5) (1929) N.Z.L.R. 909.
(6) (1931) P., at p. 4.

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standing as s. 39 in the New South Wales Act with those standing as s. 40, *Hill* J. said that under the former the order is not an order to make periodical payments and secure the payments: it is an order to secure and nothing else. "Under it the only obligation of the husband is to provide the security; having done that he is under no further liability. He enters into no covenant to pay and never becomes a debtor in respect of the payments."

With all respect his Lordship appears to have fallen into error in supposing that because under the provisions contained in s. 39 no personal order to pay can be made against the husband, therefore no covenant to pay could be required of him. That is contrary to the earlier authorities and further it is not justified by the common understanding of the word "secure". In *Hyde* v. *Hyde* (1) *Barnard* J. made an order for a personal covenant, although it is true that his order was preceded by an earlier order contemplating such a covenant and by an inchoate agreement of the parties for giving effect to that order and perhaps this lessens the weight of the decision as a precedent.

But in any case the authority of the cases already cited is well nigh conclusive to show that before the enactment of the *Matrimonial Causes Act* 1907 (7 Edw. 7 c. 12), which deprived the question of practical importance, the practice of the court in England was to include the requirement that the husband should enter into a personal covenant in an order to secure an annual sum for maintenance, if that course seemed just.

The supposed impossibility of including in the order that the respondent secure to the appellant an annual sum a requirement that he enter into a personal covenant became material in the present case only because it appeared to limit the expedients open for adjusting the conflict between the necessities of the appellant and the interests of the respondent. The case depends upon a proper application to the particular situation in which the parties stand of the principles upon which the jurisdiction given to the Court by s. 39 are exercised. It is unnecessary to say that it is a matter governed primarily by the facts and circumstances appearing in evidence. The more material of them may be briefly stated. The parties were married in 1919. The issue of the marriage is one child, a daughter. The respondent carried on business for some time as a storekeeper at Marrar near Wagga Wagga and he and his wife lived together in that place. In 1942, however, they parted, and in April 1948 she petitioned for dissolution on the ground of desertion. Alimony *pendente lite* was fixed

(1) (1948) 1 All E.R., at p. 364.

at £5 a week. A decree nisi was pronounced on 14th January 1949 and made absolute on 22nd September 1949. On 19th October 1949 the appellant gave notice of motion for an order for permanent maintenance in a form appropriate to s. 40. On the hearing of the motion before the Registrar the notice was amended to include an application under s. 39. At that time the appellant was fifty-eight years of age and the respondent fifty-seven. Their daughter had married and had several children, but her marriage had broken down. On 20th October 1949 the respondent remarried. He married a young woman aged twenty-four years. She was in ill-health—her lung had been collapsed—and she needed some care and medical attention. When the petition was filed the respondent was the proprietor of a drapery business at Epping, but before the application by the petitioner for permanent maintenance came on to be heard on 10th November 1949 he had given up this business. He transferred it to a company for a purchase consideration, partly expressed in shares in the company and partly in money. He said that he gave up the business for reasons which included his own health, acting on medical advice, but he contemplated entering again into a similar business. By the time the reference of the matter from the Registrar to the Court came on to be heard before *Edwards* J. the respondent had acquired a business and had been carrying it on for a fortnight. As a result his position both as to prospective income and as to capital had materially changed. It is enough for the purposes of this appeal to state what his circumstances were at that date. The business he had bought was that of a retail draper carried on in Cammeray. By the terms of the agreement of purchase he took over the stock-in-trade at cost and paid £1,500 for the business, plant, equipment, furniture and fittings. He took over the premises, which were held on a weekly tenancy. The value of the stock was ascertained at £1,966 and this amount he paid also. He found it necessary to increase the stock and he bought at once further stock to the value of £1,000 and ordered still further stock to the extent of another £1,000. He found that the business had been conducted on the basis of £4,000 of stock and the purchases brought up the stock carried to this amount, but he hoped to carry a stock of £6,000. When he had bought the business his remaining outside assets consisted of the following. He retained 1,000 shares in the company that took over his previous business and they were valued at 30s. each or more. He held a policy of insurance upon his own life the surrender value of which was £677 19s. 8d. He was entitled to a future interest or remainder in his deceased father's

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residuary estate expectant on the death of his mother, a woman of very advanced age. This was valued at £2,000. He owned a house which he had bought after remarrying and he had furnished it. This was the home for himself and his wife. The dwelling house and its contents were set down at £4,050. In addition he owned a motor car, which he said was essential to his business. The car was valued at £300. What would be the net earnings from the business was necessarily a matter depending on estimation. He had not been trading long enough for his own experience to form a reliable guide for the purpose and there was a dispute as to the rate of turnover and as to the percentage of net profit to be expected. An expert who was called for the appellant fixed £950 per annum as a figure which the respondent ought to be reasonably sure of gaining from the business, but whether *Edwards* J. adopted this estimate is uncertain. His Honour said that due weight must be given to the expert testimony of the witness, adding, however, that in that connection the age and health of the respondent must not be overlooked. However this may be, little doubt can exist, on the evidence, that, subject to the vicissitudes to which all businesses are exposed and to the varying results which flow from efficient and inefficient management, the business ought to produce a substantial income and that the estimate given by the witness was not inflated or exaggerated. On the side of liabilities the respondent said that he owed his mother £2,250 for moneys advanced and his sister £200. It was obvious, however, that it was not intended that these sums should be repaid in present circumstances. They were family liabilities which would probably be settled when the future interests in the father's estate fell in. Income tax is of course a liability to be considered as a deduction from net income. At the time of the hearing before *Edwards* J. the mode of life of the appellant was simple enough. She lived in a house for which she paid 37s. 6d. rent on the terms that she accommodated her landlady in the largest of its five rooms, an arrangement made apparently in consequence of the latter's age and of her need of accommodation. The appellant has no source of income, though a sister paid the rent while temporarily staying with her and sometimes gave her financial assistance. The appellant's evidence showed how difficult she had found it to subsist upon the amount of £5 a week.

Both *Edwards* J. and the Registrar considered that it was a proper case for the exercise of the power which s. 39 confers upon the court. The fact that under s. 40 it is possible only to order payment of a sum during the joint lives of the parties was referred

to and no doubt this formed a consideration affecting the decision of the learned judge as well as of the Registrar. But the existence of substantial proprietary interests in the hands of the respondent was a basal reason for the order. In making an order under s. 39 one of the matters to be weighed is the income-producing capacity of the husband's assets and it is true that much of the respondent's property does not at present produce income. But this consideration was not neglected and s. 39 authorizes the inclusion of non-income-producing property in that over which the annual payments may be secured. Nor was the consideration neglected which is embodied in the dictum of *Coleridge* L.C.J. in *Jardine* v. *Jardine* (1), namely, that the words of the other provision, s. 40, " are abundantly sufficient to include the case of a person . . . who has a large capital fairly and reasonably locked up in trade, so that it is not easy to secure upon it a fixed sum without doing that which of course it is most desirable not to do, namely, destroy the very means by which the trade is carried on ". Indeed the desirability of not hampering the respondent in the use of assets for the support and development of his business seems to have been an important consideration in the making of the precise order.

But the amount adopted by the learned judge of £260 per annum appears a slender income upon which to expect the appellant to subsist and the amount of £286 fixed by the Registrar is itself too small. The assessment of an amount involves a number of considerations. The appellant's necessities must be weighed in relation to the extent of the respondent's property and the income which by its employment and by his exertions he may be expected to command. His needs must be taken into account. The fact that the assessment must be made and an amount fixed once for all is to be considered in relation to the present and probable future position not only of the appellant but also to that of the respondent. But, after all, the appellant was his wife and obtained a decree of dissolution on the ground of his desertion and he ought not to be relieved from his responsibility for her reasonable maintenance.

On the whole, the proper course appears to be to fix an annual sum of £350 and to order that it be secured over specific items of his property and by his personal covenant. The items of his property over which it should so be secured are his land and dwelling and his life policy. The annual sum should be secured to the appellant for her life or until remarriage and the respondent's

(1) (1881) L.R. 6 P.D., at p. 215.

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covenant should be expressed to bind himself, his executors and administrators. It should be referred to the Registrar to settle a proper instrument so to secure the annual sum to fix the periodical interval of payment. There should be liberty to apply to the Supreme Court. The appeal should be allowed and the cross appeal dismissed. The order of the Supreme Court should be varied to give effect to the foregoing directions. The respondent should pay the appellant's costs of this appeal.

*Appeal allowed with costs. Cross appeal dismissed with costs. Order of Edwards J. varied by striking out the words therein after the word "confirmed" and substituting therefor the following :—"Except that the annual sum be increased to* £350, *that the annual sum be secured to the petitioner for her life or until remarriage, that the instruments referred to in the Registrar's order for securing the said annual sum shall include the personal covenant of the respondent binding upon him and his executors, that in lieu of the sum of* £1,250 *cash mentioned in the Registrar's order there be substituted the respondent's policy of assurance on his life, and that in lieu of fixing the sum of* £5 10*s.* 0*d. per week it be referred to the Registrar to fix a weekly or other periodical amount to be paid on account of such annual sum." Order that the respondent pay the costs of the proceedings before Edwards J. Liberty to apply to the Supreme Court.*

Solicitors for the appellant, *J. C. Harris & Co.*
Solicitors for the respondent, *Whitehead, Ferranti & Green.*

J. B.