[HIGH COURT OF AUSTRALIA.]

ELLEN COOK . . . . . APPELLANT;
INFORMANT,

AND

WALTER HENRY COOK . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1923.

MELBOURNE, *Oct.* 15, 16.

SYDNEY, *Dec.* 7.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

*Husband and Wife—Maintenance of wife—Order of justices—Disobedience of order—Enforcement of order by justice—Jurisdiction—Discretion—Adultery of wife since order—Power of Court of General Sessions—Limitation of proceedings—Continuing offence—Marriage Act* 1915 (*Vict.*) (*No.* 2691), *secs.* 84, 91, 93—*Marriage* (*Maintenance*) *Act* 1919 (*Vict.*) (*No.* 3010), *sec.* 4—*Justices Act* 1915 (*Vict.*) (*No.* 2675), *sec.* 210.

Sec. 84 of the *Marriage Act* 1915 (Vict.) provides that on the hearing of a complaint by a wife that her husband has left her without means of support any two justices shall, if satisfied that she is in fact without means of support and that her husband is able to maintain her or to contribute to her maintenance, make an order directing the husband to pay a weekly or monthly sum for her use. Sec. 91, as amended by the *Marriage* (*Maintenance*) *Act* 1919 (Vict.), sec. 4, provides that "Any one justice may at any time inquire in a summary way into any allegation of disobedience of any such order as aforesaid . . . ; and may for that purpose summon and examine all proper parties and witnesses, and may either commit the offender until the order has been obeyed or may impose upon such offender a penalty of not less than five nor more than fifty pounds or may order that any sum or sums of money then due under any such order (together with the costs of the inquiry under this section) be levied by distress and sale of the goods and chattels of the offender together with the reasonable charges of such distress." Sec. 93 provides that where two justices have made an order under sec. 84 "they shall transmit the same . . . to the clerk of the peace . . . ; and the Court of General Sessions, . . .

H. C. OF A. 1923. COOK v. COOK.

whether an appeal against the same has been entered or not, may at any time quash confirm or vary such order either in whole or in part at its discretion and may substitute a new order in lieu thereof."

*Held*, that the subsequent adultery of a wife does not *ipso facto* annul an order made under sec. 84, and on an inquiry under sec. 91 a justice has no authority to refuse to enforce obedience to the order on the ground of such adultery, his only jurisdiction being to inquire whether the order has been disobeyed.

*Held*, also, that on an appeal by a husband to a Court of General Sessions against an order made under sec. 84, that Court may receive further evidence upon questions of fact and consider grounds which did not exist at the time the order was made.

Sec. 210 of the *Justices Act* 1915 (Vict.) provides that "Where . . . justices are authorized by law to make an order in respect of any offence or where any offence or act is punishable by summary conviction, if no time is specially limited for laying an information in the Act of Parliament relating to such case, such information shall be laid within twelve months from the time when the matter of such information arose and not afterwards," &c.

*Held*, that if an order upon an information charging disobedience of a maintenance order is an "order in respect of an offence" within the meaning of sec. 210, the disobedience is a continuing act giving a cause of complaint *de die in diem*.

Decision of the Supreme Court of Victoria (*Mann* J.): *Cook* v. *Cook*, (1923) V.L.R., 354; 44 A.L.T., 187, reversed.

APPEAL from the Supreme Court of Victoria.

On 21st September 1915, at the Court of Petty Sessions at Macarthur, on the information of Ellen Cook that her husband, Walter Henry Cook, had left her without means of support, an order was made that he should pay ten shillings per week for her support. On 16th February 1923 at the same Court an information was heard whereby Ellen Cook charged that Walter Henry Cook had disobeyed the order of 21st September 1915 inasmuch as he had neglected to pay certain of the weekly payments amounting on 5th January 1923 to the sum of £26. After hearing evidence the Police Magistrate who heard the information dismissed it with costs, on the ground that since the order was made Mrs Cook had committed adultery. She then obtained an order nisi to review that decision on the ground (*inter alia*) that, inasmuch as by the information the application was to enforce an existing order, evidence of adultery afforded no answer

to the information. The order nisi was heard by *Mann* J., who discharged it with costs: *Cook* v. *Cook* (1).

From that decision Mrs. Cook now, by special leave, appealed to the High Court.

*Lewers* for the appellant. In proceedings under sec. 91 of the *Marriage Act* 1915 all that it is necessary for the wife to show is that an order made under sec. 84 is in existence and that it has been disobeyed. That having been shown, the justice must compel obedience to the order, which stands until it is set aside by a Court of competent authority. If circumstances arise which make it proper that the order should be put an end to, the Court of General Sessions has under sec. 93 power to quash or vary the order (*Davies* v. *Davies* (2); *Pascoe* v. *Pascoe* (3)). If that power does not exist under sec. 93, it exists under sec 139 of the *Justices Act* 1915. [Counsel also referred to *Lobley* v. *Lobley* (4); *Roberts* v. *Roberts* (5); *Upton* v. *Upton* (6); *Turner* v. *Kelly* (7); *Ruther* v. *Ruther* (8).]

*Owen Dixon* K.C. (with him *Gorman* and *Fraser*), for the respondent. Although in general an order made by a judicial tribunal must be performed and cannot be put an end to by another judicial order or by some determination contained in the order itself, yet the legislation in Part III. of the *Marriage Act* is for the enforcement of a common law liability and is framed so as to enforce the obligation as long as that liability exists. The sections contain no reference to the marriage relation, and on the words of sec. 84 an order made under it would continue in operation although there had been a dissolution of the marriage. There must be implied a condition that every order for maintenance is to terminate when the liability on which it is founded is brought to an end or is otherwise complied with—for example, upon the marriage being declared void or being dissolved or upon a resumption of cohabitation. (See *Dean* v. *Dean* (9); *Wickins* v. *Wickins* [*No.* 2] (10); *Wells* v. *Wells and Hudson* (11); *Dunn* v. *Dunn* (12);

(1) (1923) V.L.R., 354; 44 A.L.T., 187.
(2) (1919) 26 C.L.R., 348.
(3) (1921) V.L.R., 631; 43 A.L.T., 137.
(4) (1909) V.L.R., 383; 31 A.L.T., 46.
(5) (1903) 29 V.L.R., 158; 25 A.L.T., 54.
(6) (1919) V.L.R., 612; 41 A.L.T., 62.
(7) (1913) 13 S.R. (N.S.W.), 445.
(8) (1903) 2 K.B., 270.
(9) (1923) 39 T.L.R., 602.
(10) (1918) P., 282.
(11) (1864) 3 Sw. & Tr., 542.
(12) (1888) 13 P.D., 91.

H. C. OF A. 1923.

COOK v. COOK.

*Nicol* v. *Nicol* (1); *Haddon* v. *Haddon* (2); *Johnson* v. *Johnson* (3); *Read* v. *Legard* (4); *Culley* v. *Charman* (5).)

[Starke J. referred to *R.* v. *Flintan* (6); *Stimpson* v. *Wood & Son* (7); *Collins* v. *Collins* (8).

[Isaacs J. referred to *Paquine* v. *Snary* (9).]

If the order for maintenance is not terminated by the adultery of the wife, the justice under sec. 91 has a discretion to enforce the order. That section gives the justice jurisdiction to inquire into something which is an offence, namely, a disobedience of the order under circumstances which do not excuse the disobedience; and not merely into the question whether in fact there has been a non-compliance with the order. The section indicates that there may be just cause or excuse for non-compliance; and the adultery of the wife is such just cause or excuse. The information is out of time. Under sec. 210 of the *Justices Act* 1915 (Vict.) it should have been brought within twelve months from the last payment under the order. That section is intended to cover all possible proceedings except indictment, and is a general statute of limitations. [Counsel also referred to *In re Welsh* (10); *Davies* v. *Evans* (11); *Grocock* v. *Grocock* (12).]

*Lewers*, in reply, referred to *R.* v. *Justices of the Central Bailiwick*; *Ex parte McEvoy* (13); *Fearon* v. *Earl of Aylesford* (14); *Collins* v. *Collins* (8); *Goodden* v. *Goodden* (15); *Leslie* v. *Leslie* (16); *Folwell* v. *Folwell* (17).

[Starke J. referred to *Newmarch* v. *Atkinson* (18).]

*Cur. adv. vult.*

Dec. 7.

The following written judgments were delivered :—

Knox C.J. and Starke J. An order was made against Walter Henry Cook, the respondent, directing him to pay the sum of ten shillings per week to the Clerk of Petty Sessions for the maintenance

(1) (1886) 31 Ch. D., 524.
(2) (1887) 18 Q.B.D., 778.
(3) (1922) V.L.R., 487.
(4) (1851) 6 Ex., 636.
(5) (1881) 7 Q.B.D., 89.
(6) (1830) 1 B. & Ad., 227.
(7) (1888) 57 L.J. Q.B., 484.
(8) (1910) 103 L.T., 80.
(9) (1909) 1 K.B., 688.
(10) (1883) 9 V.L.R. (L.), 166; 5 A.L.T., 17.
(11) (1882) 9 Q.B.D., 238.
(12) (1920) 1 K.B., 1.
(13) (1881) 7 V.L.R. (L.), 90; 2 A.L.T., 125.
(14) (1884) 14 Q.B.D., 792.
(15) (1892) P., 1;
(16) (1911) P., 203.
(17) (1921) V.L.R., 229; 42 A.L.T., 153.
(18) (1918) 25 C.L.R., 381.

of his wife, the appellant. It was made in September 1915 pursuant to the provisions of Part III. of the *Marriage Act* 1915 of the State of Victoria. The respondent did not obey the order, and was on 5th January 1923 some £26 in arrears. The appellant laid an information against the respondent under sec. 91 of the Act, alleging disobedience of the order, but it was dismissed; and *Mann* J., in the Supreme Court of the State of Victoria, affirmed this decision. It was proved on the hearing of the information that the wife had committed adultery since the date of the maintenance order. And it was urged in support of the dismissal of the information that the legislation contained in Part III. of the *Marriage Act* was for the enforcement of an obligation which existed at common law, and that when the obligation disappeared the maintenance order disappeared with it.

A long line of authorities establish the position that a husband is not bound by common law to maintain a wife who has been guilty of adultery and is living apart from him. Further, the justices may, in their discretion, decline to make an order for maintenance under the *Marriage Act* if any reasonable cause is shown for the desertion of the wife or the refusal to maintain her (sec. 87). And adultery on the part of the wife may, no doubt, constitute a reasonable cause for declining to make an order for her maintenance under this Act. But the purpose of Part III. of the Act is, not so much to enforce a private obligation, as to effect a policy deemed necessary in the public interest, namely, the maintenance of destitute or deserted wives and children (*Davies* v. *Davies* (1) ). The means of effecting that policy must depend upon the provisions of the Act itself, and not, we should have thought, upon the private obligation of the parties. This brings us to the consideration of the meaning of sec. 91. "Any one justice," the section reads, "may at any time inquire in a summary way into any allegation of disobedience of any such order as aforesaid or of any order made by the Court of General Sessions of the Peace as hereinafter mentioned; and may for that purpose summon and examine all proper parties and witnesses, and may either commit the offender until the order has been obeyed or may impose upon such offender a penalty of not less than five or more than fifty pounds,"

(1) (1919) 26 C.L.R., 348.

H. C. OF A. 1923. COOK v. COOK. Knox C.J. Starke J.

or, by force of an amending Act (No. 3010, sec. 4), "may order that any sum or sums of money then due under any such order . . . be levied by distress and sale of the goods and chattels of the offender," &c. Now, this power is permissive in terms; but the question whether its exercise depends upon the discretion of the justice or upon proof of the particular case out of which the power arises is determined by the context in which the words are found—the particular provisions and the general scope of the enactment conferring the power. The section commences with a grant of jurisdiction to the justice to inquire into an allegation of disobedience of the order, and not into the propriety of the order or into the question whether reasonable cause exists for disobeying it. It next authorizes him to examine witnesses "for that purpose"; that is, for the purpose of the inquiry as to disobedience of the order. Then comes the authority to commit, &c.: but does this mean that the justice may commit if, having regard to all the surrounding circumstances, he thinks fit; or does it mean that he may commit in case of disobedience of the order as to which he is authorized to inquire? To our minds, the latter is the proper construction of the section. And it receives support from other sections of the Act. Thus in sec. 87 we find a provision that the maintenance order shall continue in force until it is rescinded by the justices who made it, or by any two justices upon such proof as they deem sufficient being given before them of the falsity of the averments sworn to by the wife. Again, by sec. 93, the General Sessions may at any time quash, confirm or vary the maintenance order, either wholly or in part at its discretion, and may substitute a new order in lieu thereof. In *Johnson* v. *Johnson* (1) *Irvine* C.J. said that this power was strictly appellate—"that is, a power to revise, review, or alter a decision because it was wrongly made, or, of course, to confirm it because rightly made—not to revise, review, or alter the obligations that arise from time to time under it." If the learned Chief Justice meant by these words that the Court had no authority to receive further evidence upon questions of fact or to consider grounds which did not exist at the time the maintenance order was made, then he narrows unduly, in our opinion, the powers conferred by sec 93. The section subjects the whole matter to rehearing and retrial (see *South*

(1) (1922) V.L.R., at p. 491.

*Australian Land, Mortgage & Agency Co.* v. *The King* (1); *McCullin* v. *Crawford* (2); *Pascoe* v. *Pascoe* (3) ). The actual decision, however, of the Chief Justice was that, once the matter had been heard and determined by the General Sessions, then no further appeal or hearing could be entertained by it pursuant to the provisions of sec. 93. But it is better to leave this point for further consideration. It does not directly arise in this case, and, if the decision be correct, then the changing circumstances which may affect a maintenance order have not all been provided for by the Act. But that does not enlarge the powers conferred upon a justice under sec. 91, or warrant a general implication of power necessary to correct supposed defects in the Act.

Finally, we were told that the information was not laid, as to the greater part of the arrears of maintenance, within twelve months from the time when the matter of such information arose, as required by the *Justices Act* 1915 of Victoria, sec. 210. We do not think it necessary to determine whether an order upon an information charging disobedience of a maintenance order is an " order in respect of an offence " within the provisions of sec. 210, for, assuming that it is, still the disobedience of the maintenance order is a continuing act giving a cause of complaint *de die in diem.*

The appeal must be allowed.

ISAACS J. Walter Henry Cook in 1915 unlawfully left his wife, Ellen Cook, without means of support. In September of that year a Police Magistrate under the law corresponding to sec. 84 of the *Marriage Act* 1915 made a maintenance order directing him to pay his wife ten shillings a week, and ordering him to find a surety in the sum of £20 to obey the order of maintenance. As the law then stood and still stands, if any reasonable cause had been shown for the husband's refusal to support his wife, the magistrate could have refused to make an order. We start, therefore, with the position that the husband without any justification refused to maintain his wife. On 5th January 1922 he ceased payments under the order, and on 15th February 1923 his wife instituted proceedings under sec. 91 of the Act to enforce obedience. On the hearing, the defence was that

(1) (1922) 30 C.L.R., 523, at p. 552.
(2) (1921) 29 C.L.R., 186.
(3) (1921) V.L.R., 631; 43 A.L.T., 137.

H. C. OF A. 1923.

COOK v. COOK.

Isaacs J.

the appellant was living in adultery. Objection was taken that that was not a question within the jurisdiction of the magistrate to determine on that application. The objection was overruled, and evidence was heard. The wife strenuously denied the accusation. The only witness against her was the married daughter of the parties. The daughter's evidence is certainly open to severe criticism which, in the view I take, it is quite unnecessary to elaborate. The magistrate, however, believed the daughter's statement, and found that her story of her mother's adultery was true. He on that ground alone dismissed the application. On appeal to the Supreme Court *Mann* J. upheld the decision. It is challenged before us on the ground that, upon proceedings under sec. 91 to enforce an existing order, the tribunal has no authority to question the enforceability of the order or to inquire into adultery, or anything but the allegation of disobedience and the appropriateness of applying one of the remedies prescribed by the Legislature in such case rather than any of the others. It was objected on behalf of the husband (1) that adultery *ipso facto* annulled the order; and, failing that, (2) that under sec. 91 the tribunal by reason of the word "may" had a discretion as to whether there should be any enforcement or not. (3) There is a third objection that the information was not laid within twelve months as required by sec. 210 of the *Justices Act* 1915.

The first objection is, in my opinion, wholly untenable. It goes without question that, unless it is part of the magistrate's function under sec. 91 to consider the question of adultery, either as an absolute or as a discretionary bar to the enforcement of the order, his finding on this occasion counts for nothing. In that case, no appellate tribunal having any greater right than the magistrate had to consider that issue, it follows that, if outside his function, it was also outside the function of the Supreme Court, and is equally outside ours, to proceed on the assumption that the appellant had committed adultery. We must, therefore, proceed on the issue of jurisdiction. Now, the first objection is very simple and very drastic. It is that a wife's adultery is under all circumstances and *ipso facto* an annulment of the order for maintenance. That is, that quite irrespective of the conduct of any husband, notwithstanding his initial desertion or unjustifiable refusal to maintain his wife, notwithstanding he still

declines to treat her as a deserving wife should be treated, notwithstanding he may deliberately refuse to comply with the order and leave her to starve and may himself be a drunkard or living a life of vice and degradation, and may even have conduced to his wife's degradation, he has always the right to rely on her unchastity and to protect his manly honour by simply refusing to recognize the maintenance order and the pittance it prescribes; and that the law secures to him this privilege. As there is nothing in the Act expressly requiring me to accept that argument, I have too little respect for the honour of such a man, and too much respect for the law I am called on to administer, to yield to the contention that such a privilege is implicit in the statute. In view of the discretion expressly given in sec. 87 when the original order is applied for, the suggested implication in the order of maintenance is impossible. The cases cited for the respondent on this point are without analogy, being based either on non-statutory obligation or on statutes entirely different in purpose and language. I hold the first objection to be untenable.

The second—namely, that the magistrate may inquire into the circumstances and in his discretion grant or refuse relief—is certainly more reasonable, but still without legal foundation. The argument is rested on the word " may " in sec. 91. It is unquestionable that the word " may " is in itself, like the words " it shall be lawful," primarily potential. Whatever obligation exists to exercise the power must be found *aliunde*. The law on this subject was stated in *Newmarch* v. *Atkinson* (1). That was founded on long established authorities, and has been recently reaffirmed. See *Mersey Docks and Harbour Board* v. *Hay* (2), per Earl of *Birkenhead*, per Viscount *Finlay*, per Lord *Atkinson* and per Lord *Sumner*. Lord *Sumner's* words perhaps more closely illustrate the position in the present case. His Lordship says: " The section doubtless empowers the Court and the Judge 'may' exercise that power, but he must do so when duly invoked, and he must do so according to law." Those words are not, of course, an authority for the construction of sec. 91; but they represent my view of that section. It was held in *Davies* v. *Davies* (3) that the provisions of secs. 83 and 84 of the

(1) (1918) 25 C.L.R., at pp. 387-388.
(2) (1923) A.C., 345, at pp. 356, 363, 371-372, 391.
(3) (1919) 26 C.L.R., 348.

H. C. OF A. 1923. COOK v. COOK. Isaacs J.

*Marriage Act* 1915 are enactments of public policy. That decision is fortified by the tenor of Act No. 3010, passed shortly afterwards. Sec. 91 is in any aspect a means of securing compliance with an order made under sec. 84, and it would be strange indeed if Parliament had intended that a single justice could, at his own unchallengeable discretion, set at naught all the previous provisions of the Act. For that is what the contention amounts to. If the intention of Parliament had been that the Justice was to be left free to say yes or no as he personally thought right, then he might refuse to enforce the order even though the wife were blameless and the husband an acknowledged scoundrel. If that position be unmaintainable the section must import, as I think it does import, that, once the conditions prescribed by the section are satisfied—namely, proof of the allegation of disobedience—the tribunal must exercise the power entrusted to him, and, in Lord *Sumner's* words, "he must do so according to law." The express words of the section seem to make any other view impossible. What it provides is that the tribunal may inquire in a summary way into "any allegation of disobedience" of the order, and may "for that purpose"—that is, solely for that purpose and no other purpose—summon and examine parties and witnesses. Having done that, and having so far no jurisdiction to inquire as to anything else, the tribunal may then "either" (1) commit the offender until he obeys and (2) impose on him a penalty, or (3) (by Act No. 3010) order recovery of the sums due under the order of distress. The suitability of *remedy* may be inquired into, but the *right* is previously settled independently. There is no such mere potential jurisdiction as is contended for. The second objection therefore fails also. I have arrived at this conclusion quite independently of sec. 93.

In this case no appeal whatever has been made to the Court of General Sessions. The words "at any time" are very large, but not as large as "from time to time," though it may be that sub-sec. 1 of sec. 27 of the *Acts Interpretation Act* 1915 may have some operation on sec. 93, as to which however, I have formed no opinion. In *Lobley* v. *Lobley* (1) *Madden* C.J. made some weighty observations regarding the corresponding section then in

(1) (1909) V.L.R., 383; 31 A.L.T., 46.

force, which were concurred in by *Hodges* J. and *Cussen* J. Those observations, however, do not introduce a procedure from time to time. On the other hand, in *Johnson* v. *Johnson* (1) *Irvine* C.J. held that the power could not be exercised from time to time; and, in my opinion, that decision was right. The Full Court's observations in *Lobley* v. *Lobley* (2) were practically followed in *Pascoe* v. *Pascoe* (3), which was, in my opinion, rightly decided. Both *Mann* J. in *Pascoe's Case* and *Irvine* C.J. in *Johnson's Case* correctly interpreted my words in *Davies* v. *Davies* (4). Sec. 93 cannot be judicially expanded beyond its words. " At any time " the Court of General Sessions may deal with an order, not an order made by itself, but an order made by *two justices* under prior provisions of the Act. The section has given rise to much discussion and diverse opinion ; it affects a wide area of very necessitous interests ; the power of revision as circumstances alter is certainly a most desirable power, just as in cases arising under sec. 143 of the Act, where the power said to be implied in sec. 93 is expressly given. I would suggest that Parliament make its meaning clear beyond question, because in my opinion it would be legislation and not interpretation for a Court to declare the jurisdiction . The principle of the decision in *Roberts* v. *Roberts* (5) is opposed to that of *Davies* v. *Davies*, but the subsidiary view of *Hodges* J. in that case, that the order of maintenance is indefinite in duration and the sum is simply a weekly or monthly sum accruing, therefore, weekly or monthly, is unquestionable.

The third objection, therefore, if correct, would at most strike only at the defaults outside the twelve month period, that is, six weeks. The husband's position as to this objection is singular. He says " informations for ' offences ' are, under sec. 210 of the *Justices Act*, limited to a period of twelve months, and, if in default, I am an ' offender ' "—see sec. 91 of the *Marriage Act*. No doubt sec. 91 is a section to compel obedience. But it is a section applying after disobedience and, besides describing the person disobeying as an " offender " (which in itself is not decisive), provides (1) imprisonment, (2) penalty and (3) (by amendment) distress.

(1) (1922) V.L.R., 487.
(2) (1909) V.L.R., 383; 31 A.L.T., 46.
(3) (1921) V.L.R., 631 ; 43 A.L.T., 137.
(4) (1919) 26 C.L.R., 348.
(5) (1903) 29 V.L.R., 158 ; 25 A.L.T., 54.

H. C. OF A. 1923. COOK v. COOK. Isaacs J.

But sec. 92 shows that there must be an "informant," who need not be the wife or child. One-half of every penalty must go to the Crown; the other half may be divided between the wife or child and the informant. The possible participation by the informant is another proof of the public policy of the legislation. Reading sec. 91 with sec. 92, and reading with both Act No. 3010 and the case of *Davies* v. *Davies* (1), I feel no doubt that the legislation does regard disobedience of a maintenance order as a real public offence to be punished, if need be, by imprisonment or penalty, though now by amendment a means exists for directly assisting the wife or child, instead of the indirect assistance formerly provided by surety and division of penalty. If authority is necessary, *In re Gamble* (2) contains observations of a very direct nature. *Wills* J. says: "It seems that down to 1868 where a person neglected to obey an order of justices ordering him to contribute to the maintenance of his parent he was liable to a penalty, and *a penalty necessarily implies that the act or omission in respect of which it is imposed is in the nature of a crime.*" The Victorian legislation still found in sec. 91 was long anterior to 1868, and in 1880 the case of *In re Harris* (3) was decided by the Full Court. It was held that an insolvent committed to prison by an order of the justices under the corresponding section till he should pay arrears of maintenance of his wife was not entitled to his discharge under sec. 76 of the *Insolvency Statute*, because he had committed an "offence." *Stawell* C.J., *in arguendo*, said that the husband had been guilty of a double offence, in deserting his wife and in not paying the maintenance ordered. He added: "If the disobedience were simply non-payment of money, there would be less difficulty." In giving judgment the learned Chief Justice discussed fully the nature of the proceedings, saying (*inter alia*): "The refusal to maintain the wife and the desertion of wife or children are offences"; and also "The offender is to be committed till he obeys the order. It is a means of enforcing the order, and compelling obedience, by *punishing disobedience* of it; *and the non-compliance with the order is considered as an offence*, not as a debt, for the justices may either order imprisonment, or impose a fine." *Barry* and *Stephen* JJ. were in agreement. *Stephen* J. also

(1) (1919) 26 C.L.R., 348.
(2) (1899) 1 Q.B., 305, at p. 307.
(3) (1880) 6 V.L.R. (L.), 47; 1 A.L.T., 153.

pointed out, what is material presently, that the liability to pay maintenance is one continuous liability. Since the argument we have been referred to a case of *Folwell* v. *Folwell* (1), where the contrary is held by *McArthur* J. sitting alone. The decision is contrary to *In re Harris* (2), but is rested on a dictum of *Higinbotham* J. sitting in the Full Court in *R.* v. *Collins*; *Ex parte Collins* (3). The dictum of *Higinbotham* J. was plainly directed to the original proceeding to obtain an order for maintenance, when no penalties are in question; and not to the proceeding for disobedience of the order, when penalties exist. The case of *In re Harris* decided in the previous year was not cited, and, of course, was not overruled. Indeed *Stawell* C.J. and *Stephen* J. were both present in *R.* v. *Collins*; *Ex parte Collins*, and we cannot suppose they thought *In re Harris* was impeached. *Cohen* v. *MacDonough* (4) is in line with *In re Harris*. I, therefore, both on principle and authority, consider *Folwell* v. *Folwell* unsustainable.

Nevertheless, I hold the objection futile, and for the following reason :—Disobedience is a continuing offence. The information avers that the said defendant has disobeyed the said order inasmuch as he has neglected to pay certain of the weekly payments as aforesaid amounting in all to the sum of £26 on the fifth day of January 1923. True, for the six weeks outside the twelve month period a separate penalty of £5 could not be imposed. But, for the disobedience complained of, imprisonment or penalty or distress can be awarded in the judicial discretion of the tribunal. And, as the order still stands and the disobedience still continues and includes the whole £26, the whole £26 may be recovered. It is not like some offence which, once committed, is complete and ended, and exists only in the past. It resembles a debt which, though payable a month ago, is still payable.

In the result, I am of opinion that the appeal should be allowed, and the information remitted to the Court of Petty Sessions at Macarthur to be dealt with consistently with the judgment of this Court.

(1) (1921) V.L.R., 229; 42 A.L.T., 153.

(2) (1880) 6 V.L.R. (L.), 47; 1 A.L.T., 153.

(3) (1881) 7 V.L.R. (L.), 74, at p. 78.

(4) (1907) V.L.R., 7; 28 A.L.T., 119.

H. C. OF A. 1923. COOK v. COOK. Higgins J.

HIGGINS J. The question is: Does adultery, committed by the wife after an order made against the husband for her maintenance under section 84 of the Victorian *Marriage Act* 1915, put an end to the order; or does it justify the magistrate, on an application made under sec. 91, in refusing to enforce obedience to the order?

The magistrate dismissed the application made under sec. 91, relying on the Victorian case of *Gardiner* v. *Gardiner* (1). But that case decided merely that on the original claim for maintenance the two magistrates who hear it may take misconduct of the wife into account. This follows from the discretion given to the two justices, under sec. 87: "if any reasonable cause is shown for such desertion or refusal of maintenance . . . the justices may in their discretion decline to make an order." But there is no such provision as to the proceedings under sec. 91 before a single justice.

Sec. 91 merely provides that "any one justice may at any time inquire in a summary way *into any allegation of disobedience* of any such order as aforesaid or of any order made by the Court of General Sessions of the Peace as hereinafter mentioned; and may *for that purpose* summon and examine all proper parties and witnesses, and may either commit the offender *until the order has been obeyed*, or may impose upon such offender a penalty of not less than five nor more than fifty pounds or" (Act 3010, sec. 4) "may order that any sum or sums of money then due under any such order . . . be levied by distress and sale of the goods and chattels of the offender," &c. The main question of this case is as to the meaning of this section. The section has been discussed as if its meaning depended on the word "may" being read as if it were "must"; but that is a mistake. The question is, has the single justice any power to say that the order for maintenance made by the two justices need not be obeyed — can he inquire into any substantive issue other than disobedience of the order—an order made by two justices or by the Court of General Sessions? The section expressly provides that he can examine witnesses *for the one purpose* of testing the allegation of disobedience. The single justice has a discretion either to commit the person disobeying, or to inflict on him a penalty from £5 to £50, or to order

(1) (1893) 15 A.L.T., 71.

distress to be levied for any arrears; but, if the justice commit, he must commit "*until the order has been obeyed*"—not if he think the order ought to be obeyed.

The order of the two justices for maintenance contains no condition as to chastity, and is without limit of time, on its face or under the Act. The order is that the husband pay to the Clerk of Petty Sessions for the time being at Macarthur for the use and maintenance of the said Ellen Cook the weekly sum of ten shillings. According to *Stawell* C.J. the order continues for the joint lives of the husband and the wife, unless sufficient cause be proved at any time before justices (that is to say, two justices, under the section corresponding to the present sec. 87) for its rescission or discharge (*In re Welsh* (1)). Sec. 87, indeed, expressly provides that the order "shall continue in force until it is rescinded by the same or any two other justices." If it is desirable that such orders should be conditional on chastity, or limited to a term, it is for the Legislature to say so; it is not for us to imply it (see *Fearon* v. *Earl of Aylesford* (2); *Collins* v. *Collins* (3)). Of course, one instinctively asks "Why should a husband go on paying maintenance to an unfaithful wife?" But it has to be remembered that the cause of the maintenance order is the infidelity of the husband in unlawfully deserting his wife, or in leaving her without means of support. Desertion or non-maintenance may conduce to unchastity; and perhaps this fact, and the fact that any rigid rule as to maintenance allowance ceasing on adultery would do injustice to wives who may have been more sinned against than sinning, may have influenced the Legislature in its withholding a *dum casta* condition. At all events, the Act and the order under it prescribe no term of duration and no condition; and I cannot think that *Hodges* J. was right in *Roberts* v. *Roberts* (4) in treating even a resumption of cohabitation as in itself putting an end to the order for maintenance. Of course it may be a ground on which a competent tribunal may quash or vary the order. I see that *Cussen* J. doubted the decision in *Lobley* v. *Lobley* (5). It has also been held by the Full Court of Victoria that

(1) (1883) 9 V.L.R. (L.), 166; 5 A.L.T., 17.
(2) (1884) 14 Q.B.D., 792.
(3) (1910) 103 L.T., 80.
(4) (1903) 29 V.L.R., 158; 25 A.L.T., 54.
(5) (1909) V.L.R., 383; 31 A.L.T., 46.

H. C. OF A. 1923.

COOK v. COOK.

Higgins J.

subsequent intercourse of the parties does not annul an order for maintenance (*Upton* v. *Upton* (1) ).

The argument which chiefly influenced the learned judge (*Mann* J.) in affirming the action of the single magistrate in dismissing the application under sec. 91 is that the wife's adultery put an end to that obligation which it was the purpose of the maintenance order to enforce—the obligation of the husband to maintain his wife. I do not question the position that at common law a husband is not bound to maintain his wife if she commit adultery (*Govier* v. *Hancock* (2); *R.* v. *Flintan* (3) ). But we have here to consider the effect of an Act of the Legislature, and of an order made under the Act; and the Act is not confined within the limits of the common law. The common law does not make the father of an illegitimate child liable for its maintenance; but this Act does (sec. 83 (*b*) ). The Legislature in sec. 83 contemplates an order which is not conditioned upon the obligations at common law.

So far as I am aware, in all other jurisdictions the order of a Court is treated as binding, whether right or wrong on the merits, until set aside or varied. I have never known an application for contempt, on the ground of disobedience to an order, to be successfully opposed on the ground that circumstances have changed since the order, and that the defendant, or party bound by the order, should not be punished for not obeying it. Should the wife misconduct herself, or should she get ample means of support through some will, or should the husband be unable to pay the sum ordered, it is not for the husband or the single justice to quash or vary the order.

If it is good law, as stated in Victorian cases (see *Lobley* v. *Lobley* (4); *Pascoe* v. *Pascoe* (5) ), and not (I think) controverted by counsel for the husband, that under sec. 93 the husband can appeal to General Sessions to " quash confirm or vary " the order for maintenance on grounds which do not exist at the time of the order being made, then the scheme of the legislation becomes clearer still. The husband has, of course, to obey the order until it be quashed or varied; but the Court of General Sessions can, according to these cases, give

(1) (1919) V.L.R., 612; 41 A.L.T., 62.
(2) (1796) 6 T.R., 603.
(3) (1830) 1 B. & Ad., 227.
(4) (1909) V.L.R., 383; 31 A.L.T., 46.
(5) (1921) V.L.R., 631; 43 A.L.T., 137.

him relief for the future. I do not want, however, to pronounce finally on this subject, because of the recent decision of the learned Chief Justice of Victoria in *Johnson* v. *Johnson* (1). I infer from that case that if the husband appealed from the order for maintenance when it was made, he cannot again appeal to General Sessions on the ground of facts which have occurred since the order. So far as I am concerned, I think I should leave the matter open.

The English cases cited seem to me to be mostly irrelevant: they turn on the special words of English Acts; whereas the Victorian Act follows the system initiated in New South Wales by the Act 4 Vict. No. 5.

In my opinion the appeal must be allowed.

RICH J. The magistrate refused the application under sec. 91 to enforce the existing order for maintenance on the sole ground that he found in fact that the wife had committed adultery. The question is whether he had any jurisdiction to inquire into that matter at all. If he had not, the circumstance that he found adultery to have existed is immaterial for any purpose. In my opinion it was beyond his jurisdiction to entertain such an allegation as a defence to the application. What the magistrate has to consider is whether the order has been disobeyed. He must regard the order as a valid binding order still continuing in operation. Accepting this to start with, he has a discretion, within the words of the section as now amended, as to the penalty; but that is all.

The objection that the period of limitation affects the case is met by the fact that the disobedience is a continuing one, as pointed out by my brother *Isaacs* in his judgment, which I have had the opportunity of reading.

The appeal should therefore be allowed, and the case remitted accordingly.

*Appeal allowed. Order of Court of Petty Sessions and of Mann J. discharged. Matter remitted to Court of Petty Sessions at Macarthur to be dealt with consistently with this judgment.*

(1) (1922) V.L.R., 487.

H. C. OF A. 1923. COOK v. COOK.

*Respondent to pay costs of appeal and costs of application to Supreme Court for order to review.*

Solicitor for the appellant, *S. I. Silberberg*, Hamilton, by *Louis S. Lazarus*.

Solicitors for the respondent, *Doyle & Kerr*.

B. L.

Cons *R v Austin Harvey & Lane* (1991) 57 ACrimR 220 | Appl *R v Rogerson* (1992) 66 ALJR 500 | Cons *R v Allen* (1992) 27 NSWLR 398

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[HIGH COURT OF AUSTRALIA.]

HIS MAJESTY THE KING . . . . APPELLANT;

AND

BOSTON AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1923. SYDNEY, *Nov.* 13-16; *Dec.* 10. Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

*Criminal Law—Conspiracy—Indictment—Agreement to pay member of Parliament to bring about purchase of land by Crown—Exercise of official position outside Parliament—Public officer—Duties of member of Parliament—Conflict of interest and duty.*

A count of a criminal information by the Attorney-General of New South Wales alleged that A, B and C unlawfully conspired together and with other persons (unknown) that large sums of money should be "corruptly given by" B and C and other persons to A "in his official capacity," he "then being a public officer to wit a member of the Legislative Assembly of New South Wales, and that the said sums of money should be corruptly accepted by" A "in his said official capacity as inducement to" A "in violation of his official duty to do or omit to do certain acts to wit to use his position as such member to secure the inspection of, acquisition and the payment in cash for certain estates by the Government of the State of New South Wales and which estates were to be paid for out of the public funds of the said State and to put pressure upon the Minister for Lands and other officers of the Crown to inspect acquire and pay cash for certain estates the said payment to" A "being to the public mischief" &c.