

1914

Present : Pereira J. and Shaw J.

## SILVA v. SILVA.

422—D. C. Colombo, 39,111.

*Agreement between husband and wife for separation a mensa et thoro and for the payment of allowance to wife—Is it enforceable?—Is it terminable at the will of either party?*

*Held* (PEREIRA J. dubitantly, but following the decision in the case of *Soyes v. Soyes*), that under the Roman-Dutch law an agreement between husband and wife for a separation *a mensa et thoro* and for the payment by the husband to the wife of a monthly allowance is enforceable.

*Seemle*, that such an agreement is terminable at the will and option of either party.

*Per* PEREIRA J.—There is nothing in the Roman-Dutch law to prevent married persons from living apart by mutual consent, but the continuance of mutuality in the consent is a condition precedent to the continuance of the separation. As between the parties themselves, however, the separation, so long as it lasts, is effectual so far as their civil rights and responsibilities are concerned, but either party may terminate the situation by resiling from it.

**T**HE facts appear from the judgment.

A. St. V. Jayewardene, for defendant, appellant.

Samarawickreme, for plaintiff, respondent.

(*ur. adx. vult.*)

December 16, 1914. PEREIRA J.—

This is an action on an agreement between husband and wife providing for a separation *a mensa et thoro* and for the payment by the husband to the wife of a monthly allowance for her maintenance. The plaintiff sues for four monthly instalments that had already become due at the date of action. The question has been raised whether an agreement between husband and wife for an extra judicial separation is valid. As to the validity of such an agreement under the Roman-Dutch law, in the absence of positive proof by the party seeking to enforce it of the fact that at the date of the agreement circumstances existed that would have justified an action for a judicial separation *a mensa et thoro*, I have my doubts, but I think I should follow the judgment of this Court in the case of *Soyes v. Soyes* (No. 229 of 1914) and answer the question in the affirmative.

The next question is whether, assuming that the agreement is valid, it is not terminable at the will and option of either party. I am inclined to think that it is, but the question need not be decided in this case, because there is no plea that the agreement was determined by the defendant before the instalments of alimony now sued for became due.

I may add there is nothing that I know of in the Roman-Dutch law to prevent married persons from living apart by mutual consent in any circumstances whatsoever. Voet makes express reference to the position when he says: *Si communi consensu, absque ullo publico auctoritatis aut decreti interventu, conjuges seorsim habitare constituerint, honorem tamen matrimonii sibi invicem habentes dubium esse non potest, quin nuptiæ durent, quas non coitus sed maritalis affectus facit* (Voet ad Pand. 24, 2, 19). But the continuance of the mutuality in the consent, I take it is a condition precedent to the continuance of the separation. As between the parties, the separation, so long as it lasts, is effectual so far as their civil rights and responsibilities are concerned, but either party may, I take it, terminate the situation by resiling from it.

I agree with the District Judge that it was competent to the plaintiff, though a married woman, to sue the defendant in a case like this, and I would dismiss the appeal with costs.

SHAW J.—

I agree. I express no opinion on the point raised in the case of *Soysa v. Soysa*, as it has not been argued before us. The decision in that case is a very recent one in this Court, and is now under appeal to the Privy Council, and I think it would be very inconvenient not to follow it at the present time.

*Affirmed.*

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PEREIRA J.

*Silva v.  
Silva*