1934 *Present :* **Garvin S.P.J. and Poyser J.**

DE SILVA *v.* KING.

211—D. C. Colombo, 48,762.

Husband and wife—Action for divorce by husband—Decree in favour of husband with settlement out of wife's property—Amount of settlement reduced in appeal—Husband's appeal to Privy Council—Agreement with regard to settlement—Withdrawal of appeal to Privy Council—Validity of agreement—Not contrary to public policy—Ordinance No. 15 of 1876, s. 13, and Civil Procedure Code, s. 349.

In an action brought by the plaintiff against his wife, the defendant, for divorce, the District Court entered decree dissolving the marriage and declaring the plaintiff entitled to such a settlement, out of his wife's estate, as would yield a monthly income of Rs. 1,000. In appeal, the Supreme Court affirmed the decree, dissolving the marriage but reduced the amount of the settlement to a monthly income of Rs. 400.

The plaintiff appealed to the Privy Council from this judgment. Pending this appeal and an appeal by the defendant from the refusal of the District Court to enter decree absolute dissolving marriage, a notarial agreement was entered into between the parties whereby the defendant agreed to secure to the plaintiff the payment of a monthly sum of Rs. 750 in consideration of the plaintiff undertaking to withdraw his appeal to the Privy Council and to agree to the allowance of defendants' appeal from the order of the District Court refusing to enter decree absolute.

Held (in an action brought by the plaintiff to recover arrears of money due under the agreement), that the agreement was enforceable in law and was not a collusive agreement and therefore not contrary to public policy.

The object of the agreement was to carry out the directions of the decree and as such it did not amount to an adjustment of the decree within the meaning of section 349 of the Civil Procedure Code.

THIS was an action brought by the plaintiff to recover from the defendant a sum of Rs. 11,500 with interest due upon an agreement entered into between them under the circumstances set out in the head-note. The defendant pleaded that the agreement was a contract relating to property of the wife made during coverture and was therefore unenforceable. It was further pleaded that it was a collusive agreement made for the purpose of obtaining a decree of divorce contrary to the justice of the case. It was also contended that it was in effect an adjustment of a decree of a Court within the meaning of section 349 of the Civil Procedure Code, and, not having been certified, could not be made the basis of an action. The learned District Judge gave judgment for the plaintiff.

Keuneman (with him *D. W. Fernando*), for defendant, appellant.—The settlement was induced by the promise not to oppose the decree being made absolute. This was part of the consideration. Plaintiff utilized defendant's desire for freedom in order to get a bigger amount. Any form of concert at any stage of the proceedings is against public policy (*Carmichael v. Carmichael* [1]). Condonation is on the same footing as collusion (*Hyman v. Hyman* [2]). There is nothing to compel a plaintiff to get a decree *nisi* made absolute (*Hulse v. Hulse* [3]).

[1] *42 T. L. R. 133; (1857) 8 De G. M. and G. 731.* [2] *91 L. T. 361.*
[3] *24 L. T. 647.*

[GARVIN J. referred to section 605 of the Civil Procedure Code. The Court must make the decree absolute after the period has expired.]

Section 631 makes collusion at any stage of the action a bar. During the progress of the action means at any stage before decree absolute. See also section 606. Section 604 does not mention a fixed time after which decree must be made absolute. Until the Court actually makes the order the decree is not made absolute. An act of Court is necessary. It is only the petitioner that can move the Court (*1875*) *1 P. 56*; *Ousey v Ousey* [1]; *Boddington v. Boddington* [2].

[GARVIN J.—Section 605 does not recognize any such right in the plaintiff.]

If the Court does not make the order *ex mero motu* we are thrown back on the parties. A plaintiff who uses this right to gain an advantage is acting contrary to public policy.

Any arrangement not provided for by the Civil Procedure Code resulting in dissolution is invalid. Section 617 contemplates only a settlement of property. If this is not a settlement of Nattandiya estate, it is bad. It may be that under the common law there is no want of capacity in the wife to contract (*Soysa v. Soysa* [3]). But this is illegal and against public policy since as a result of this agreement the marriage is to be dissolved (*71 L. T. 782*). It does not matter whether the parties intended it or not. In English law no compromise is permitted unless the object of it is that the action should be dismissed (*Cahill v. Cahill* [4]). In Ceylon section 617 defines the limits within which a compromise could be effected.

This is an adjustment or compromise of a decree and should have been certified under section 349. Any variation made with the consent of parties is an adjustment. (*Sarkar, 9th ed. 1522*; *9 S. C. C. 187*; *Laksaman Das v. Naroba* [5]; *Abdul Rahiman v. Khoja Khaki Aruth* [6].)

Hayley, K.C. (with him *Canakeratne & E. B. Wikramanayake*) *for plaintiff* respondent.—The only question is whether the collateral undertaking not to oppose the appeal is a collusive obtaining of the decree absolute. Our Code does not follow the English procedure. See section 605. In England numerous steps have to be taken by the plaintiff before he can get the decree absolute. (*16 Hals. 592.*) Under section 605 decree *nisi* shall on the expiration of three months be made absolute. In these three months any person can show collusion on the part of the parties, that is, collusion in obtaining the decree *nisi*. The question of collusion is one for the Court to decide on all the facts of the case, and not to be inferred from the terms of the document. (*1913*) *P. 52*; (*1917*) *P. 28*. An agreement is not necessarily contrary to public policy and unenforceable even if it is sufficient to invalidate divorce proceedings. Even if the petitioner is the only person who can ask for the decree to be made absolute, if he does not take that step the respondent has the right to call upon him to take the step. (*Ousey v. Ousey* (*supra*).) If he then does so, that cannot be called collusion.

[1] *33 L. T. 789.*
[2] *44 L. T. 252.*
[3] *19 N. L. R. 146.*
[4] *49 L. T. 605.*
[5] *16 Bom. 589.*
[6] *11 Bom. 6.*

Section 349 refers only to Courts executing the decree. (*Ramghulam v. Jank Rai*[1]; *Sita Ram v. Mahipal*[2]). A judgment-debtor cannot plead that decree has been satisfied unless it has been certified. (*Don Marthes v. Don Lewis*[3]; *Bristol Hotel Co. v. Power*[4].) This matter cannot be raised now. It has not been raised in the answer. If it had, the plaintiff might have moved to certify the adjustment and withdraw the present action under section 406.

Cur. adv. vult.

Keuneman, in reply.

March 28, 1934. GARVIN S.P.J.—

This is an appeal from a decree directing the defendant to pay to the plaintiff a sum of Rs. 12,118.75 with interest on Rs. 11,500 at 9 per cent. per annum from May 11, 1932, till the date of the decree and thereafter on the aggregate amount at the same rate till payment in full. It was further decreed that the defendant's claim in reconvention be dismissed with costs.

The plaintiff and the defendant were at one time husband and wife. An action No. 10,899 was instituted in the District Court of Colombo by the plaintiff for the dissolution of his marriage with the defendant on the ground of adultery. On December 5, 1924, a decree *nisi* was entered granting the plaintiff a dissolution of the marriage and further declaring him entitled to such a settlement of his wife's property as would yield an income of Rs. 1,000 a month. The defendant appealed, and by the judgment and decree of the Supreme Court dated October 27, 1925, the decree of the District Court dissolving the marriage was affirmed, but the order of the District Court declaring the plaintiff entitled to a settlement sufficient to yield an income of Rs. 1,000 was set aside and in lieu thereof the Supreme Court directed that the settlement be made to secure to the plaintiff a monthly income of Rs. 400. The plaintiff then applied for conditional leave to appeal to His Majesty in Council. At that stage the question of the dissolution of the marriage had been definitely settled so far at least as the parties were concerned, and the plaintiff's purpose in entering an appeal to the Privy Council was to obtain relief from the order of the Supreme Court varying the order of the District Court in regard to the settlement to be made on him. In the meanwhile, the defendant moved the District Court to enter a decree absolute dissolving the marriage. This was opposed by the plaintiff and on November 10, 1925, the District Court dismissed her application upon the ground that pending the appeal to the Privy Council it had no power to make the order. The defendant then entered an appeal to this Court and while this appeal and the appeal to the Privy Council were pending it was agreed between the parties that in lieu of a settlement sufficient to secure a monthly income of Rs. 400 as ordered by the Supreme Court, the defendant should secure to the plaintiff the payment of a sum of Rs. 750 a month, which was approximately equivalent to half the difference between the award made in the Supreme Court and the award of the District Court. A written agreement bearing No. 326 and dated February 4, 1926, was

[1] *7 All. 124.*
[2] *3 All. 533.*
[3] *11 N. L. R. 31.*
[4] *3 S. C. R. 168.*

then executed to give effect to this agreement, and the payments to be made thereunder were further secured by the mortgage and the hypothecation of property by the deed No. 329 dated February 18, 1926. Now, in consideration of the defendant's undertaking, the plaintiff agreed *inter alia* to withdraw his appeal to the Privy Council and he also agreed to consent to the appeal entered by the defendant from the order of the District Court dated November 10, 1925, being allowed. In due course that appeal came before this Court and after argument it was held that the appeal to the Privy Council which was then pending did not in any way affect the question of the dissolution of the marriage between the parties which had been determined by the decree *nisi* entered in the District Court and the confirmation of that decree in appeal to this Court. It was further pointed out that under the provisions of our Code the Court is required to make the decree *nisi* absolute on the expiration of three months from the date of the decree *nisi* unless sufficient cause has been shown in the meanwhile why the same should not be made absolute. No such cause had been shown and, both parties consenting, it was further directed that the decree be made absolute.

The claim in this action was based on the settlement evidenced by the agreement No. 326 of February 4, 1926, and the mortgage bond No. 329 of February 18, 1926. The defendant who had paid the monthly instalments in terms of the agreement up to the end of December, 1930, and a sum of Rs. 500 out of the instalment payable in respect of the month of January, 1931, thereafter failed to make any payments and is seeking to repudiate her obligations under this agreement upon the plea that it is null and void and of no effect in law. A large number of pleas in support of this contention were advanced in the Court below but in appeal learned Counsel limited himself to the following:—(*a*) That the agreement is a contract between husband and wife in respect of or relating to property of the wife made during coverture and was, therefore, unenforceable, (*b*) that it was in effect an adjustment of a decree of Court and not having been certified as such under the provisions of section 349 could not be made the basis of an action, and (*c*) that this was a collusive agreement made for the purpose of obtaining a decree of dissolution of marriage contrary to the justice of the case.

Inasmuch as this agreement was made after the decree *nisi* but before decree absolute was entered it was urged that it was made at a time at which the parties must still be regarded as husband and wife. Assuming this to be so, it has still to be shown, that an agreement such as the one under consideration is obnoxious to our law. Under section 13 of Ordinance No. 15 of 1876 it is provided that " it shall be lawful for any husband or wife . . . . notwithstanding the relation of marriage . . . . to make or join each other in making, during the marriage, any voluntary grant, gift, or settlement of any property, whether movable or immovable, to, upon, or in favour of the other ". It would seem, therefore, that under the law in force in Ceylon there is nothing to prevent a wife entering into such a contract as the one now under consideration with her husband. This view of the law was affirmed by Their Lordships of the Privy Council in *Soysa v. Soysa*[1]. Learned counsel felt the difficulty of sustaining his

[1] *19 N. L. R. 146.*

position in the face of this judgment, but he drew our attention to section 617 of the Civil Procedure Code which is one of a series of sections forming Chapter 42 of the Code, relating to matrimonial actions. That section enables a Court when pronouncing a decree of dissolution of marriage on the ground of adultery of the wife to order such a settlement as it thinks reasonable to be made of her property or any part thereof for the benefit of the husband or of the children or both. The section then proceeds as follows:—"Any instrument executed pursuant to any order of the court at the time of or after the pronouncing of a decree of dissolution of marriage, or separation, shall be deemed valid notwithstanding the existence of the disability of coverture at the time of the execution thereof". It was urged as an inference from this provision that any instrument of that nature executed by a wife during the subsistence of the marriage except when executed pursuant to an order of Court must be deemed to be invalid.

Now, many of the sections in this chapter have obviously been taken over from the corresponding provisions in the English Acts, and it is manifest that the provision quoted above which is a provision made in the English Acts was taken over by the draftsman. It is impossible to argue, as an inference from the circumstance that such a provision appears in our Civil Procedure Code, that it was intended by the legislature to effect so radical a change in the capacity of a wife in her relations with her husband or that it could ever have been intended to bring about what would in effect be a repeal of section 13 of Ordinance No. 15 of 1876. The provision, however, nevertheless exists, but its existence is not incompatible with section 13 of Ordinance No. 15 of 1876. The indications, therefore, are either that the provision was taken over without proper consideration or that it was inserted out of greater caution to put the validity of an instrument so executed beyond all question.

The second point urged in support of this appeal depends firstly upon whether the agreement referred to is an adjustment of a decree of Court, and secondly, if it is an adjustment whether it is the law that no action can be maintained upon it until the adjustment has been certified. Section 349 of the Civil Procedure Code provides as follows:—"If any money payable under a decree is paid out of court, or the decree is otherwise adjusted in whole or in part, to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the court whose duty it is to execute the decree. The judgment-debtor may also by petition inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree-holder to show cause on a day to be fixed by the Court why such payment or adjustment should not be recorded as certified . . . . No such payment or adjustment shall be recognized by any court unless it has been certified as aforesaid". The argument addressed to us is that directly it appears to a Court that an agreement such as this is in effect an adjustment of a decree the Court is required by the concluding sentence of section 349 to refuse to entertain any action based thereon.

Section 349 above quoted is substantially the same as section 258 of the Indian Code of Civil Procedure of 1882 and the case of *Hadi Abdul Rahiman v. Khoja Khaki Aruth*[1], was relied on for the proposition that

[1] *I. L. R. 11 Bombay 6.*

no action will lie upon an adjustment which has not been certified to the Court. But a careful examination of the judgment in that case does not appear to lay down anything like so extensive a proposition. The judgment is certainly an authority for the proposition that where the consideration for the agreement is the adjustment of the decree, then no other evidence will be admitted to prove that the decree was adjusted or satisfied except evidence that the adjustment had been certified as required by the section. It would seem, however, that the Allahabad and the Calcutta Courts have taken a different view of this section, and it was held that upon a proper interpretation of section 258 the adjustment of a decree out of Court not certified to the Court was under the provisions of that section ineffectual only so far as the execution of the decree was concerned—See *Ramghulam v. Janki Rai*[1]. The Indian legislature has since amended section 258 by limiting the requirement of certification to the Court executing the decree and thereby brought the anactment into line with the law as declared by the courts of Allahabad and Calcutta. Indeed, our own section 349 is part of a chapter which relates to the execution of decrees, and as in the case of the Indian section this circumstance lends some support to the contention that the Court which is prohibited from recognizing an adjustment made out of Court unless it has been certified is the Court executing the decree. But there is yet another view of this provision. The words " no such payment or adjustment shall be recognized by any court unless it has been certified as aforesaid " may fairly be construed as meaning that " no such payment or adjustment shall be recognized by any court as a payment or adjustment of a decree unless it has been certified as aforesaid ". These words are in effect a rule of evidence which excludes every other evidence of the payment or adjustment of a decree other than proof of certification. The section imposes a duty upon the judgment-creditor to certify the payment or adjustment, but it also enables the judgment-debtor to obtain certification of any payment or adjustment and having thus made provision for the certification of payments or adjustments concludes with words which I think carry out the object and the purpose of the enactment when they are construed in the manner suggested. Had it been the intention of the legislature to empty an agreement valid and enforceable under the general law and in all other respects unexceptionable of all legal effect merely by reason of the circumstance that it was not certified as an adjustment under section 349 in any case in which the effect of the agreement or contract is to adjust an existing decree, it would, I think, have expressed its intention in very different phraseology, for if the legislature intended that no action should under any circumstances be maintainable upon an uncertified adjustment nothing could have been easier than to have said so.

Now the construction of this section as a rule which excludes any evidence of the adjustment of a decree other than the certification provided for by section 349 is in accordance with a judgment of our own Court—vide *Pitcha Tamby v. Mahamadu Khan*[2]. That was an action for contribution on the footing that the plaintiff had paid and satisfied a joint

[1] *I. L. R. 7 Allahabad 124.* [2] *9 S. C. C. p. 187.*

decree against himself and the defendants and it appeared that the payment had not been certified as required by section 349. It was held that the effect of section 349 was to render the certificate the sole admissible evidence of the satisfaction of the decree and that the plaintiff was not entitled to recover. In the course of his judgment Burnside C.J. referred to this section as a very salutary provision and added " and we must not say that this was only accidental, but we must give it effect. The only evidence, therefore, of payment under a decree, either in whole or in part, which we or any court can recognize, is that which is certified to as required by the section ". In any case in which it is essential to the success of an action to show that a decree had been satisfied or adjusted, all evidence other than evidence of certification would in this view be excluded and the action must fail. This in my judgment is the correct construction and effect of section 349, and so far as we are concerned the matter is concluded by the judgment in *Pitcha Tamby v. Mahamadu Khan* (*supra*), which is a judgment of the Full Bench.

In this case it is in no sense necessary to the success of the plaintiff's action that he should prove that any decree had been adjusted. His action is based solely upon the agreement and despite the numerous pleas and objections advanced in defence it was at no time urged in the Court below, or indeed before us, that the sole consideration for the agreement was the adjustment of a decree and that such consideration had failed. Neither in the pleadings nor even in the issues was any such defence advanced, although it is to be gathered from the judgment of the learned District Judge that at some stage in the argument the plea was advanced that this was an uncertified adjustment of a decree, and that as such no action could be maintained thereon. It was based not upon any ground of failure of consideration but upon the general ground that any agreement made out of Court, the effect of which was to bring about the adjustment of a decree is unenforceable by action unless it be certified. In my view of section 349 such a plea is not sustainable.

There is another aspect of this question which it is perhaps unnecessary to consider in view of the opinion already expressed. It is a question whether the decree contemplated by section 349 is other than a money decree. The decrees which a Court may pass are classified under section 217 as follows:—(*a*) To pay money; (*b*) to deliver movable property; (*c*) to yield up possession of immovable property; (*d*) to grant, convey or otherwise pass from himself any right to, or interest in, any property; (*e*) to do any act not falling under any of the foregoing heads; (*f*) not to do a specified act, or to abstain from specified conduct or behaviour; (*g*) declare a right or status, and in sections which follow a procedure is prescribed for the execution of each type of decree.

Now the provisions of section 349 would clearly be applicable having regard to its terms, to the case of a decree to pay money, for the opening words: " If any money payable under a decree is paid out of court or the decree is otherwise adjusted in whole or in part ", clearly contemplate in the first instance a decree to pay money and when reference is made to an adjustment it is of " the decree ". That would seem to have reference to the opening words which contemplate a decree to pay money. This

at least was the view taken of the corresponding provision (section 258 of the Indian Act). See *Sankaran Nambiar v. Kanara Kurup*[1], where the Court held that that section refers only to the executions of decrees under which money is payable. It is to be noted that the Indian section has since been amended by the addition of words " of any kind " immediately after the word " decree " in the first line thereof, so that it now reads : " If any money payable under a decree of any kind is paid out of court ". Presumably this amendment was made to make it clear that the rule applies to other than what are strictly money decrees. And lastly, it is a question whether the word " adjustment " can be applied to an agreement in reference to a decree directing a person to do some act when the object and effect of the agreement is to carry out the direction in the decree, though at the same time going beyond the decree and doing more than the judgment-debtor was directed to do. At the date of this agreement the order which remained in force was the order of the Supreme Court directing that a settlement be made to secure to the plaintiff a monthly income of Rs. 400 from the defendant's property during their joint lives. The effect of this agreement and the mortgage bond executed in terms thereof was to assure to the plaintiff an income of Rs. 750 a month. The defendant has, therefore, complied with the order of the Supreme Court. To the extent that she has gone beyond it, she did so in consideration of the plaintiff undertaking to withdraw an appeal to the Privy Council as a result of which he hoped to obtain a restoration of the District Judge's order that the amount that should be secured to him by the settlement should be Rs. 1,000 a month. It is not that the decree has been adjusted but that the defendant has done all that she was directed to do.

It only remains now to consider the argument that this agreement is contrary to public policy, entered into collusively for the purpose of obtaining a decree of divorce contrary to the justice of the case. No evidence whatever has been adduced before us save the agreement itself. Indeed, the only witness who testified in this case is a witness called by the plaintiff. He was at one time the plaintiff's proctor and acted for him in the matter of this agreement. He tells us that a solicitor had been retained and counsel briefed to appear for the plaintiff in the Privy Council, and he states, among other things, that the plaintiff has carried out the obligation imposed upon him by this agreement. Not a single question was put to him in regard to this allegation of collusion. The agreement then being the only evidence before us, is there anything in it or in its terms which indicate such collusion as would mark it as an agreement which is contrary to public policy and which the law will not enforce.

Now the agreement sets out in the fullest detail the whole history of this matter commencing with the institution of the proceedings for divorce and referring to every step of importance in its history up to the time of the decision of the appeal confirming the decree *nisi* for dissolution of marriage entered by the District Court on December 15, 1924, but varying the order as to the settlement. There is then a reference to the steps which the plaintiff had taken to appeal to the Privy Council from the order made by the Supreme Court as to the settlement to which he was entitled. The deed then states by way of recital " And whereas the said

[1] *I. L. R. 22 Madras 182.*

Henry Peter Christopher de Silva and Dorothy Margaret Catherine de Silva have agreed to effect a compromise regardng the monthly allowance payable to the said Henry Peter Christopher de Silva and to settle all matters and disputes between them". It is to be noted that at the date of this agreement, namely, February 4, 1926, the decree for dissolution granted over a year previously by the District Court had been affirmed by this Court and the only matter really outstanding between the parties was the matter of the settlement. The defendant then proceeds to agree and bind herself to pay and to secure the payment to the plaintiff of the sum of Rs. 750 which was Rs. 350 more than the Supreme Court had ordered but which was Rs. 250 less than the amount ordered by the District Court. Certain other incidental matters are then provided for and the plaintiff for his part agreed not to prosecute his appeal to the Privy Council against the judgment of the Supreme Court.

Thus far there is nothing in the agreement to which counsel could take exception, but the plaintiff proceeded further to agree not to oppose the appeal entered by the defendant from the order of the District Judge refusing to make the decree *nisi* absolute because in his view it was not within his power to do so while an appeal was pending to the Privy Council. This is pointed to as evidence that the agreement was in effect one which had for its object the obtaining of a decree for dissolution of marriage, and as such vitiated the whole of it. But the dissolution of the marriage had already been decreed. By reason of section 605 of the Civil Procedure Code the Court is required to enter a decree absolute within three months of the date upon which the decree *nisi* was entered, that is to say, December 15, 1924, the contest in regard to whether the defendant had committed adultery or not had been determined by that decree which would have been final but for the appeal. But the appeal was finally determined by the decision of this Court dated October 27, 1925, and three months had elapsed from that date. During the whole of this period of over a year no step had been taken under any of the privisions of the Civil Procedure Code to prove that the divorce had been obtained by collusion or by reason of material facts not having been brought before the Court or the failure to bring to its notice any fact which might have affected the justice of the case. It is not suggested that even at the date of this agreement there was any fact or circumstance which should in the interests of justice have been brought to the notice of the Court which had been suppresed or that the parties had agreed to suppress any such facts. The sole ground upon which the whole of this contention is based is that the mere fact that the plaintiff agreed not to oppose an appeal which had for its object the obtaining of a decree absolute was itself evidence of such collusion as brings this agreement within the class of agreements that are contrary to public policy.

Reference was made to the case of *Hope v Hope*[1], but there the agreement which it was sought to enforce was one by which the plaintiff undertook "not to oppose the suit for a divorce instituted against her by Mr. Hope in the English Courts, but on the contrary to facilitate the obtaining of such divorce". It is hardly necessary to remark that the facts of the case are wholly different from the one before us.

[1] *8 De G. M. & G. 731.*

Another case to which reference was made was the case of *Churchward v. Churchward and Holliday*[1], for the purpose of showing of what collusion consists. The decision there was that "if the initiation of a divorce suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld". The agreement with which we are here concerned had nothing to do with the initiation of a divorce suit nor had it any reference to the conduct of it, but on the contrary was one which was entered into by the parties long after the dispute had been determined by the decree *nisi*.

The later case of *Scott v. Scott*[2] was referred to by counsel for the respondent as showing the view of the Court that collusion which would deprive a party of the right to a decree *nisi* for divorce is defined to mean "An improper act done, or an improper refraining from doing an act, for a dishonest purpose".

Among the other cases cited in the course of the argument was the case of *Carmichael v. Carmichael*[3]. After the petition in that case had been served, a deed was executed which recited the proceedings and gave the custody of the child to the petitioner so long as she remained unmarried, and then to the respondent. £240 a year was to be paid to the petitioner *dum sola et casta* while the respondent remained in his present position, and, if his position altered, she was to have one-fourth of his gross income. The President, Lord Merrivale, after inquiry was satisfied that notwithstanding the agreement the petition was not a collusive petition, that the evidence was not collusively provided, and that although the husband was willing to be divorced there was no collusive arrangement between the petitioner and the respondent. Having come to this conclusion, he pronounced a decree *nisi* granting the divorce.

It would seem, therefore, that the tendency of the divorce Courts when confronted with an agreement which suggests collusion is to claim the right to look into all the circumstances, and if satisfied that the proceedings nevertheless were free from taint to allow the divorce.

Now there is not the slightest suggestion of any collusion or even impropriety in regard to the institution of these proceedings or their conduct up to the time of the decree *nisi* and until its confirmation by the Supreme Court. And, moreover, there is not even a suggestion that there was any collusion for any improper purpose at the time this agreement was entered into. In consenting not to oppose the appeal from the order made by the District Court upon the defendant's application for a decree absolute the plaintiff was only doing indirectly that which he was entitled to do himself. The sole object and purpose of his action was to obtain a dissolution of his marriage, and at the time of this agreement all conditions had been fulfilled which entitled him to a decree absolute. Since the defendant had already herself taken steps to that end, I can see no

[1] (1895) L. R. Probate Div. 7.

[2] (1913) L. R. Probate Div. 52.

[3] 42 T. L. R. 133.

impropriety in the plaintiff consenting that such a decree should be entered. But in another view of the matter, it was essential that the decree absolute should be entered whether the plaintiff had agreed to do so or not, before he could reap the benefit of this agreement or even the benefit of the decree which the Supreme Court had entered in his favour. The order directing the defendant to make a settlement could only be enforced when the decree had been made absolute and the plaintiff could only obtain the benefit of the order when the decree was made absolute. So also, the settlement effected by the agreement and bond referred to appears to me to contemplate that the dissolution already decreed would be made absolute. Assuming that the plaintiff had in effect agreed to move the Court to enter decree absolute, he was doing that which he was entitled to do and which he was bound to do before he could take the benefit of this agreement or even of the order of the Supreme Court.

There is nothing in the agreement or in the circumstances under which it was entered into which would justify one in holding that it had any improper object or purpose or that it was contrary to public policy or unenforceable at law.

The appeal is accordingly dismissed with costs.

POYSER J.—

It is unnecessary to recapitulate the facts of this case which are fully set out in the judgment of my brother Garvin which I have had the advantage of reading.

In regard to the first point taken on behalf of the appellant, that the agreement No. 326 of February 4, 1926, is unenforceable as it was a contract between husband and wife relating to the property of the wife made during coverture, I agree that the case of *Soysa v. Soysa*[1] definitely disposes of this point, and I also agree that section 617 of the Civil Procedure Code is not incompatible with section 13 of Ordinance No. 15 of 1876.

The most important point, in my opinion, which arises on this appeal, is whether the above agreement was a collusive agreement made for the purpose of obtaining a decree of dissolution of marriage contrary to the justice of the case, and therefore contrary to the public policy.

The only ground upon which this argument is based is clause 6 of the agreement which provided that the plaintiff should consent to the appeal of the first defendant against the refusal of the Court in D. C. Colombo, No. 10,899, to make the decree *nisi* absolute being allowed.

The procedure in regard to making a decree *nisi* absolute under section 605 of the Civil Procedure Code is entirely different to the English procedure. In England the application to make the decree *nisi* absolute can only be made by the injured party, and if it be delayed the fact that the party in default desires a decree does not entitle him or her to make such application. The remedy of such party is to have the suit dismissed for want of prosecution. See *Ousey v. Ousey and Atkinson* [2].

[1] *19 N. L. R. 146.*

[2] *(1875-1876) L. R. Probate Div., Vol. I., 56.*

Under section 605 either party may make this application and as Garvin J. points out in his judgment, allowing the appeal in D. C. Colombo, No. 10,899, S. C. Minutes of May 18, 1926, " at the expiration of three months in the absence of any objection the Court is required to make the decree so entered absolute ".

The plaintiff, therefore, in agreeing not to oppose the appeal of the first defendant was only in effect consenting to an order he was himself entitled to and had in fact been entitled to before he entered into this agreement.

I agree with my brother that there is no impropriety in such an agreement, nor do I consider that any of the cases cited by counsel for the appellant support this contention that this agreement constitutes collusion between the parties.

The facts in the case of *Churchyard v. Churchyard and Holliday*[1], were entirely dissimilar. In that case the President found that the initiation of the suit was procured and its results as to costs and damages settled by agreement and therefore held that there was collusion.

The case of *Scott v. Scott*[2] cited by counsel for the respondent is an authority against the appellant's contention. In that case a petitioning wife, who had already obtained a decree of judicial separation on the ground of her husband's desertion accepted the offer of a sum of money to be paid at once and a further like sum on decree absolute and an increase of her allowance if she would proceed for a dissolution of marriage on the further ground of her husband's adultery, the means of proving which were furnished to her. Bucknill J. granted the petitioner a decree and in the course of his judgment stated: " It is quite clear that she is entitled to a decree upon established facts unless she has prevented herself from obtaining it by what I call misconduct for I consider that collusion amounts to misconduct. Collusion is an act done by a petitioner with another person with an improper intention. In this case the petitioner was absolutely and entirely free from any dishonest purpose ".

In this case also I consider the plaintiff was absolutely and entirely free from any dishonest purpose, and therefore I agree that there is nothing in the agreement to justify the appellant's contention that it was entered into with an improper object or that it was contrary to public policy.

In regard to the argument that the agreement was in effect an adjustment of a decree of Court and not having been certified as such under section 349 of the Civil Procedure Code was not actionable, I consider the effect of that section is to render an agreement, which has the effect of an adjustment of a decree and is not certified, ineffectual only as against the execution of the decree, and in my view there is nothing in that section which debars a party to an agreement in supersession of a decree from suing on such agreement, and this view is supported by local authority, viz., *The Bristol Hotel Company Limited v. Bower*[3], in which Withers J. held that where a judgment-creditor enters

[1] *(1895) L. R. Probate Div. 7.* [2] *(1913) L. R. Probate Div. 52.*
[3] *3 Supreme Court Rep. 168.*

into an agreement with his debtor superseding the decree, such judgment creditor is not entitled to a writ under the decree. He must either sue the debtor on his agreement in supersession of the decree, or, if he wishes to execute it, as a decree, he must have it certified of record as an adjustment under section 349 of the Civil Procedure Code.

I agree that this appeal should be dismissed with costs.

Appeal dismissed.