

Present : Pereira J.

1914.

GOONEWARDENE v. ABEYEWICKREME.

148—P. C. Galle, 6,524.

*Maintenance—Separation of husband and wife by mutual consent—Wife may claim maintenance if she undertakes to return to husband.*

Where a husband and wife agree to live separately by mutual consent, the wife may claim maintenance from her husband if she undertakes to return to her husband and live with him as his wife.

IN this case the applicant claimed maintenance from her husband. She had lived away from him for twenty years. At the date of the application the respondent had a mistress. The respondent resisted the application on the ground that he had separated from the applicant by mutual agreement many years before.

*Bartholomeuss*, for the applicant, appellant.—There was, as a matter of fact, no separation by mutual agreement. But even if there was, such an agreement would not be a bar to the present application, if the applicant is willing to go back to her husband. *Voet 24, 2, 19, 20.*

*Drieberg*, for defendant, respondent, relied on *15 N. L. R. 191.*

*Cur. adv. vult.*

June 15, 1914. PEREIRA J.—

I think that the order made by the Magistrate is premature. The case cited by him from the *Leader Law Reports*, which is also reported at page 191 of Volume XV. of the *New Law Reports*, applies only where the parties remain of one mind as to separation and the wife applies for maintenance while she lives separated from her husband. An extrajudicial separation, that is, a separation by voluntary agreement from bed and board, is allowed under the Roman-Dutch law; but the information given to us by the text writers is very scanty. *Voet* refers to it in book 24 of his Commentary (24, 2, 19, 20). Its continuance depends upon the continued consent of the parties. So far as I can see there is nothing to prevent either party from terminating it, provided he or she submits to the complete reversion to the *status quo ante*. It appears to have been decided in South Africa that the agreement was not binding upon the spouses, unless circumstances existed at the date of the separation which would have justified the Court in granting a decree of separation (see *Maasdorp Institutes*, vol. I., p. 178).

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In the present case, if the applicant undertake to return to the defendant and live with him as his wife, but the defendant refuse to take her back or to have a suitable house in readiness for her, or be found to be guilty of such conduct as renders it intolerable for his wife to live with him, I think that the applicant would be entitled to an order in her favour.

I set aside the order appealed from and remit the case to the Court below for further hearing and adjudication.

*Sent back.*

(The second appeal in this case is reported in 17 N. L. R. 450.)

