1916.

[PRIVY COUNCIL.]

Present : The Lord Chancellor, Lord Shaw, and Lord Parmoor.

SOYSA *v.* SOYSA

229—D. C. Colombo, 36,962.

Husband and wife—Deed of separation a mensa et thoro—*Annuity to wife—Ordinance No. 15 of 1876, s. 13.*

By an agreement of voluntary separation *a mensa et thoro* the appellant undertook to pay his wife (the respondent) during her life " the annual sum of Rs. 7,200 in monthly instalments of Rs. 600 each."

Held, that the agreement of separation was not illegal. And that the annuity was valid under section 13 of Ordinance No. 15 of 1876.

THE facts are set out in the judgment.

July 25, 1916. Delivered by LORD SHAW :—

This is an appeal against a judgment pronounced by the Supreme Court of the Island of Ceylon, dated August 7, 1914, affirming the judgment of the District Court of Colombo, dated May 11, 1914.

The parties were married on September 22, 1903. There is no issue of the marriage.

The appellant had made an antenuptial settlement in favour of the respondent, his wife, and during the marriage he also made to her certain substantial gifts. There is no question with regard to these in this case.

On March 25, 1912, they entered into an agreement of voluntary separation *a mensa et thoro*. Under this agreement the appellant undertook to pay the respondent during her life " the annual sum of Rs. 7,200 in monthly instalments of Rs. 600 each."

On January 15, 1913, the respondent obtained a decree (absolute) of divorce against her husband in respect of adultery committed by him, and the marriage was thus dissolved. By the agreement sued on, however, this event had been provided for, and it was stipulated that " nothing in this indenture shall prejudice or affect the right " to sue for a dissolution of the marriage. The agreement further provided that " the dissolution of the said marriage by reason of such misconduct ..... shall in no manner affect or prejudice the provision heretofore and by these presents made for the said " wife.

In the present suit she claimed Rs. 600, being the instalment payable under the agreement to her on August 10, 1913. The action is, of course, a test as to her rights to her annuity under the agreement.

In the Court below various defences were taken, which were very properly not insisted in before the Board. In particular it was not contended that the agreement sued on was voidable as contrary

to public policy. Although not strongly contended for, it was, however, suggested in argument that such an agreement for a voluntary separation was inconsistent with the principles of Roman-Dutch law. Their Lordships see no reason to doubt the judgment of the Supreme Court thus expressed upon that subject by Mr. Justice de Sampayo:— "I cannot find any authority for saying that under the Roman-Dutch law an agreement for separation is wholly illegal." The learned Judge investigates with care the authorities upon the topic, and sums these up by saying:— "The result of all the authorities is that an agreement for voluntary separation and a provision as to property are not only not illegal, but valid as between the parties themselves, and only ineffectual for certain purposes."

More stress was laid in argument upon certain principles put forward as those of the Roman-Dutch law, and said to be still operative, namely, (1) that the funds out of which this annuity was derived were within the scope of the *communio bonorum*, and consequently fell to the husband in virtue of his *jus mariti;* while as to the control and management thereof, this was also entirely his, in virtue of his right of marital administration. The second point put forward was that under the same assumption, viz., that the situation was governed by Roman-Dutch legal rule, gifts which would include annuities such as the present were void between husband and wife. Upon the latter point there might be a variety of view as to whether *donationes inter virum et uxorem* were void or were merely recoverable, or—as the learned District Judge of Colombo expresses it—were "in a state of suspended animation, capable of being quickened by the death of the donating spouse."

In their Lordships' opinion it is unnecessary to make any pronouncement upon either of these questions, for in the view of the Board, as of the Courts below, they do not form or truly bear upon the law of this case. And the entire rights of parties so far as they are in question in the case are, in their Lordships' opinion, regulated by Ordinance No. 15 of 1876.

This Ordinance is of fundamental importance in the settlement of matrimonial rights in Ceylon. It provides that the matrimonial rights of every husband or wife domiciled in the Island and married after the date of the Ordinance "shall during the subsistence of such marriage or such domicile or residence be governed by the provisions in this Ordinance. By section 6 this applies to movable, and by section 7 to immovable, property. In the definition of matrimonial rights, that expression means "the respective rights and powers of married parties in and about the management, control, disposition, and alienation of property belonging to either party, or to which either party may be entitled during marriage."

In these circumstances, it seems to their Lordships that the attempt to regulate the matrimonial rights of parties domiciled or

1916.

LORD SHAW

Soysa v. Soysa

resident in Ceylon by a reference to the state of the law anterior to the Ordinance would not be warranted, except in the case, if ever such a case should arise, where ambiguity should appear in the language of the governing Ordinance, which ambiguity might be cleared up by such a reference. This view is expressly confirmed in reference to the first point already mentioned, namely, the argument submitted as to the *communio bonorum*, and the consequential reference to the *jus mariti*, and the husband's right of administration under the Roman-Dutch law. For by section 8 of the Ordinance it is provided that after its proclamation there shall be no such community either in respect of movable or immovable property. By the comprehensive character of the Ordinance the point is thus disposed of.

Upon the second question raised, a strenuous argument was however, put forward to the effect that the Ordinance did not in fact by its terms cover the transaction contained in the agreement in the present case. That transaction could not be enforced, so it was maintained, because it was a donation *inter virum et uxorem*. This necessitates a reference to section 13. It provides:—"It shall be lawful for any husband or wife, whether married before or after the proclamation of this Ordinance, notwithstanding the relation of marriage and notwithstanding the existence of any community of goods between them, 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; but all property so granted, gifted, or settled, and all acquisitions made by a husband or wife out of or by means of the moneys or property of the other, shall, except as otherwise provided by section 11 (the reference is to the wife's jewels, &c., and to implements of trade and agriculture), be subject to the debts and engagements of each spouse in the same manner and to the same extent as if such grant, gift, settlement, or acquisition had not been made or occurred." This section, it will be observed, makes an end of the argument, for donations between husband and wife are expressly made legal.

The true point in the case is, Did the constitution of this annuity fall within the terms "voluntary grant, gift, or settlement of any property whether movable or immovable"? Their Lordships are of opinion that it did. It was of the nature of a grant, it was also of the nature of a gift, and it was also of the nature of a settlement. Their Lordships do not have any doubt that a correct conclusion has been reached by the Courts below upon this subject. There is no room for introducing any question of "consideration" in the sense of the law of England into the case. The expressions used in the Ordinance, taken together or singly, would appear to comprise the transaction which is now challenged. It was accordingly a perfectly legal transaction.

Section 19 of the statute was suggested to have a bearing upon the case. That section provides that all movable property to which a married woman should be entitled " during her marriage " should vest in her husband. The suggestion was that when the monthly payment of the annuity provided by the husband became payable to his wife she was disentitled to it, because by the force of the Ordinance it went back again to the husband and vested in him. It is sufficient to say of this argument that the marriage is at end, and that in no circumstances could the section regulate the relations of parties after the dissolution of the marriage.

Their Lordships will humbly advise His Majesty that the appeal be disallowed, with costs.

Appeal disallowed.