1939 *Present :* **Hearne J.**

FERNANDO *v.* FERNANDO

771—P. C. Panadure, 49,356.

Maintenance—Agreement to separate by mutual consent—Waiver of future rights to maintenance—Wife's offer to return to husband—Claim to maintenance—Ordinance No. 19 of 1889, s. 5.

Where husband and wife agreed to separate by mutual consent and the wife thereafter offered to return to the husband and, on his refusal, applied for maintenance,—

Held, that the agreement to separate did not debar the wife from applying for maintenance, if the husband was not maintaining her at the time, unless she was living in adultery or refused to live with him without sufficient reason.

Goonewardene v. Abeywickreme (*18 N. L. R. 69*) followed.

APPEAL from an order of the Police Magistrate of Panadure.

In 1934 the applicant and her husband entered into a deed under which she received Rs. 250, agreed to live separately and waived all her rights to maintenance. She came into Court in 1938 and claimed maintenance under the Maintenance Ordinance, 1889. The learned Magistrate ordered maintenance from which order the respondent appealed.

H. V. Perera, KC. (with him *H. E. Amarasinghe* and *D. M. Weerasinghe*), for respondent, appellant.—Payment under the deed of separation was made to the wife. Thereafter she came into Court and stated that she repudiated the agreement. The learned Magistrate thought that she could repudiate it. Further, in evidence she had stated that she was not aware of what she wrote. She said that she wanted to go back to her husband and that he refused to have her. This evidence was contradicted by that of the respondent, appellant. Under the existing law a deed could be entered into because the old Roman-Dutch law had been abrogated as was held in *Soysa v. Soysa*[1]. Under section 5 of the Ordinance a wife could not claim maintenance—see *Micho Hamine v. Girigoris Appu*[2]. His Lordship Mr. Justice Pereira in *Goonewardene v. Abeyewickreme*[3] thought that *Micho Hamine v. Girigoris* (*supra*) applied only where the parties remained of one mind as to separation. The second appeal in this case is reported in *17 N. L. R. 450.* In *Maliappa Chetty v. Maliappa*[4], it was held that a separation by mutual consent contemplated by section 5 of the Ordinance must be one entered into under circumstances which would justify a judicial separation—see *1 Maasdorp* (*5th ed.*), *p. 82* as well. If the wife can repudiate the contract she can do so by an action for restitution of conjugal rights—see *Stone v. Stone*[5]. One party cannot set it aside except in a competent Court and the Magistrate's Court is not the one for it. According to the evidence there were between the parties differences which would justify a judicial separation. Hence the deed of separation was valid. Counsel cited *Voet 24, 2, 19, 20.*

[1] *(1916) 19 N. L. R. 146.*
[2] *(1912) 15 N. L. R. 191.*
[3] *(1914) 18 N. L. R. 69.*
[4] *(1927) 29 N. L. R. 78.*
[5] *(1917) C. P. D. 143.*

G. P. J. Kurukulasuriya, for applicant, respondent.—The object of the Ordinance is to prevent wives and children being left destitute by husbands. Prior to this Ordinance, the neglect of wives and children was an offence under the Vagrancy Ordinance. Section 3 gives the ground of maintenance. The defences are given in section 5 so far as the wife is concerned. A reconciliation between husband and wife is always favoured. The two people must be of the same mind for mutual separation. The section should not be construed in a mannar to exclude a person who had lived separately by mutual consent at some time previous to the application. In *Simo Nona v. Melias Singho* [1], the words "*is living in adultery*" are explained. A civil right may be waived but a statutory liability cannot be waived. Hence as soon as the woman has repudiated the agreement she could claim maintenance. Either party could terminate such an agreement—See *Silva v. Silva* [2] & *Goonewardene v. Abeyawickreme* (*supra*) In *Micho Hamine v. Girigoris Appu* (*supra*) the woman had not repudiated the agreement before she asked for maintenance. The Maintenance Ordinance, 1889, is identical with section 488 of the Indian Criminal Procedure Code. See, *Chitaley's The Code of Criminal Procedure Code, vol. III., pp. 2444, 2445.* In *Matthews v. Matthews* [3] it was held that a man's liability to maintain his wife could not be terminated by the payment of a lump sum of money to the wife.

Counsel also cited *Nakamuttu v. Kantan* [4], *Madduma Hami v. Kalu Banda* [5], and *76 Law Journal 84.*

H. E. Amarasinghe, in reply.—In *Samaratunga v. Samaratunga* [6] it was held that the words "is living in adultery" should not be construed in a restricted sense. In England the Summary Jurisdiction (Married Women) Act, 1895 [7], gave the wife a right to claim maintenance if she was living separately as a result of the husband's behaviour, but in 1925 by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, an absolute liability to maintain the wife was created. In Ceylon there is no such liability. The only case where a deed was in existence is *Stone v Stone* (*supra*). It was held in *Jane Nona v. Van Twest* [8] that the maintenance of wives and children is a civil liability.

Cur. adv. vult.

February 22, 1939. HEARNE J.—

The applicant who had separated from her husband under a deed sued him for maintenance. The deed (R 1) was executed in 1934 and she came into Court in 1938 alleging that the defendant had not maintained her for one year. On the execution of the deed she had received Rs. 250 and this sum had been exhausted. The Magistrate found that she is now without means of support.

Section 5 of the Maintenance Ordinance provides that no wife shall be entitled to receive a maintenance allowance from her husband if they are living separately by mutual consent. The Magistrate held that R 1 was no bar to maintenance proceedings and this appeal turns on the interpretation that is to be given to section 5 of the Ordinance.

[1] *(1923) 26 N. L. R. 61.*
[2] *(1914) 18 N. L. R. 26.*
[3] *(1932) 101 L. J. P. D. A. 41.*
[4] *(1908) 1 Weer. 48.*
[5] *(1880) 3 S. C. C. 132.*
[6] *(1936) 15 Cey. Law. Rec. 198.*
[7] *58 & Vict. C. 39.*
[8] *(1929) 10 Cey. Law. Rec. 51.*

In *Micho Hamine v. Girigoris Appu*[1] Wood Renton J. said that he interpreted the words, "if they are living separately by mutual consent" as meaning "if they have separated by mutual consent". This interpretation involves the view that once a husband and wife agreed to live separately by mutual consent and separated, the wife could not thereafter compel her husband to take her back or pay her maintenance. Although the head note is to this effect I have considerable doubt that the learned Judge intended to lay this down as a proposition of law. He was dealing with a case in which "the applicant had parted from her husband a great number of years ago on her own initiative (since when) to all intents and purposes they had been living separate by mutual consent". It would appear that they were living separately by mutual consent right up to the time proceedings in the Magistrate's Court were initiated.

Pereira J. in *Goonewardene v. Abeywickreme*[2] certainly understood that these were the facts to which the dictum of Wood Renton J. should be applied: for, in his judgment, he says "the case. . . . . 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".

It has however, been argued that the reasons given by Pereira J. in *Goonewardene v. Abeywickreme* (*supra*) for holding that "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 him and live with him as his wife" were not sufficient reasons.

In *Maliappa Chetty v. Malaippa*[3] Lyall Grant J. thought the passage from *Voet* (*24, 2, 19, 20,*) on which reliance was placed "too vague to be of much assistance" and with respect I do not think the quotation from Maasdorp carried the point much further.

Maasdorp in the *Institues, vol. I., p. 76,* cites a South African decision to the effect that an extra judicial separation was held not to be binding on the spouses, unless circumstances existed at the date of the separation which would have justified a Court in granting a decree of separation. The *ratio decidendi* was that such an agreement, being without legal consideration, would amount to a donation between husband and wife. This reason, however, does not apply in Ceylon where donations *inter virum et uxorem* are expressly made legal. (*Soysa v. Soysa*[4].)

It may be that it is possible to extract from *Voet* (*24, 2, 19, 20*), as a principle of Roman-Dutch law, that the continuance of an extra judicial separation depends for its validity upon the continued consent of the parties, although like Lyall Grant J., I am unable to do so ; but I propose in this appeal to follow the conclusion of Pereira J. for reasons which, as it appears to me, arise from a consideration of the Ordinance itself.

A husband is under a statutory obligation to maintain his wife and the purpose of the Ordinance (No. 19 of 1889) is to enforce that obligation on proof that he has sufficient means and neglects or refuses to maintain her.

If the Court finds that the husband and wife are living separately by mutual consent it can pass no order for the reason, as I think that a Court is not intended to be used for creating facilities for separation between husband and wife or for fixing alimony.

[1] *(1912) 15 N. L. R. 191.*
[2] *(1914) 18 N. L. R. 69.*
[3] *(1927) 29 N. L. R. 78.*
[4] *(1916) 19 N. L. R. 146, at p. 148.*

If they have separted by argeement and the wife, though anxious to terminate the separation, is under the agreement in receipt of an allowance which is being punctually paid and to which she agreed outside Court, it can, I think, no longer be said that the husband is guilty of neglect or refusal to maintain, and the jurisdiction of the Magistrate comes to an end.

But if, notwithstanding the agreement to separate, the wife when she comes into Court is not being maintained by her husband, she is disqualified from asking the assistance of the Court only if she is living in adultery, or without sufficent reason refuses to live with her husband, or is living separately from him by the continuing consent of both parties. If she is prepared to live wth him mutuality ceases to exit, her disqualification to obtain relief disappears and the law imposes on the husband, as his paramount duty, the duty of maintaining his wife. It is not so much that a wife is permitted to resile from an agreement into which she has entered in the past. It is that in law a husband's duty to maintain his wife overrides any agreement which absolves him from discharging his duty unless such agreement, founded upon mutual consent, subsists in the present in which case, as I have indicated, it would be against the policy of the law to interfere. That is how I read the Ordinance.

The Magistrate did not consider the question of whether the applicant's offer to return to her husband is a *bona fide* one. To this he should address himself. If he is satisfied that her undertaking to return to her husband is *bona fide*, and the defendant refuses to take her back, or if he takes her back, makes her life intolerable, the applicant would be entitled to an order in her favour.

The appeal is dismissed with costs.

Appeal dismissed.