Present : Wood Renton A.C.J. and De Sampayo A.J. 1914.

SOYSA *v.* SOYSA.

229—D. C. Colombo, 36,962.

Deed of separation—Payment of annuity to wife—Dissolution of marriage by Court—Separation deed how far affected—Annuity by husband to wife is separate property of wife — Agreement for voluntary separation not illegal under the Roman-Dutch law—Appeal to the Privy Council.

A dissolution of the marriage does not of itself affect the provisions in a separation deed as to a settlement of property or the liability of the husband on a covenant to pay an annuity to the wife by way of a permanent provision, though such provisions may be varied by the Court in pursuance of its jurisdiction in that behalf.

An annuity granted by a husband to his wife belongs to the separate estate of the wife, and does not, as being movable property, vest in the husband.

Under the Roman-Dutch law an agreement for voluntary separation and a provision as to property are not only not illegal, but valid as between the parties themselves, and are only ineffectual for certain purposes.

DE SAMPAYO A.J.—"The provision for the payment of an annuity by the defendant to the plaintiff is good and valid under the Roman-Dutch law, even if that law applied on this point to the case of a marriage not in community, but under Ordinance No. 15 of 1876, of which I have serious doubts."

THE facts are fully set out in the judgment.

Bawa, K.C., and *A. St. V. Jayewardene*, for plaintiff.

F. M. de Saram (with *Elliott* and *Hayley*), for respondent.

Cur. adv. vult.

August 8, 1914. DE SAMPAYO A.J.—

The plaintiff was the wife of the defendant, having been married to him in London on September 22, 1903. Certain differences having arisen between them they lived apart since December, 1911, and their marriage was dissolved by final decree of divorce on January 15, 1913, in the action No. 34,307 of the District Court of Colombo brought by the plaintiff against the defendant. In the meantime the parties entered into the deed No. 588 dated March 25, 1912, whereby, after reciting that they were living separate and apart from each other on account of their differennces, that by an ante-nuptial agreement the defendant had settled on certain trustees

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for the benefit of the plaintiff a policy of insurance for £5,000, and had also gifted to her on February 17, 1911, the Keenekelle estate of the value of Rs. 250,000, and in July, 1911, a sum of £4,000 in cash, and that it had been agreed that the defendant should, "in addition to the provision already made as hereinbefore set forth, make further provision by way of annuity (for the plaintiff) upon terms and conditions hereinafter expressed," it was witnessed that, "in pursuance of the said agreement and in consideration of the premises," the defendant covenanted to pay to the plaintiff during her life the annual sum of Rs. 7,200 in monthly instalments of Rs. 600. Under this agreement the defendant duly paid to the plaintiff the monthly instalments which fell due both before and after the decree of divorce, but he failed to do so since August, 1913, and this action is brought for the recovery of Rs. 600 for the instalment due for August, 1913.

The claim is resisted on various grounds, which the District Judge in an able and exhaustive judgment has decided against the defendant, and which are again pressed before us in appeal.

It is, in the first place, objected that the plaintiff, not having made a claim for alimony or for a settlement of property in the divorce action, and no order having been made under section 615 and succeeding sections of the Civil Procedure Code, the plaintiff is precluded by the operation of section 34 from maintaining this action on the agreement. The deed expressly provided that the plaintiff should, out of the provision made for her before and by the deed, maintain herself, and should not take any action or proceedings against the defendant for the recovery of any sum of money by way of maintenance or alimony. Accordingly, when the plaintiff brought the divorce action, she stated in her plaint that she made no claim for alimony in that action, as the defendant had already made provision for her in that respect. The defendant filed no answer, and, as a matter of fact, the decree for divorce was entered after *ex parte* trial. But it is, nevertheless, argued that she should have obtained an order for alimony under section 615 of the Code, or have sought an inquiry into the antenuptial and postnuptial settlements and have had an order made under section 617 or section 618 of the Code, and that in default she would not be entitled to enforce the covenant in the agreement. I should say it was for the defendant to have moved the Court in that respect, if he desired to alter the existing situation, especially in view of the fact that the plaintiff had clearly expressed in the plaint her intention to abide by her agreement not to take any proceedings in respect of maintenance or alimony. Moreover, what section 34 of the Code provides is that "every action should include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." The cause of action in the divorce case was the misconduct of the defendant, and the whole claim in respect of it is the claim for dissolution

of the marriage tie. No doubt the Court is vested with power, on entering any decree of divorce, to make orders for alimony, but that is not a matter necessarily arising from the cause of action. In matrimonial cases the Court is to do what is fair and just in respect of the future of the parties and of their children independently of any special claim in the plaint, and, indeed, such order may be made, not as part of the decree, but even after decree and in separate proceedings. The objection, however, was even more broadly stated; that is to say, that divorce proceedings put an end altogether to any previously existing agreements for alimony. Under the English law a dissolution of the marriage does not of itself affect the provisions in a separation deed as to a settlement of property, or the liability of the husband on a covenant to pay an annuity to the wife by way of a permanent provision, though, of course, such provisions may be varied by the Court in pursuance of its jurisdiction in that behalf. See the *Laws of England, vol. XVI., p. 450,* and the authorities therein cited. I know of nothing in the Roman-Dutch law which compels us to hold otherwise, and I think that the English law, which is in accordance with reason, should be followed. Whatever doubt may arise on this point in the case of a marriage with community of property, there can be no difficulty in this case, because the parties here are governed by the Matrimonial Rights Ordinance, No. 15 of 1876, which itself is based on English legislation regarding the status and property of a married woman.

Then it is said that the agreement has the effect of conducing to matrimonial misconduct and facilitating divorce proceedings, and is therefore wholly bad as being contrary to public policy. The reference is to the clause which, after providing that neither party should molest the other or endeavour to compel the other to cohabit with him or her by legal proceedings for restitution of conjugal rights or otherwise, proceeds to state a proviso, thus: " Provided always and it is hereby expressly agreed that it shall be lawful for either of them to sue for and obtain from a Court of competent jurisdiction a dissolution of their marriage by reason of any misconduct which has heretofore taken place or which may hereafter take place, and the dissolution of the said marriage ..... shall not in any manner affect or prejudice the provision by these presents made for (the plaintiff), and the (defendant) shall, notwithstanding the dissolution of the said marriage, continue to pay the annuity hereinbefore provided. " I cannot see that this clause has the tendency contended for; it probably has the opposite tendency, for the defended is thereby obliged to pay the agreed annuity and no more, while the Court in divorce proceedings may compel him to pay more, or, if the plaintiff were the offending party, may cut down the provision, so that both parties, so far as material considerations are concerned, are interested in preserving the *status quo*. Nor do I think that there is any foundation for the

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further argument that the agreement is bad because it provides for a future separation. The document itself recites that the parties had already begun to live apart, and proceeds to witness that they had agreed to live separate and apart thereafter at all times. Both by intention and by actual provision the separation was to be immediate.

It is also argued that the covenant in the deed is inoperative, for the reason that the annuity is movable property, which vests in the husband under section 19 of the Matrimonial Rights Ordinance, and need not therefore be paid. That section vests the wife's movable property in the husband, but (1) " subject and without prejudice to any settlement affecting the same, and (2) except so far as is by this Ordinance otherwise provided." The present case appears to me to come under both these exceptions. The annuity is the subject of settlement under the deed, but it is argued that the word " settlement " means settlement in the sense of the English law, and does not include a mere covenant to pay money. Whatever the technical meaning of the term may be in the English law, I think the right to the annuity is vested in the plaintiff under the Ordinance. Section 13 authorizes " any voluntary grant, gift, or settlement," which appears to me to embrace all modes of voluntary bestowal of property. If the provision in the deed is not a " setlement," it is a gift, and the money belongs to the wife's separate estate and so comes under the second exception in section 19.

I come now to the main, and in some respects the strongest, argument on behalf of the defendant. It is conceded that under the English law such an agreement as this is valid, but it is contended that under the Roman-Dutch law, which, it is said, is still applicable to the parties, a voluntary separation is wholly illegal, and that consequently the provision for an annuity in consideration of it goes with it. I cannot find any authority for saying that under the Roman-Dutch law an agreement for separation is wholly illegal. Brouwer, *de thor. et men. separ. 2, 29, 4*, which is relied on, says that the reason why a voluntary separation is prohibited is that at that time (*hodie*) the marriage itself is a public contract, at which the parties make a promise to the Judge to observe unity of life (*individuam vitæ consuetudinem*), and that therefore the Judge alone, to whom the promise is made, can dispense them from the chief obligation so undertaken, viz., the living together (*vitæ scilicet consortium*). This reasoning does not seem to be applicable to us, and, moreover, Brouwer does not explain what he means by " prohibited " (*interdicta*). There is no doubt that the general rule is that a separation *a mensa et thoro* as much as a divorce *a vinculo* should be effected by decree of Court, but it is necessary to understand the scope and extent of the law so stated. Voet, *de divor et repud, 24, 2, 19*, says that the effect of the non-interposition of a

decree of Court is that all the consequences of the marriage remain unaffected, unless the parties otherwise agree (*nisi aliud inter conjuges pacto actum esset*), in which case the agreement will be binding on the parties themselves though not on the creditors. Bruyn, in his *Opinions of Grotius*, at page 33, referring to *Vanderlinden 1, 3, 8*, and certain South African cases, states the law in the same way. Delaney and Hutton's *Leading Cases on Vanderlinden*, at page 13, quotes the following passage from the judgment of Chief Justice de Villiers in *Scholtz v. Felmore*:[1] "The general rule is that voluntary separation between parties is binding only between these parties, but where a creditor knows beforehand the terms of the separation, he cannot have any rights greater than those of the wife with whom he is dealing," showing that in the case mentioned even creditors would be bound. In Roos and Reitz's *Principles of Roman-Dutch Law*, at page 21, the authors state that in the Transvaal, if the parties enter into a notarial deed of separation, either party may make application to a Judge in chambers for a judicial separation subject to the terms of the notarial deed, and they refer to *Ex parte Van der Hove and Van der Hove*,[2] which is said to have been followed in numerous cases. As regards the law as understood and applied in Holland itself, I may refer to two decisions which are to be found in Neostadius, *de pactis antenup. observ. VII. & VIII.* In the first of these cases, the question arose between the wife and a creditor in respect of a judgment entered against the husband after the separation. The creditor sought to sell in execution a house which had belonged to the community. The Provincial Court decided in favour of the wife, but in appeal the Court of Holland set aside the decision and held that the house was executable for half the judgment debt. In a note on the case Neostadius explains the *ratio decidendi* and shows that the whole question turns upon the *potestas maritalis*, which he says continues notwithstanding the separation, and by virtue of which the husband can subject the common property to his debts; but he adds that, if under the same circumstances the *potestas maritalis* had ceased by his death before execution, the mandate which a debtor is supposed to give to his judgment-creditor to realize the debt by sale of property would have expired too, and the house would have remained to the wife as her absolute property by virtue of the terms of the agreement. In the other case reported by Neostadius, the separation was affected by a notarial instrument, by which in consideration of the separation and in redemption of the husband's interest in the community the wife agreed to pay him a certain sum in annual instalments. The husband received the agreed annuity, but afterwards returning to the house occupied himself as an agricultural labourer of the wife for wages. After his death his daughter claimed a half share of the property against the widow.

[1] *4 S. C. 192.*

[2] *(1908) T. S. 317.*

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The Provincial Court held in her favour, and the decision was affirmed by the Appellate Court. In the comment on the case, Noëstadius, as usual, discusses its *ratio*, and he puts the question, " How far is the separation good and valid so long as the *potestas maritalis* continues and so long as the husband's right to administer the common property has not been taken away from him ? " His answer is that both the *potestas maritalis* and the right of administration can be determined by agreement so far as the wife is concerned (*marito abrogari quoad mulierem poterit*), though it may be different as regards creditors, because the creditors have a vested right to pursue the common property, unless at the time of the separation the husband had been publicly interdicted either as regards the whole community or as regards her share (*nisi simul cum divisione bonis marito in universum vel pro uxoris parte publice sit interdictum; tum enim et potestas maritalis corruet et administratio cessabit*). The last sentence here quoted appears to support Chief Justice de Villiers' opinion above referred to, that creditors who have knowledge of the terms of the separation are thereby affected. As regards the reason for dividing the estate between the daughter and the widow, Neostadius explains that the division of property by consent was in law temporary and provisional, for the *separatio à mensâ et thoro* lasts only till the death of one, when the marriage is finally dissolved and the division of property is made afresh. Grotius goes farther than any other Dutch jurist as regards the effect of voluntary separation on the community of property, for he says in book 3, chapter 21, section 11, " Such partnership (i.e., community of property) is dissolved by the death of either spouse; also by decree of divorce on the ground of adultery, or, in as far as the parties themselves and their beirs are concerned, by voluntary separation of property." Referring to this passage, Abraham a Wesel *2, 4, 28 & 29*, says that this is inconsistent with the decision of the Court of Holland in the case between the widow and the daughter which I have cited from Neostadius. Finally, *3 Burge 817* (new edition) states that the view of the law as understood in South Africa also is that " as regards the spouses an agreement for separation which provides for the division of the community to which the innocent spouse would have been entitled if a judicial separation had been obtained is considered a legal and effectual contract." 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 are only ineffectual for certain purposes. I therefore think that the provision for the payment of an annuity by the defendant to the plaintiff in this case is good and valid under the Roman-Dutch law, even if that law applied on this point to the case of a marriage not in community but under the Ordinance No. 15 of 1876, of which I have serious doubts. This being so, it is unnecessary to deal with the further point discussed

during the argument as to whether the part of the deed relating to the annuity can be severed from that relating to the separation, and can be held to be by itself operative and enforceable. The South African cases, *Ziedeman v. Ziedeman*[1] and *Albertus v. Albertus*,[2] to which, since preparing the above judgment, I have been able to refer, quite bear out the conclusion I have arrived at.

I would dismiss the appeal with costs.

WOOD RENTON A.C.J.—

I had commenced the preparation of a judgment of my own. But I feel that I cannot usefully add anything to the elaborate and, if I may venture to say so, illuminating judgment of my brother De Sampayo, which I have had the very great advantage of perusing, and with which I entirely agree.

The appeal is dismissed with costs.

Appeal dismissed.

PEREIRA J.—

This is an application for conditional leave to appeal under the rules in schedule 1 to Ordinance No. 31 of 1909. Objection has been taken that the case is not one that falls within the scope of rule I (*a*) of the rules referred to. The applicant moves, not only for a declaration that the contemplated appeal involves indirectly (if not directly) a question respecting property or a civil right amounting to or of the value of Rs. 5,000 or upwards, but for an order that in the opinion of this Court the question involved in the appeal would be one which by reason of its " great general or public importance or otherwise " ought to be submitted to His Majesty in Council for decision. The action is based on an agreement between the defendant and the plaintiff, who were husband and wife, for a separation a *mensâ et thoro*. The averment in the second paragraph of the plaint is that the defendant agreed to pay to the plaintiff during her life the annual sum of Rs. 7,200, payable in monthly instalments of Rs. 600 each, payable on or before the 10th of each and every month. The actual claim made in the plaint is that the defendant be condemned to pay the plaintiff the Rs. 600 that became due on the 10th August, 1913. The validity of the agreement in question was put in issue by the defendant, and the District Court, after trial, held that the agreement was valid. The validity of the agreement thus became matter that was *res judicata* between the parties. (See *Samitchi v. Pieris—14 N. L. R. 357.*) That being so, the right to be valued in the case is the right of the defendant to receive from the plaintiff Rs. 7,200 a year during her lifetime. The actual value of this right would, of course, depend largely upon the number of years that the plaintiff was still likely to live. In view of the fact that the plaintiff has so far lived since the 10th August, 1913, more than a year, and has become entitled to recover at the rate of Rs. 600 during that period, it is not difficult to see that the right in question exceeds Rs. 5,000 in value.

I am, moreover, of opinion that the question involved in this appeal is one which by reason of its importance ought to be submitted to His Majesty in Council for decision, and I would allow the application with costs.

The applicant should, of course, give the necessary security, which I would fix at Rs. 3,000.

DE SAMPAYO A.J.—I agree.

[1] *(1838) 1 Menz. 238.*

[2] *(1859) 3 S. 202.*