1941 *Present :* **de Kretser J.**

FRUGTNEIT v. FRUGTNEIT.

44—C. R. Colombo, 67,570.

Husband and wife—Agreement to live apart—Payment of monthly allowance to wife and child—Agreement not terminable at option of party.

Where husband and wife entered into an agreement to live separately and the husband agreed to pay the wife a monthly allowance for the support of herself and their child,—

Held, that the agreement was not terminable at the option of one of the parties.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

H. V. Perera, K.C. (with him *H. W. Thambiah*), for defendant, appellant.

F. C. W. Van Geyzel, for plaintiff, respondent.

Cur. adv. vult.

September 4, 1941. DE KRETSER J.—

Plaintiff and defendant, who are wife and husband, on June 17, 1937, entered into the agreement (P 1) which recited that unhappy differences had arisen between them, that the defendant had been sued by the plaintiff for a judicial separation, that they had agreed to live separately from each other and that the defendant had agreed to pay plaintiff a monthly allowance for the support of herself and their child. The agreement provided that in the event of their agreeing thereafter to live together and cohabit as husband and wife, then in such case the allowance should be no longer payable and all the covenants of the agreement should be void.

Thereafter the plaintiff brought an action on March 27, 1939, seeking a divorce, and the defendant filed answer alleging that it was the plaintiff who had maliciously deserted him, that living with her was insupportable and dangerous to life and limb, and himself praying for a divorce. On the trial day plaintiff moved to withdraw the action, having realized that she could not prove malicious desertion as the parties had separated voluntarily. An attempt was made to proceed with the action as one for judicial separation and a discussion followed. Thereupon plaintiff's Counsel moved to withdraw the issue he had suggested, viz., whether, the parties having entered into a mutual agreement, the plaintiff was entitled to a decree for judicial separation. In the course of the discussion Counsel for defendant, who had objected to the issue, stated that it was not a matter for the Court as there was already a deed ; he also stated that defendant was quite prepared to remain separated. As plaintiff withdrew her claim, defendant withdrew his claim for a divorce. Both claim and counterclaim were therefore dismissed.

On the very day this happened, March 18, 1940, defendant sent letter D 2 to the plaintiff. It runs as follows :—

"Dear Lilian,—This is to give you notice that I desire you to come and live with me. This is best in your interest, in my interest and more than all in the interest of our child. The incidents of December, 1938, make it perfectly clear that you were not keen about resuming married life. I can assure you that in the event of your coming back to live with me, I shall provide you with all facilities to live separately.

I am making this offer in the interest of our daughter who is now growing to be a woman. You are hereby to take notice that no further allowance will be paid to you. Yours sincerely, ... ".

It will be observed that both at the beginning and at the end of the letter he gives his wife "notice". He invites her to come back and offers to provide her with "all facilities to live separately". There is not a pretence of any affection for her nor any desire expressed that they should resume marital relations. Considering that defendant had himself asked for a divorce, there is no reason to believe that he desired the *consortium* of his wife. The trial Judge held that the defendant's offer was not made in good faith and I see no reason to disagree with his views.

Various defences on the law were taken in the lower Court, but before this Court the only question raised was whether the agreement (P 1) was one which could be enforced when one of the parties wished to resile from it. Mr. Perera for the appellant would not question the validity of the agreement, in view of the decision of the Privy Council in *Soysa v. Soysa*[1]; his contention was that while the agreement was valid so long as there was mutuality and while it might be enforced regarding arrears of money which had accrued before one of the parties desired to resile from it, it was terminable at the will and option of either party, quite irrespective of the motive which prompted the party to act in that way. He based his contention on an *obiter dictum* of Pereira J. in *Silva v. Silva*[2], and on an article by a Professor of Roman-Dutch law at the University of Amsterdam, reported in 1917—*S. A. Law Journal, XXXIV., 11.* It will be convenient to take the Professor's opinion first, for it includes the view expressed by Pereira J. and deals with the matter more fully than he did in a passing opinion. Besides, Perera J. doubted the correctness of the decision of this Court in *Soysa v. Soysa*[3], and his opinion was expressed during the pendency of the appeal to the Privy Council, which upheld the view expressed by this Court. In my opinion the decision of the Privy Council removes the question from the region of doubt.

The Professor quite clearly considers that an extra-judicial separation is entirely void. He states (at page 33) : "Now to my mind this whole fabric of the legal institution of a private separation from bed and board rests on no authority or legal ground whatsoever. It is based on a disregard of the public character of the marriage contract and on the false supposition that, in this respect, spouses may freely contract with each other. Marriage is a matter of too much public concern than that the parties should be allowed to put an end to the relation and duties called into being by effect of law". He puts such an agreement on the same footing as an antenuptial contract that the parties should live apart from each other. He cannot see any distinction between the two cases, and he assumes that such an antenuptial contract would be entered into only because parties were convinced that cohabitation would be unbearable. The agreement then, according to him, is void on grounds of public policy. But he is faced with the fact that in South Africa the Courts have recognized the validity of such agreements and have refused restitution of conjugal rights. He refers to a number of cases, quite plainly hints that

[1] *19 N. L. R. 146.* [2] *18 N. L. R. 26.* [3] *17 N. L. R. 385.*

they were based on insufficient authority, and infers that they were most probably influenced by English authorities. Referring to the opinion of Sir James Hannen, President of the Court of Probate expressed in *Marshall v. Marshall*[1], that it was in the highest degree desirable for the preservation of the peace and reputation of families, that such agreements should be encouraged rather than that the parties should be forced to expose their matrimonial differences in a Court of justice, he thinks the reasons so given insufficient for recognizing such agreements and suggests as a *via media* that the Courts should adopt a policy of readily allowing the confirmation of such deeds of separation entered into by mutual consent. The position boils down to this, viz., which aspect of public policy should be allowed to prevail, that which Sir James Hannen indicated or that which the Professor supports.

Now we have been in the habit of following the decisions of the South African Court, and, if I may say so with all respect, their view on this matter is more in accordance with modern ideas. It must also be remembered that we have now no community of property between spouses, that a wife has a separate estate, and that donations between spouses are allowed. The matrimonial rights of parties are now governed by the Ordinance of 1876.

Sampayo J. in *Soysa v. Soysa* (*supra*), doubted whether the Roman-Dutch law any longer applied. The Privy Council thought it did not. It is true the Privy Council was not faced with the position that one of the parties wished to resile from the contract during the subsistence of the marriage, but a close analysis will, I think, lead to the conclusion that once it is held that the agreement is enforceable it must necessarily follow that it was enforceable when one of the parties wished to depart from it, for while there was mutuality there would ordinarily be no question of enforcing the contract. I can see no objection to a husband entering into an agreement with his wife to pay her a certain sum monthly, and if such an agreement were good while they still lived together I fail to see why it should not be good when they lived apart. What the Professor was concerned with was the personal relations of husband and wife, but we do not recognize an action for restitution of conjugal rights and consequently, however, much the Courts may disapprove of the agreement, the parties would still live apart.

Again, the Professor clearly contemplates a genuine desire on the part of one spouse to resume marital relations with the other. A Court may look with favour on such a desire and may, if it had the power, decree a restitution of conjugal rights. But when, as in the present case, there is no such genuine desire and merely an attempt to escape from pecuniary liability, I do not think a Court will view an application like that of the defendant with anything but disfavour. I do not think any Court will force a wife to live under the same roof as a husband who expressly states that there is to be no *consortium* and who had just previously sought a divorce.

In my opinion the Commissioner has arrived at the right conclusion. The appeal is dismissed with costs.

Appeal dismissed.

[1] *L. R. 5, Prob. Div. 19.*