1914, *June* 4, 15. MASON, J.

Husband and Wife.—Agreement at time of Marriage.—Not to live out of England.—Contra bonos mores.

An agreement between husband and wife, made before or at the time of the marriage, that the wife should not be called upon by the husband to live out of England during the marriage, is *contra bonos mores* and invalid, as being opposed to one of the main purposes of marriage.

Application by the plaintiff to strike out a special plea on the ground that it was bad in law.

The plaintiff, the husband, claimed restitution of conjugal rights, on the ground that the defendant had maliciously deserted him in December, 1906. The marriage was celebrated in England. The plaintiff alleged that he was domiciled in Johannesburg, and that the defendant was resident in Cambridge, England.

The defendant pleaded to the jurisdiction on the ground that the plaintiff's domicile was in England; she admitted the facts of the marriage, and denied the desertion and the refusal to return. She further pleaded specially as follows: "Before or at the time of the marriage, it was agreed between the plaintiff and the defendant that the latter should not be called upon by the plaintiff to live out of England during the marriage, and this agreement has never been cancelled or varied and still subsists." The plaintiff applied to have the special plea struck out on the ground that it was bad in law.

E. Esselen, K.C., (with him *E. S. Langerman*), for the plaintiff. The agreement is invalid, as it purports to change the law of domicile; the domicile of the husband is that of the wife, and regulates the rights of the spouses, Burge, *Colonial Law*, (Vol. I, 245); Maasdorp, (Vol. I, 6). Further the agreement is invalid as it is an agreement made at the time of marriage to separate after marriage, and therefore is *contra bonos mores*; Story, *Conflict of Laws*, (7th Ed., 110, 112); *Voet*, (23.4.20); Halsbury, *Laws of England*, (Vol. 16, 439); *Reeves* v. *Reeves*, (I Menz. 249); *Peters* v. *Peters*, (16, S.C. 303).

S. S. Taylor, for the defendant. The agreement is not bad *ab initio*; in addition to the cases quoted, see *Mason* v. *Mason*, (4, E.D.C., 300); *Voet*, (23.4.30; 24.2.13; 5,1,95-101); Van der Keessel (*Th.* 228). Even if the agreement is bad in law, it is good as a plea; it is a good defence to the action, namely, to show that the

desertion was not malicious. The agreement is binding on the parties until cancelled by mutual consent or by the court, *Anquez* v. *Anquez* (I, P. 176). Further I had to plead the agreement in order to know whether the plaintiff admits the same.

Esselen, K.C., in reply: There is no agreement at all, because the alleged agreement is not binding. If the defendant were to return here, would the plaintiff be entitled, by virtue of the agreement, to object to her presence?

Cur. adv. vult.

Postea, (June 15).

MASON, J.: The plaintiff claims restitution of conjugal rights on the ground that the defendant, his wife, during the month of December, 1906, deserted him, and still refuses to return to him. His domicile is alleged to be Johannesburg; her present residence is in Cambridge, England. The marriage was celebrated in England.

After pleading to the jurisdiction on the ground that the plaintiff's domicile is in England and after admitting the facts of the marriage, the defendant denies the desertion and the refusal to return, and pleads specially that, before or at the time of the marriage, it was agreed between the plaintiff and the defendant that the latter should not be called upon by the plaintiff to live out of England during the marriage, and that this agreement has never been cancelled or varied and still subsists. The plaintiff moves to strike out this special plea on the ground that it is bad in law, and founds his application upon the contention that any such agreement as is alleged is invalid.

The defendant justifies upon two grounds; first that the agreement shows that the residence of the defendant in England was with the plaintiff's consent, and that there was therefore no malicious desertion; and second, that the agreement is valid in law and binding upon the parties until cancelled by mutual consent, or at any rate by an order of the Court. As to the first ground Mr. *Taylor* referred to *Anquez* v. *Anquez* (I, P. 176).

There is no doubt that such an agreement, even if not binding in law, would be a sufficient explanation of the defendant's residence in England, but it is no answer, in such a case, to the averment

that she refuses to return. It seems to me, moreover, that, so far as it amounts to a mere explanation that the original absence was not malicious desertion, it is unnecessary, as that is covered by the denial that the desertion was malicious. The special plea, therefore, is, apart from the validity of the agreement, unnecessary and embarrassing.

The real question then remains for decision whether such an agreement is valid.

It was decided in *Pugh* v. *Pugh*, (1910 T.S. 792) that an agreement of separation between spouses was valid, even though it had not been made an order of Court; hence, it is argued, an agreement amounting to much less than complete separation must also be valid.

It is settled that an action for malicious desertion cannot be maintained during the subsistence of a judicial decree of separation *Smit* v. *Smit* (1909, T.S. 1067), and that the Court will not make an agreement of separation an order of Court without proof that the spouses cannot live together, but there is no definite decision, so far as I am aware, as to the manner in which private agreements of separation can be cancelled. Are they revocable as to the future at the will of either party, or is a judgment of the Court requisite?

And, if the interposition of the Court is necessary, upon what principles is the Court to act?

There are several expressions in the judgments in *Pugh* v. *Pugh* which point to the binding character *inter partes* of a voluntary deed of separation, and render it doubtful whether cancellation would be claimable, except upon such grounds as would justify the cancellation of any contract, but I gather that it was only necessary to decide in that case whether past due alimony was claimable.

In England a voluntary deed of separation was no answer to a suit for restitution of conjugal rights, though such an agreement is not *per se* invalid as being contrary to public policy (*Anquez* v. *Anquez* (*supra*).

It is stated in Halsbury, *Laws of England* (vol. 16, sec. 899) that such an agreement is valid, provided it is made in contemplation of and is followed by an immediate separation.

If, of course, such an agreement is terminable at will, then it would not be a good answer to a demand for restitution of conjugal

rights, but it is not necessary in the view which I take of this case to discuss this question.

Voet, (23.4.16), lays it down that agreements tending to the dissolution of marriage are contrary to law and good morals, and it is upon this ground that in England any agreement providing for the event of a future separation is void, as being contrary to public policy Halsbury (vol. 16, sec. 900); Bishop's *Marriage and Divorce* (Vol. I, sec. 1277). I have little doubt that the same principle applies in Roman-Dutch law also.

The agreement therefore in this case cannot be justified upon the ground that voluntary deeds of separation are effectual *inter partes*, because it contemplates a future separation. The general rule undoubtedly is that, apart from deeds of separation, there is no answer to a claim for restitution of conjugal rights except the proof of such facts as would justify the court in decreeing a divorce or judicial separation *Taylor* v. *Taylor* (1906, T.S. 358). No South African case was quoted in which such an agreement as this has been considered, but in the case of *Santo Teodoro* v. *Santo Teodoro* (5 P. 79) an agreement, by which the spouses were always to have after marriage a residence in England, and to live six months at least each year in England, was relied upon, together with the fact of such residence as conferring jurisdiction on the English Court. It is doubtful whether the decision is consistent with *Le Mesurier* v. *Le Mesurier* (1895, A.C. p. 517), but there was no appearance for the defendant.

The main argument for the plaintiff was rested upon two grounds; the one that such an agreement is contrary to public policy, as involving in part the negation of the substance of marriage, namely that the spouses should live together, and the other, that, as the husband's domicile is also the wife's she is under an obligation to reside where he resides. Both of these arguments naturally cover somewhat similar ground. Mr. *Taylor* for the defendant, whilst admitting that the domicile of the wife is necessarily the same as the husband's, contends that an agreement may be made before marriage as to domicile, and that under any circumstances, whatever the domicile may be, the agreement pleaded is valid.

It is true that there is some controversy whether a praenuptial agreement that the husband should not change his domicile without

the consent of the wife is of any force. Van der Keessel, *Th.* (228) expresses the opinion that such an agreement is not void. *Voet* takes the contrary view (5.1.101). It seems doubtful whether Van der Keessel intended to lay down that such an agreement would prevent a change of domicile without the wife's consent. If so, it seems to me contrary to international law, by which the actual as distinguished from the contemplated domicile governs the condition of persons. It may be that such an agreement would give the wife a right to compensation in the event of her proprietary rights being adversely affected by such a change of domicile in breach of the agreement *Voet* (23.4.20), but it seems to me ineffectual to prevent the husband migrating to a new country and establishing a new domicile there. But the important bearing of *Voet's* statement in Book 5.1.101. upon this part of the case lies in the reasons which he gives; they refer not to questions of international law, which seems to me opposed to the efficacy of such an agreement as to change of domicile, but they lay stress on companionship and cohabition as the main elements of marriage. In substance the argument is that such an agreement may involve separation and thus it is contrary to the chief purpose of marriage. *Voet's* language in this section is entirely inconsistent with the idea that the duty of the spouses to live together is affected by any such agreement. The wife is bound, he says, to follow the husband to the new domicile, whether it be a domicile of his own selection or even a compulsory domicile—for instance due to banishment.

Wesel, *De pactis dotalibus* (sec. 107, *et seq.*) adopts the same view as *Voet*, and Loenius gives a case in his *Decisions* (No. 54) where a stipulation that the spouses hould reside in Schoorl and that the wife should not be taken to any other place against her will was considered to be *contra bonos mores*. Rodenburg (*Prel. Tract. De Jure Conn.*, tit. 4, cap. 1) apparently adopts the views that a covenant against emigration to some particular country would be valid, but not one binding the spouses to one territory.

In my opinion therefore an agreement of the nature now pleaded, whether advanced by the husband or wife, is not enforceable between the spouses as being opposed to one of the main purposes of marriage and is therefore *contra bonos mores*.

There may be, of course, circumstances which would release the wife from the duty of following her husband, such as serious and ascertained danger to her health in the other country, but they are

independent of agreement, and would require averment and proof before the Court could take them into consideration.

The application to strike out so much of paragraph 2 of the plea as does not consist of a denial of paragraph 5 of the declaration must therefore be granted with costs.

Plaintiff's Attorneys: *Van Hulsteyn, Feltham & Ford;* Defendant's Attorneys: *Hutchinson & Bowen.*

[G.W.]