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*May 30
*Oct. 2

DONALD M. FINDLAY (DEFENDANT) ....APPELLANT;

AND

MARY FINDLAY (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Husband and Wife—Separation Agreement—Repudiation of payments by husband—Application for maintenance under The Deserted Wives' and Children's Maintenance Act, R.S.O. 1937, c. 211, dismissed as to wife—Effect on action by wife to recover arrears under separation agreement.

Under a separation agreement a husband covenanted to pay a monthly sum for his wife's support and a further sum for the support of their child. After several payments had been made the wife wrote the husband demanding an increase. The husband treated the demand as a repudiation of the agreement and ceased paying. Alleging desertion the wife brought action under *The Deserted Wives' and Children's Maintenance Act.* The claim was dismissed as to the wife but maintained as to the child. The wife then sued to recover the amounts in arrear under the agreement and secured judgment. The husband appealed on the grounds that: the wife had repudiated the agreement and elected for recourse under the Act; was thereby estopped from asserting any claim she might have had under the agreement, and finally that the judgment obtained under the Act was *res judicata.*

Held: (Cartwright J. dissenting). The appeal should be dismissed. The doctrine of election had no application and there was no basis for the defence of estoppel or *res ajudicata.* (Kerwin J. concurred in the finding of the trial judge, affirmed by the Court of Appeal, that the correspondence did not effect a repudiation by the respondent or a termination by mutual agreement of the provisions of the separation agreement.)

Per Rand J. The rights under the agreement and statute are based on different considerations: they remain co-existent but, related to a period of time, the performance of only one can be exacted, and the operation of one and suspension of the other will depend on the circumstances. Election can not be taken as between the statutory right and the agreement as a whole. The purpose of the statute is to give the wife a summary means of compelling the husband to support her: it is not to cut down rights against him which she otherwise possesses. To bring an action under the agreement can not affect the right under the statute.

Per Kellock and Locke JJ. The respondent on the facts of the case, did not have any cause of action under the Act and therefore was not in fact faced with an election at all. Where the parties are living apart by consent when the refusal or neglect occurs, it cannot be said of the wife that she is living apart "because of" such refusal or neglect.

*PRESENT: Kerwin, Rand, Kellock, Locke and Cartwright JJ.

Per Cartwright J., dissenting, The default by the husband in the circumstances amounted in law to a repudiation. The wife had a choice of remedies, to sue on the contract, or to treat it as at an end. If she chose the latter the contract would no longer be in existence. *Lush on Husband and Wife* 4 ed. p. 385. Having sought payment under the statute and not by virtue of the contract, she made her election. *Cooper* v. *C.N.O.R.* 55 O.L.R. 256 at 260; *Scarf* v. *Jardine* 7 App. Cas. 345 at 360.

Decision of the Court of Appeal [1951] 1 D.L.R. 185, affirmed.

APPEAL by a husband from the judgment of the Court of Appeal (1) affirming the judgment of Gale J. (2) in favour of a wife in an action to recover arrears under a separation agreement.

R. M. W. Chitty K.C. for the appellant: The Court of Appeal erred in the following respects (i) the facts show that the respondent unequivocally repudiated the contract and therefore the cause of action disappeared; (ii) having elected the remedy of recourse to the Courts, she elected to rely on her rights under the statute and abandoned the contract; (iii) she is estopped from setting up the contract; (iv) the order of the Family Court is *res judicata.*

The agreement not being in arrears the respondent was precluded from a resort to the *Deserted Wives' and Children's Maintenance Act.* She might have had an action in alimony. *Hyman* v. *Hyman* (3). The appellant could have continued to make payments under the agreement and thus barred the action taken by the respondent under the statute but he chose, as he had the right to do, to accept a repudiation: *Hochster* v. *De la Tour* (4); *Scarf* v. *Jardine* (5); *Cooper* v. *C.N.O.R.* (6); *Toronto Ry. Co.* v. *Hutton* (7); *Bouveur* v. *Bouveur* (8); *Wagner* v. *Wagner* (9); *Wiley* v. *Wiley* (10); *Tulip* v. *Tulip* (11).

The principle of estoppel is essentially involved in the argument already submitted. Election is a branch of estoppel, 13 Hals. 2nd Ed. pp. 454-5.

The information in the Family Court was clearly laid under s. (1) of *The Deserted Wives' and Children's Maintenance Act.* That section permits a deserted wife

(1) [1950] O.W.N. 708; [1951] 1 D.L.R. 185.
(2) [1950] O.W.N. 485.
(3) [1929] A.C. 601.
(4) (1853) 2 E. & B. 678.
(5) (1882) 7 App. Cas. 345 at 360-1.
(6) 55 O.L.R. 256 at 260.
(7) 59 Can. S.C.R. 413.
(8) [1941] 2 D.L.R. 348.
(9) [1940] 4 D.L.R., 848.
(10) (1919) 46 O.L.R. 176.
(11) [1951] 1 All E.R. 563.

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to claim maintenance for herself and children of the marriage living with her. It does not involve any adjudication that the children are "deserted." The magistrate's order purports to dismiss the application as to the wife but orders maintenance for the child living with her. The order as to the child must depend upon a finding that the wife was deserted and the purported dismissal as to the wife can only mean that the wife while "deserted", to give jurisdiction to make the order, is not entitled to maintenance.

There is thus a valid and subsisting order of a Court of competent jurisdiction adjudicating the rights of the parties. The appellant was at no time charged with desertion of his child and so until and unless the information was amended so to charge him the magistrate had no jurisdiction to make an order under s. 2. The order can only have been made under s. 1 and the dismissal as to the wife can only mean that under the circumstances and on the evidence the wife was not entitled to an award of maintenance for herself but only for the child. In *Stevens* v. *Stevens* (1), the Court of Appeal for Ontario held in that case, as McTague J.A. delivering the judgment said, "It is unnecessary to decide whether the order of the Domestic Relations Court abrogates the agreement, but I take the view that the operation of the separation agreement is under suspension as long as the order is outstanding." His *obiter dictum* does not go far enough but assuming it is an accurate statement of the law, so far as it goes, the respondent here is barred by it from enforcing the agreement because there is an order of the Family Court subsisting that at least suspends the remedy under the separation agreement. The separation agreement is no more severable in this manner than the order of the Family Court.

Moyer v. *Moyer* (2) is clearly distinguishable—there the order of the Family Court had expired and was not a subsisting order. *Smellie* v. *Smellie* (3) is also distinguishable. No question of contractual rights arose. The conflict was between rights under *The Matrimonial Causes Act* and *The Deserted Wives' and Children's Maintenance Act.*

(1) [1940] O.R. 243 at 246. (2) [1945] O.W.N. 46.
(3) [1946] O.W.N. 458.

W. D. S. Morden, for the respondent: There was no evidence adduced to support the allegation that the respondent deserted the appellant. Assuming that she had, such desertion could not affect the validity of the separation agreement entered into more than a month after the alleged desertion.

The separation agreement was not brought about by duress. A contract is voidable at the option of one of the parties if he entered into it under duress, but he must make his choice to deny or affirm the contract within a reasonable time. In this case the appellant acted on the separation agreement for nine months and as a consequence cannot now be heard to complain of circumstances leading up to the making of the agreement. *United Shoe Machinery Co.* v. *Brunet* (1); *Bowlf Grain Co.* v. *Ross* (2); *Abram S.S. Co.* v. *Westville Shipping Co.* (3); *McKinnon* v. *Doran* (4).

The separation agreement was not terminated by mutual consent. Mere negotiation for a variation of the terms of a contract will not amount to a waiver unless the circumstances show that it was the intention of the parties that there should be an absolute abandonment and dissolution of the contract. *Robinson* v. *Page* (5). Where the question is whether one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon the contract and altogether to refuse performance. *Frult* v. *Burr* (6); *General Billposting Co.* v. *Atkinson* (7).

The learned trial judge was right in holding that there is nothing in *The Deserted Wives' and Children's Maintenance Act* which expressly extinguishes the respondent's right of action under the separation agreement. No statute operates to repeal or modify the existing law, whether common or statutory, unless the intention is clearly implied. *Lamontagne* v. *Quebec Ry. L.H. & P. Co.* (8); *Western Cos. Ry. Co.* v. *Windsor & Annapolis Ry.* (9). The

(1) [1909] A.C. 330; 78 L.J.P.C. 101 at 104.
(2) 55 Can. S.C.R. 232.
(3) [1923] A.C. 773; 93 L.J.P.C. 38 at 44.
(4) (1916) 35 O.L.R. 349 at 362, affirmed 53 Can. S.C.R. 609.
(5) (1826) 3 Russ. 114 at 119.
(6) (1874) L.R. 9, C.P. 205; 43 L.J.P.C. 91.
(7) [1909] A.C. 115 at 128.
(8) 50 Can. S.C.R. 423.
(9) (1882) 7 App. Cas. 178.

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respondent retains a right to sue for default under the separation agreement despite the proceedings taken by her in the Family Court. Had that Court made an order in her favour, the provisions in the separation agreement would be suspended as long as the order was outstanding. *Steevens* v. *Steevens* (1); *Moyer* v. *Moyer* (2); *Smellie* v. *Smellie* (3).

Chitty K.C. replied.

KERWIN J.:—This Court granted leave to the defendant, Donald M. Findlay, to appeal from an order of the Court of Appeal for Ontario (4) dismissing an appeal by him from the order of Gale J. which adjudged that the plaintiff, Mary L. Findlay, the wife of the defendant, do recover against him fifty-five dollars with costs on the Division Court scale without set-off, and further ordered that the defendant's counter-claim be dismissed with costs to the plaintiff on the Supreme Court scale. Several of the issues raised before the trial judge and the Court of Appeal were abandoned in this Court, leaving for consideration only the questions designated by counsel for the appellant as repudiation, election, estoppel and *res judicata*.

By an agreement of September 16, 1948, the parties separated and agreed that the husband should have the custody and control of a son of the marriage and that the wife should have the custody and control of a daughter. The husband agreed to pay the wife $30 each month for herself, down to and including the month of January, 1950, after which the monthly payment was to be increased to $40. He also agreed to pay the wife $35 per month for the daughter's maintenance. On May 31 the respondent wrote the appellant a letter to which no reply was made until June 29, and it in turn was answered on July 4. At that time no default had been made in any of the payments under the agreement.

The trial judge considered this correspondence and his conclusion that it did not effect a repudiation by the respondent or a termination by mutual agreement, of the provisions of the separation agreement, was affirmed by

(1) [1940] O.R. 243.
(2) [1945] O.W.N. 463.
(3) [1946] O.W.N. 458.
(4) [1950] O.W.N. 708; [1951] 1 D.L.R. 185.

the Court of Appeal. Without detailing the contents of these letters, it is sufficient to say that having read them and considered the argument on behalf of the appellant, I am in agreement with that conclusion.

The issues as to election, estoppel and *res judicata* may be considered together but it is first necessary to narrate what occurred after the correspondence referred to above. Under *The Deserted Wives' and Children's Maintenance Act,* R.S.O. 1937, c. 211, as amended, an information was laid by the respondent against the appellant charging that he had deserted his wife without having made adequate provision for her maintenance and the maintenance of any of his children residing with her, and that he was able to maintain them in whole or part, and that he wilfully neglected or refused so to do. The record shows that after a plea of not guilty, the order made upon that information was as follows:—

> Dismissed as to wife. Order for $10 per week for support of child, first payment to be made July 26, 1949, at the York County Family Court office.

The appellant was paid the $10 each week for the daughter. On October 12, 1949, the respondent brought an action against the appellant in the First Division Court of the County of York, claiming the sum of $120 as arrears of payments due her under the separation agreement. On the appellant's application this action was transferred into the Supreme Court of Ontario and came on for trial before Gale J. Presumably something had been paid on account of the $120, leaving a balance of $55, for which amount judgment was given.

In *Stevens* v. *Stevens* (1), the wife took proceedings under the *Deserted Wives' and Children's Maintenance Act* and was granted an order for payments which were less in amount than those to which she was entitled under a separation agreement. She then commenced proceedings in the Division Court for a sum representing the difference between the total of the payments due under the separation agreement and those made under the Act. It was held that

(1) [1940] O.R. 243; 3 D.L.R. 283.

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she had alternative and not cumulative remedies, and McTague J.A., in delivering the judgment of the Court of Appeal, states:—

> It is unnecessary to decide whether the order of the Domestic Relations Court abrogates the agreement, but I take the view that the operation of the separation agreement is under suspension as long as the order is outstanding.

In *Moyer* v. *Moyer* (1), the plaintiff had made an application under the Act and an order was granted directing the husband to pay the wife certain amounts "for a period of six months with the opportunity to either party to speak to this Court" at the expiration of that time. After the expiration of six months within which no further steps were taken in those proceedings, an action was commenced in the Supreme Court of Ontario for alimony, and Hogg J. held, following *Stevens* v. *Stevens,* that her rights were under suspension, but only so long as the order was outstanding. The *Stevens* case was also referred to in *Smellie* v. *Smellie and Murphy* (2). That was a motion in an action for divorce for an order for payment of maintenance for the infant children of the parties. It was held that it was undesirable where the relief asked is within the competence of the lower Court that an order should be made in the Supreme Court of Ontario as long as there is outstanding in the Magistrate's Court an order for the same purpose.

In the meantime, in Saskatchewan, MacDonald J. in *Bouveur* v. *Bouveur* (3), had extended the decision in Stevens and proceeding upon a suggested analogy with decisions under the British and Saskatchewan Workmen's Compensation Acts held that the granting of an order under the Saskatchewan Act and compliance with it by the husband, although the order was subsequently rescinded on the latter's application, estopped the wife from relying upon the provisions of a separation agreement. He referred to the decision of Elwood J. in *Dalrymple* v. *C.P.R.* (4), and the Court of Appeal in *Neale* v. *Electric and Ordnance Accessories Co.* (5). It remains but to add that *Bouveur* v. *Bouveur* was distinguished by the Saskatchewan Court

(1) [1945] O.W.N. 463.
(2) [1946] O.W.N. 458; 3 D.L.R. 672.
(3) [1941] 2 D.L.R. 348; 1 W.W.R. 245.
(4) (1920) 13 S.L.R. 482. 55 D.L.R. 166.
(5) [1906] 2 K.B. 558.

of Appeal in an opinion delivered on its behalf by Mr. Justice MacDonald in *Wagner* v. *Wagner* (1), where it was held that the fact that an action for alimony has been commenced and later discontinued by a wife does not constitute a bar to her subsequent enforcement of her right to the payment of maintenance under *The Deserted Wives' and Children's Maintenance Act*, R.S.S. 1940, c. 234.

On this appeal it is unnecessary to consider a situation such as existed in *Stevens* v. *Stevens*. The suggested analogy with decisions under Workmen's Compensation Acts is not valid as that class of legislation contains special provisions differing in various jurisdictions as to the right to claim compensation if an action be dismissed, and also amendments have from time to time been made conferring a right, in England at any rate, upon the Court of Appeal to fix the compensation or refer the matter back for that purpose if the action and an appeal from its dismissal have been dismissed. I deem it unsafe to apply any decisions under such Acts to circumstances such as here exist.

The doctrine of election, or as it is called in the law of Scotland, the doctrine of "approbation" and "reprobation", depends upon intention: *Spread* v. *Morgan* (2). The doctrine was fully discussed in *Lissenden* v. *C.A.V. Bosch Limited* (3), and particularly in the judgment of Viscount Maugham. He points out it was confined in England and in Scotland to cases arising under wills and deeds and other instruments *inter vivos* until the decision of the Court of Appeal in *Johnson* v. *Newton Fire Extinguisher Co.* (4). That decision and others following it were overruled in Lissenden and it was held that the doctrine could not apply to the right of a litigant to appeal either from a judgment or from an award of a County Court judge made under the British Workmen's Compensation Act, 1925, where the litigant had accepted weekly sums payable under an award, and it was decided that he was not precluded from appealing on the ground that the compensation should have been of a larger sum than that awarded. At page 419, after stating as one of the general propositions not in doubt that no person is taken to have made an

(1) [1949] 4 D.L.R. 848.
(2) (1865) 11 H.L. Cas. 588.
(3) [1940] A.C. 412.
(4) [1914] 2 K.B. 111.

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election until he has had an opportunity of ascertaining his rights and is aware of their nature and extent, Viscount Maugham continues:—"Election in other words, being an equitable doctrine, is a question of intention based on knowledge." At page 429, Lord Atkin states:—"Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one, he cannot afterwards assert the other." Lord Russell of Killowen agreed with Viscount Maugham and Lord Atkin. At page 436, Lord Wright states:—"Even if this were (which it is not) a case of election, there is, furthermore, no evidence of the essential elements of election, namely, the presence of knowledge of the position and intention to elect."

I am unable to perceive upon what grounds it may be said that merely by laying the information the respondent intended to forego any rights she had under the separation agreement. Indeed it is plain that nothing was farther from her mind. The doctrine of election has, therefore, no application. As to estoppel, no step was taken by the appellant in reliance upon any action of the respondent and there is no basis for that defence or the defence of *res judicata* as all that transpired before the magistrate was that the respondent's claim under the Act for maintenance for herself was dismissed. The magistrate had no jurisdiction to enforce the separation agreement although, under subsection 2 of section 1, the existence of such an agreement, providing there has been default thereunder, does not prevent the exercise of jurisdiction to order payments.

The appeal should be dismissed with costs.

RAND J.:—This action was brought by a wife on a separation agreement made in September, 1948, for monthly payments as provided. Several defences were raised: that the contract had been obtained by duress: that a repudiation by the wife had been accepted by the husband: that it had been terminated by agreement: and that the action was barred by reason of certain proceedings brought in the York County Family Court under *The Deserted Wives' and Children's Maintenance Act.* The first three were found against the husband in both courts below and those findings have not been seriously challenged in this Court.

The last presents the substantial point in the appeal. After an exchange of letters in May and June, 1949, on which the defence of repudiation was based, the husband, here the appellant, defaulted in the monthly payments both to the wife for herself and for the maintenance of a young daughter living with her. The wife thereupon laid an information under the Act mentioned both on her own behalf and on behalf of the child, alleging desertion and claiming maintenance. The Family Court, treating the relief sought as severable, dismissed the wife's personal claim on the ground that no evidence of desertion within section 1(2) of the Act, the condition of relief, had been presented; and made an order in favour of the wife for the benefit of the child of $10 a week. By the agreement the sum for the wife was $30 a month and for the daughter, $35. Following the dismissal of the wife's complaint, this action was brought.

The argument is put on several grounds: election, estoppel and *res judicata*; but before dealing with them, it will be desirable to refer to the relevant provisions of the statute.

S. 1(1):—

Where a wife has been deserted by her husband an information may be laid before a justice of the peace and such justice of the peace may issue a summons against the husband in accordance with the form in the Schedule to this Act and if upon the hearing before a magistrate, it appears that the husband has deserted his wife without having made adequate provision for her maintenance and the maintenance of his children residing with her and that he is able to maintain them in whole or in part and neglects or refuses so to do, the magistrate may order him to pay such weekly sum as may be deemed proper, having regard to all the circumstances and such order may be in the form given in the Schedule to this Act.

(2) A married woman shall be deemed to have been deserted within the meaning of this section when she is living apart from her husband because of his acts of cruelty, or of his refusal or neglect, without sufficient cause, to supply her with food and other necessaries when able so to do, or of the husband having been guilty of adultery which has not been condoned and which is duly proved, notwithstanding the existence of a separation agreement, providing there has been default thereunder and whether or not the separation agreement contains express provisions excluding the operations of this Act.

Section 2(2):—

A child shall be deemed to have been deserted by his father, within the meaning of this section, when the child is under the age of sixteen years and when the father has, without adequate cause, refused or neglected to supply such child with food or other necessaries when able so to do.

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What is the "default" under p. 1(2) that will open the statutory relief to the wife? If the agreement does not provide for maintenance, is the wife forever barred, providing no default takes place? Assuming default to be in payment of maintenance and that only agreements containing such a provision are within the subsection, the statute is to be taken as creating, as a matter of public policy, a right in the wife to which resort may not be made so long as a provision for maintenance in a separation agreement is being fulfilled.

But it is patent that the right under the agreement and that under the statute are based on different matters and factors: the former could be resisted only by considerations arising out of the agreement: but that under the statute involves desertion and the conditions laid down in s. 1. They are thus separate and distinct in substance, character and remedy. It is not, then, a matter of alternative claims arising out of the same state of facts. The jural conclusion from that situation is this: the rights remain coexistent but, related to a period of time, the performance of only one of them can be exacted; and the operation of one and the suspension of the other will depend on the circumstances. Election could not be taken to be between the statutory right and the agreement as a whole: the latter will in general provide for essential matters which are quite beyond the purview of the statute; and if resort to the statute were to abrogate the provision in the agreement for maintenance, it would effect a basic alteration in the considerations on which the mutual promises were made. It might conceivably lead as well to the defeat of the statutory claim through the removal, by the husband, of the grounds on which it rests. The purpose of the statute is to give to the wife a summary means of compelling the husband to support her: it is not to cut down rights against him which she otherwise possesses. Where such relief is, in the public interest, provided for the protection of the wife, why should it be so interpreted as to create substantial risks in resorting to it? In the presence of such disparate and independent claims, each depending on different facts, a rule that the commencement of proceedings on one is an irrevocable election to be bound by its result, putting both on the issue of one, seems to me to lack a sound legal basis.

Election, moreover, implies a plurality of real rights: if an asserted claim is rejected, it cannot be the matter of election. The order of the Family Court did reject the claim under the statute and there was left only the right, if it existed, under the agreement. Furthermore, to bring action on the agreement would not affect the right under the statute; if that were not so, the husband, by deliberate default, could effectually force the wife to the loss of one or other of the remedies; but the statute cannot be taken to intend as a further condition of its availability, that the wife should abandon her remedy under the agreement, an unsatisfied judgment on which would appear clearly to be such a default as s. 1(2) envisages. As election must operate reciprocally, *a fortiori* the right under the agreement is not lost by a futile resort to the statute.

Nor can I see any possible application of estoppel. In whatever mode it is conceived, as representation of fact, existing or future, or as a mutual assumption of a situation acted upon, it lacks a basis in actuality. The letters between the parties exhibit the defects of the contention; if estoppel could be tortured out of them, that device would become an almost universal determinant of rights.

Finally it is urged that the order by the Family Court is *res judicata*. The issue to be determined there was that of desertion and it was found against the wife: but desertion is no part of the claim under the agreement. And as the order in relation to the child was clearly made under s. 2, this ground is without any substance.

The appeal must be dismissed with costs.

The judgment of Kellock and Locke JJ. was delivered by:

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for Ontario affirming a judgment at trial in favour of the respondent in an action brought by her to recover certain past due instalments under a separation agreement between the parties. Under the agreement in question, dated September 16, 1948, the appellant covenanted to pay to the respondent during the joint lives of the parties an "allowance" of $30 per month and to pay for the maintenance of their infant daughter, whose custody

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was to be in the wife, the sum of $35 per month until the child attained the age of 18 years. At the present time, the child is eleven.

The payments called for by the agreement were duly made until and including the month of June, 1949, when, as result of certain correspondence passing between the parties, initiated by the respondent, the appellant refused to make further payments. Thereafter, the respondent commenced proceedings under *The Deserted Wives' and Children's Maintenance Act,* R.S.O. 1937, c. 211. These proceedings were dismissed as to the respondent herself but an order was made against the appellant for the payment of $10 per week for the support of the infant daughter, the payments to be paid into the Family Court of York County.

The appellant contends that the action ought to have been dismissed at the trial on the ground that the respondent, in the correspondence passing between the parties prior to the litigation, had repudiated the separation agreement and that this repudiation was accepted by him. He further contends that, on the basis of election or estoppel, by reason of the proceedings taken by the respondent above referred to, she is no longer entitled to enforce the covenant for payment in the deed of separation.

The statute, by subsection (1) of s. 1, provides that where a husband has deserted his wife without having made adequate provision for her maintenance and the maintenance of his children residing with her, and (that) he is able to maintain them in whole or in part and neglects or refuses so to do, he may be ordered to pay such weekly sum as may be deemed proper, having regard to all the circumstances. It is further provided by subsection (2) that a married woman shall be deemed to have been deserted within the meaning of the section when she is living apart from her husband because of, *inter alia,* his refusal or neglect without cause to supply her with food and other necessaries when able so to do, "notwithstanding the existence of a separation agreement, providing there has been default thereunder, and whether or not the separation agreement contains express provisions excluding the operation of this Act." The words quoted were added by amendment in 1935.

Subsection (1) of s. 2 provides that a father who has deserted his child may be summoned before a magistrate or judge of the Juvenile Court, who, if satisfied that the former has wilfully refused or neglected to maintain the child and has deserted the child, may order the father to pay up to $20 per week for its support, as the magistrate or judge may consider proper, having regard to the means of the father and to any means the child may have for his support. Subsection (2) provides that a child shall be deemed to have been deserted by the father within the meaning of the section when the child is under the age of 16 years and the father has, without adequate cause, refused or neglected to supply such child with food or other necessaries when able so to do.

With respect to the correspondence, I am content to take the view that the respondent was announcing her intention not to be bound by the agreement with respect to the amount thereby provided for and, if necessary, of instituting proceedings to obtain increased maintenance. What the basis of this demand was the correspondence does not say. The appellant purported to accept this renunciation of the payments called for by the agreement, but coupled therewith an assertion of his intention of insisting otherwise upon the deed, including the provision as to living separate from the respondent.

It will be convenient, first, to deal with the defence founded upon election. It is, of course, for the appellant, with respect to this defence as with respect to the others, to make out his case. He contends that the respondent had a choice as between her rights under the agreement and a claim under the statute, and having chosen the latter she has lost the former.

Appellant cites the following from the judgment of Lord Blackburn in *Scarf* v. *Jardine* (1):—

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean

(1) (1882) 7 App. Cas. 345 at 360.

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an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

In this judgment Lord Blackburn, as pointed out by Lord Atkin in *United Australia* v. *Barclays Bank* (1), is dealing not with alternative remedies but with the case of a person who is presented with two inconsistent rights, and the important thing to observe for present purposes is that in order that a plaintiff becomes disentitled to a right by electing to enforce another, he must, to begin with, have actually had a choice of two rights. This underlies the judgments of all of their Lordships.

In the course of his judgment in the *United Australia* case, (*supra*), Lord Atkin said at p. 30:—

> On the other hand, if a man is *entitled* to one of two inconsistent rights, it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which after the first choice is, *by reason of the inconsistency,* no longer his to choose.

In my opinion the respondent, on the facts in the case at bar, did not have any cause of action under the *Deserted Wives' and Children's Maintenance Act,* and therefore was not, in fact, faced with an election at all.

In order that a wife may obtain an order under s. 1, subsection (2) of the statute, she must have been

> living apart from her husband *because of* * * * his refusal or neglect, without sufficient cause, to supply her with food and other necessaries when able so to do.

In a case where the parties are already living apart by consent when the refusal or neglect occurs, it cannot be said of the wife that she is living apart "because of" such refusal or neglect. In *Hofland* v. *Hofland* (2), it was held that a wife could not succeed under the statute where the husband and wife were not living together when the alleged desertion occurred. It may be that it was as a result of this decision that the amendment of 1935 set out above was made and that a case of desertion within the statute may be made out where the original separation was consensual but where, as indicated by Lord Greene in *Pardy* v. *Pardy* (3), its character has changed. It is not necessary to consider the effect of the amendment for

(1) [1941] A.C. 1 at 30. (2) [1933] O.W.N. 608.
(3) [1939] P. 288.

whatever its effect may be in another case, neither of the parties to the instant case had changed his or her intention to live apart. It cannot, therefore, be said that the respondent, at the time she took the proceedings under the statute, was living apart from the appellant "because of" his refusal or neglect to maintain her. That being so, the respondent was not entitled to any rights under the statute and the learned magistrate so found.

Moreover, for all that appears, and it was for the appellant to show otherwise if it were the fact, he did not change in those proceedings the position which he had earlier taken up in the correspondence, namely, insisting on the efficacy of the deed of separation. In these circumstances, the defence founded on election cannot succeed.

In my opinion the order made in favour of the infant does not affect the situation. S. 2 of the statute creates an independent liability on the part of the appellant toward his child, which, by s. 4, the respondent was entitled to assert on its behalf. No question arises in the present case as to the effect of the order upon the liability of the appellant under the covenant in the agreement with respect to the child's maintenance as there is no claim made in these proceedings with respect to the child.

The appellant's argument founded on estoppel, he admits, is involved in his argument with respect to election. It is therefore not necessary to deal separately with this contention.

I would dismiss the appeal with costs.

CARTWRIGHT J. (dissenting):—This is an appeal, by special leave, from a judgment of the Court of Appeal for Ontario affirming, without written reasons, a judgment of Gale J. in favour of the respondent for certain arrears under a separation deed.

The relevant facts are not disputed and may be briefly stated. The respondent is the wife of the appellant. They were married in 1935. There are two children of the marriage, a boy born March 1, 1937 and a girl born September 7, 1940. The parties finally separated in 1948 and subsequently entered into a separation deed, dated the 16th of September, 1948. They have lived apart ever since. The deed recites the marriage, the birth of the

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children, the fact that unhappy differences have arisen and that the parties have agreed to live separate and apart from each other and proceeds:—

4. Now this indenture witnesseth that in consideration of the mutual covenants herein contained, it is hereby agreed and declared as follows:

The deed provides that the husband shall have the custody of the boy and the wife of the girl with rights of reasonable access in each case.

The deed contains the following mutual covenants:—

5. The parties hereto will henceforth live separate and apart from each other, and neither of them will take proceedings against the other for the restitution of conjugal rights, or molest or annoy or interfere with the other in any manner whatsoever. Each party covenants and agrees with the other not to utter any words which would constitute defamation or slander of the other. Each party releases the other of all claims for anything existing up to the present time, except such rights or obligations as are imposed under the terms of this agreement.

The deed contains the following covenants by the husband:—

10. The husband will pay to the wife, as and for her separate property, an allowance of $30 on the third day of each month during the term of their joint lives if they shall so long live separate from each other, and on condition that and so long as the wife shall continue to lead a chaste life, the first of such payments to be made on the third day of August, 1948. The payments shall cease upon the remarriage of the wife.

It is expressly provided, however, that the payments of $30 per month are to be made up to and including the month of January, 1950, and commencing with the payment due on the third day of February, 1950, the said payments to the wife shall be increased to the sum of $40 per month.

12. The husband shall pay for the maintenance of the said infant child, Jennifer Elizabeth Findlay, the sum of $35 per month, such payments to be made on the third day of each month, and to commence on the third day of August, 1948; and the payments to cease upon the said infant attending the age of eighteen years.

14. In the event of the said infant child, Jennifer Elizabeth Findlay, requiring special medical or surgical treatment, the wife shall consult with the husband as to the treatment to be given, and the physician or physicians to be consulted and the husband shall pay to the wife a sum in addition to the monthly payment set forth in Paragraph 12 herein, sufficient to pay any medical or hospital accounts and all debts incurred in connection with such treatment of the said child.

The husband also covenants to pay the sum of $50 to the wife and that she shall have certain chattels and furniture, set out in a schedule to the deed, it being expressly provided that the execution of the deed shall pass the title in such chattels to the wife.

The deed contains a covenant on the part of the wife to bar dower and the following covenants:—

8. The wife shall have the custody and control of the infant child, Jennifer Elizabeth Findlay, and shall be responsible for her support, maintenance and education out of the moneys paid to her under the provisions of paragraph No. 12 of the within agreement, subject to the provisions of Paragraph No. 14 with regard to extra medical care.

11. The wife agrees that from the date of this agreement she will pay her own debts and will keep the husband indemnified therefrom and if the wife shall make default in observing this covenant, all moneys which shall be paid by the husband in respect of any debt or liability of the wife shall be deducted by him out of the monthly instalments payable to the wife under the provisions of this agreement, saving and excepting therefrom only any payments or expenses which might be incurred by the wife in accordance with paragraph 14 hereof arising out of sickness, accident or other emergency on behalf of the infant child, the said Jennifer Elizabeth Findlay.

The husband made all payments provided in the deed up to and including the payment due on the 3rd of June, 1949. Following the making of this payment, which, at the request of the wife, was made a few days in advance of its due date, the wife wrote to the husband, on May 31, 1949, stating that unless he at once made her an increased living allowance she would not hesitate to take him into court. The letter says, in part: "What have I got to lose? —very little." It goes on to say that any court "would hardly allot us less than $65." It mentions that the court proceedings would be embarrassing to the husband, uses the expression "when I walk into court I shall have thrown my hat over the windmill", says that the court proceedings might get the wife custody of the son and concludes

* * * to proclude (*sic*) further stalling the least amount I would consider *now,* not next February is $100 a month and that is not unreasonable. I would not bother with a divorce unless the whole thing were in the form of a settlement, said settlement to be equivalent to at least ten (10) years of aforesaid allowance. I would suggest that you reply with as little delay as possible as we are completely ready to go ahead. I am affording you this last courtesy of a letter from me, rather than my lawyers.

Under date of June 29, 1949, the husband wrote a long letter in answer in which he says, in part:—

You are renouncing the payments under the agreement. Very well, I consent to this repudiation, but with one reservation, if it is open to me to make it. If it is not open to me, I will not let that reservation prevent your renunciation being complete. But at least, should the occasion arise, I will argue that the agreement is divisible and that I can

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still rely on the clauses concerning living separate, defamation, release of prior claims, custody of Peter, dower. If my argument should fail, your repudiation will be complete.

You are free, therefore, to attempt any court proceedings you feel like, but I will defend my position to the end * * *

* * *

Now that you have thrown over the provisions made in the agreement for the two of you, two results follow immediately. There will be no more cheques for you and you will kindly make arrangements to return Jennifer to my care immediately.

To this letter the wife replied on or about July 3, 1949:—

Alright (*sic*) Don, I am quite willing to fight this thing out in court—sooner or later it had to come to a head.

In the concluding paragraph of the letter, after reproaching the appellant with having paid attention, prior to the date of the separation deed, to two women who are named the respondent continues:—

* * * I'm bringing these few isolated occurrences to your attention because I wonder if you've forgotten? Fortunately for me but unfortunately for them these people are all readily accessible and it is only your stubborness to see reason that makes it necessary to smear them as well as you.

See you in court.

The husband made no further payments under the deed, and the wife made application for maintenance for herself and the daughter in the York County Family Court, under *The Deserted Wives' and Children's Maintenance Act,* on July 8, 1949, the instalment under the deed due on July 3rd being then in arrears. After an adjournment on July 19, 1949, the application was disposed of by the Magistrate on July 26, 1949, the adjudication being in the following words:—

Dismissed as to wife. Order for $10 per week for support of child, first payment to be made July 26, 1949, at the York County Family Court Office.

The husband has ever since paid the $10 per week. Neither party has taken any steps under s. 5 of the Act to have the application reheard or to rescind or vary the order of the Magistrate and such order is still in force.

In October, 1949, the wife commenced an action in the First Division Court of the County of York for the arrears under paragraph 10 of the deed commencing with the payment falling due on July 3, 1949. This action was transferred to the Supreme Court of Ontario by order of Gale J. and the action was tried by that learned judge. The effect

of his judgment is to hold that the wife is entitled to enforce the covenant contained in paragraph 10 of the deed and at the same time to enforce the order of the Magistrate requiring payments of $10 a week. No attempt was made by the wife to assert a claim under paragraph 12 of the deed.

For the appellant it is argued that the respondent, by her earlier letter referred to above, unequivocally repudiated the contract, that this repudiation was accepted by the appellant in his letter of June 29th and that the contract thereupon ceased to exist. While I do not find it necessary to decide whether this is so, I incline to the view that it is not. I regard the wife's letter of May 31st as a definite statement that she was no longer going to regard herself as bound by the contract and was going to seek her rights at law outside its provisions. It may well be that it was then open to the husband to accept this as a complete repudiation by the wife and to notify her that he was treating the contract as at an end but I incline to the view that he did not do so. I read his letter of July 29th, quoted in part above, as a conditional, not an unqualified, acceptance in which he seeks to take the position that the wife has forfeited all her rights under the agreement but that he retains at least some of his rights.

For the same reason I do not think that the husband's letter of June 29th amounted to an unconditional offer to regard the contract as at an end which can be said to have been accepted by the wife's letter of July 4th but, again, I do not find it necessary to determine this question. For the purposes of this appeal I will assume, without deciding, that counsel for the respondent is right in his contention that after the letter of July 4th was delivered to the husband the wife was still in a position to insist that the contract was in force. At this time, however, as has been mentioned above, the husband had made default in the payments due on July 3rd. It is true that the reason he assigned for this was the unequivocal statement of the wife that she did not intend to abide by the contract but the fact remains that he made default not through inadvertence or temporary financial embarrassment but deliberately and in pursuance of his statement quoted above "There will be no more cheques for you." His default

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was not of the temporary sort made by the husband in *Kunski* v. *Kunski* (1), which was held by the learned President not to entitle the wife to regard the deed as repudiated by the husband. It was rather of the sort dealt with in *Kennedy* v. *Kennedy* (2), where default was accompanied by the expressed intention not to make further payments and was held to entitle the wife to regard the deed as at an end.

In *Kunski* v. *Kunski* (*supra*) the learned President said at page 19:—

> I quite agree that this is a matter of great importance, and a substantial part of the consideration for the deed; and if a serious and substantial refusal by the respondent to pay one of the instalments can be shewn, then he is not entitled to enforce a deed from the terms of which he has departed.

I am of opinion that following the husband's default in making the payments due on July 3rd the wife had the option of insisting upon the contract or of treating it as at an end and pursuing such rights as she might have apart from the contract. The effect of the judgment in appeal is to hold that having chosen the latter alternative and pursued her rights apart from the contract by proceedings in the Family Court the wife may, if dissatisfied with the result of such proceedings, re-assert her rights under the contract. This is challenged by the appellant and is the substantial point to be decided on this appeal.

In approaching the solution of the question it is well to bear in mind the words of Lord Atkin in *Hyman* v. *Hyman* (3) where, after referring to a separation deed as "a class of document which has had a chequered career at law", he continues:—

> Full effect has therefor to be given in all Courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial Courts seems to suggest that at times they are still looked at askance, and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement, of whose nature indeed they sometimes partake. As in other contracts stipulations will not be enforced which are illegal either as being opposed to positive law or public policy. But this is a common attribute of all contracts, though we may recognize that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy.

(1) (1899) 68 L.J.P. 18. (2) [1907] P. 49.
(3) [1929] A.C. 601 at 625, 626.

It appears to me that the applicable rules of contract law are well settled. The default by the husband in the circumstances mentioned above amounted in law to a repudiation by him of the contract (or, if the contract be regarded as severable which I do not think it is, of those parts of it dealing with the obligation of the husband to make payments and of the wife to accept such payments and keep the husband indemnified from further claims). Such repudiation by one party could not of itself discharge the contract. The wife had a choice of remedies. She might sue the husband on the contract or she might treat it as at an end. If the wife chose the latter course the result would follow that the contract would no longer be in existence and the situation would be as stated in *Lush on Husband and Wife,* 4th Edition, (1933), pages 385 and 386:—

> It would seem that since the right of a married woman to maintenance is established in status, not contract, and in common law, not statute, that upon the payments appointed under the agreement terminated from any cause, the wife's right to be maintained by her husband would revive, and she could either pledge his credit as agent of necessity for her necessaries, or seek from him the payment of maintenance by the methods that are secured to a wife by statute * * *

The wife chose to treat the contract as at an end. She could not in the Family Court sue upon the contract. She sought there an order for payments in excess of those which the contract provided but this fact is not of importance. The important fact is that she sought payment by one of the methods secured to her by statute and not by virtue of the contract.

Having done this, it is my view that she could not at any later date take the position that the contract was still in force. She had made her election. Election is defined in Wharton's Law Lexicon, 12th Ed., page 317, quoted with approval in *Cooper* v. *C.N.O.R.* (1) as "The obligation conferred upon a person to choose between two inconsistent or alternative rights or claims." In *Scarf* v. *Jardine* (2), Lord Blackburn said:—

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he

(1) (1924) 55 O.L.R. 256 at 260. (2) (1882) 7 App. Cas. 345 at 360.

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has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election:

We were not referred to any case in which a wife has obtained an order for maintenance, or an award of alimony, by way of supplement to the sums being paid to her under a separation deed. I do not mean by this that a wife is of necessity limited to the payments under a separation deed or that such a deed can always be successfully pleaded in bar in proceedings either for alimony or maintenance during the subsistence of marriage or for maintenance on its dissolution. Such a question does not arise in this appeal. It has recently been held in England that a wife, who is receiving payments under a separation deed which are so inadequate that it can be said that the husband is neglecting to provide reasonable maintenance for her, may take proceedings for maintenance either before the justices or in the high court,—see *Tulip* v. *Tulip* (1). It has also been held that no separation deed can oust the jurisdiction of the court to decree maintenance for a wife on the dissolution of her marriage,—see *Hyman* v. *Hyman* (*supra*). I have found no case in which upon a wife taking proceedings to require a husband to make payments differing from and in excess of those provided by a separation deed the husband, instead of insisting on the deed, has taken the position that the deed is at an end, and in which the deed has been held to remain in force. To so decide would, I think, be contrary to the principle that a person may not approbate and reprobate. A result of so deciding would be that a provision in a separation deed for periodical payments to be made during the joint lives of the spouses would amount to nothing more than the statement of an irreducible minimum, binding the husband but leaving the wife free, so often as she might please and in such forums as she might choose, to seek additional payments. It is one thing to hold that the power conferred upon the courts by statute to require a husband to properly maintain his wife cannot be fettered by agreement between the parties, but quite another thing to hold that a wife may continue throughout the joint lives of herself and her husband to

(1) [1951] 2 All E.R. 91.

rely upon a separation deed while seeking support by proceedings in the court outside of, and in a manner inconsistent with, the terms of the deed.

I have not overlooked the fact that in the judgments in *Hyman* v. *Hyman* (*supra*) expressions were used indicating that in the proceedings to fix maintenance which were to follow the judgment the court might well hold the provisions of the separation deed there under consideration to constitute sufficient maintenance and that similar expressions are found in the judgment in *Tulip* v. *Tulip* (*supra*); but in each of these cases the husband, far from seeking to repudiate the deed, had at all times faithfully performed it, was willing to continue to do so, was expressly taking the position that the deed remained in force and was relying on it as constituting a sufficient provision for the wife. I find nothing in the judgments in either case to suggest that on the wife commencing the proceedings for maintenance it would not have been open to the husband to elect to treat the deed as at an end. In neither case did that question arise.

I find myself in agreement with the conclusion of McDonald J., as he then was, in *Bouveur* v. *Bouveur* (1), which judgment was, at least by implication, approved by the Court of Appeal of Saskatchewan in *Wagner* v. *Wagner* (2). *Bouveur* v. *Bouveur* was an action by a wife against her husband to enforce the maintenance provisions of a separation agreement. The relevant facts, admitted in a stated case, were that the husband and wife had been living apart for some years under a separation agreement a term of which was that the husband should make semi-monthly payments to the wife. Partial default had been made in payment of the instalments due on February 15th and March 1st, 1936. On March 23, 1936, upon the wife's application, an order had been made under the *Deserted Wives' Maintenance Act* requiring the husband to pay $20 a week to the wife. On November 23, 1936, an order had been made under the same Act rescinding the earlier order and this had been affirmed on appeal. On these facts the question submitted to the court was: "Has the plaintiff by proceeding under the *Deserted Wives' Maintenance Act* elected her remedy and thereby disentitled herself from

(1) [1941] 2 D.L.R. 348. (2) [1949] 4 D.L.R. 848.

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enforcing against the defendant the provisions of the said separation agreement as to payment of maintenance and support?" This question was answered in the affirmative. It will be observed that it was not the making of the order by the magistrate but the election by the wife to proceed under the Act instead of on the contract which brought the latter to an end. I do not find anything in the Ontario cases referred to by the learned trial judge which appears to me to be at variance with the conclusion reached in the *Bouveur* case. In neither *Moyer* v. *Moyer* (1), nor *Smellie* v. *Smellie* (2) did any question of contractual rights arise. Except for one sentence, which I have italicized, it seems to me that the following passages in the judgment of McTague J.A. concurred in by Middleton and Masten JJ.A. in *Stevens* v. *Stevens* (3), support the reasoning in the Bouveur judgment:—At page 245:—

> The question of the defendant's liability for the difference between what he is ordered to pay by the Domestic Relations Court and what is stipulated for by the separation agreement is much more important.

At pages 245 and 246:—

> The plaintiff had alternative remedies as I see it, not cumulative remedies. She was bound to elect. Counsel for the plaintiff has argued strenuously that the Domestic Relations Court has no jurisdiction with respect to the separation agreement. With that I agree. All the Act provides in this regard is that the circumstance of a separation agreement shall not in itself take the plaintiff out of the category of a deserted wife and thereby bar her from relief under the Act: sec. 1(2). The plaintiff's difficulty, as I see it, does not arise from any lack of jurisdiction in the Domestic Relations Court with respect to the separation agreement but from her own election to invoke the jurisdiction of the Court notwithstanding the separation agreement. It is unnecessary to decide whether the order of the Domestic Relations Court abrogates the agreement, but *I take the view that the operation of the separation agreement is under suspension as long as the order is outstanding.*

At pages 246 and 247:—

> As I see it, she has chosen to forego her rights under the agreement and cannot be allowed to adopt part of it in answer to the consequences of her own act.

Counsel for the respondent argued that the correct inference to be drawn from the italicized words quoted above is that notwithstanding the proceedings in the Domestic Relations Court the agreement remained in force, although temporarily under suspension and would

(1) [1945] O.W.N. 463. (2) [1946] O.W.N. 458.
(3) [1940] O.R. 243.

revive if and when that court's order terminated. As I read his judgment, McTague J.A. expressly refrained from so deciding, being of the view that a decision on the point was unnecessary. I think that the suggested inference would be at variance with the other portions of his reasons set out above.

In the case at bar, for the reasons given above, I am of opinion that the separation deed is no longer in force. The deed has come to an end because, the husband having made default in an essential matter, the wife elected to treat it as at an end and to pursue her rights apart from contract.

I, of course, express no opinion as to whether or not the wife should have been refused maintenance by the magistrate. *The Deserted Wives' and Children's Maintenance Act* provides for rehearings and for the confirmation, rescission or variation of any order made in that court. Nor do I express any opinion as to the wife's right to alimony if she should require the husband to receive her and support her as his wife and he should refuse to do so or if the facts are such that she is entitled, apart from the provisions of the separation deed, to live apart from him and to require him to maintain her. In my view all that we have to decide on this appeal is whether the deed of separation remains in force and I have already indicated that, in my opinion, it does not.

I would allow the appeal and direct that judgment be entered dismissing the action. There should be no order as to the costs of this appeal or of the motion for leave to appeal or in the courts below.

Appeal dismissed with costs.

Solicitor for the appellant: *R. M. W. Chitty.*

Solicitors for the respondent: *McLaughlin, Macaulay, May & Soward.*