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SEPARATION AGREEMENTS: SOME PROBLEMS OF ENFORCEMENT

The typical separation agreement involves a situation where the separation has already occurred or is imminent, and the husband and wife enter into a contract by which the husband is to pay a stated amount to the wife on designated terms. A suit for divorce may be subsequently imposed upon this situation, but the discussion here is confined to the problems of enforcement of a contract for support in view of a separation without divorce. The terms of such an agreement may be in the following forms: "(I) Transfer of property, real and/or personal, (II) Payment of a lump sum, (III) Periodic payments, fixed or flexible, (IV) Creation of a trust income to the wife, and (V) Combination of any two or more of the above."¹

Inasmuch as the duty to support is the basis of this agreement and this duty flows only from the husband to the wife, there can be no reciprocal agreement whereby she is obliged to support him unless involving unusual circumstances.

Assuming for the purposes of discussion that the usual requirements as to a valid contract have been met, and in addition because of the peculiar nature of the right it embodies the requisite of fairness has been satisfied, what are the problems of enforcement that will be faced by the wife?

Without further complicating factors, the conflict arises as to whether the enforcement shall be based upon the contractual rights or upon the marital rights. In other words, may the wife, with a valid contract of support in existence, sue upon her marital rights for separate maintenance, disregarding the contract? If the possibility that she might sue on both at once is eliminated, and surely no one would seriously urge such a procedure, there are two practical alternatives: (1) the contract precludes a suit for separate maintenance; (2) the contract is no bar to such a suit.²

A study of the cases is convincing evidence, however, that the weight of authority is with the first group.³ And this is as it should be. The theory that urges most strongly this conclusion is that the duty to support is supplanted by the contract and remains in abeyance during the existence of the contract.⁴ However, if the contract

¹ LINDEY, SEPARATION AGREEMENTS (1937) 225.

Patton v Patton, —N. J. Eq. (Ch.)— 58 Atl. 1019 (1904), Drane v. Drane, 201 N. Y. Supp. 756 (1923), Commonwealth v. Pengelly 6 Pa. D. & C. 359 (1925), see Longhi v Longhi, 193 Ill. App. 21 (1916)

² Patterson v. Patterson, 111 Ill. App. 342 (1903).

³ Note (1920) 6 A. L. R. 6, 75.

Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 1111 (1889), Galusha v Galusha, 116 N. Y. 635, 22 N. E. 1114 (1889)

be terminated by both parties, the marital obligation in the husband is revived, thus making a suit for separate maintenance by the wife possible.⁶ But until these acts occur, there is no basis for such a suit.

A breach by one party has the effect of giving the other party an excuse for renouncing the contract, but it is not necessarily to be considered a termination, as the party responsible for the breach is still bound, if the party not at fault desires to seek specific performance. Inasmuch as either husband or wife may act to breach the contract, consideration will be given the subject in either event.

If the husband has acted to breach the contract, this gives the wife the right to renounce the agreement, and she now may be said to have an election as to the method by which she will seek recovery.⁷ This election, extends, however, only to the manner of the remedy, for if she accepts the contractual method of relief, she accepts all its provisions, being able to reject nothing but the contract in its entirety.⁸ And to be able to recover on the contract, the wife must not have induced the breach or be in fault.⁹ It does not, of course, follow that by violating the separation agreement the wife loses all right of support from the husband. If in her suit for separate maintenance, which she might bring since she lost her right to enforce the contract, the husband should offer the contract by way of defense of the suit, this should bar her recovery, because she was in breach of the contract. If he does not, the failure should be interpreted as a disavowal of the contract on his part.

Suppose the husband has breached the contract by refusing to pay the amounts called for, may the wife consider the breach as giving her the right to terminate, and, electing to sue upon her marital rights, recover as from the date of election, and then institute a suit for payments due her by the terms of the agreement prior to the date of election? Such has been permitted in the case of *Breiterman v. Breiterman*.¹⁰ The court said,

"The fact that the wife accepted the failure to further perform as terminating the contract as of that date does not permit the husband to avoid making the payments which are due under the separation agreement.

"The cases which hold that a wife may not sue for a separation, and at the same time sue upon a sepa-

⁶ *Drummond v. Drummond*, 171 N. Y. Supp. 477 (1918), see *Barclay v. Barclay*, 98 Md. 366, 56 Atl. 804, 807 (1904) *Crim v. Crim*, 176 N. Y. Supp. 68, 70-71 (1919), *Beebe v. Beebe*, 160 N. Y. Supp. 967, 972 (1916).

⁷ *Ibid.*

⁸ *Johnson v. Johnson*, 206 N. Y. 561, 100 N. E. 408 (1912).

⁹ *Muth v. Wuest*, 76 App. Div. 332, 78 N. Y. Supp. 431 (1902) *Shimp v. Gray*, 41 Pa. Super. Ct. 542 (1910), *James v. Golson*, 174 S.W. 688 (Tex. 1915), see *Duryea v. Bliven*, 122 N. Y. 567, 25 N. E. 908, 909 (1890).

¹⁰ 239 App. Div. 709, 268 N. Y. Supp. 628, 632 (1934)

ration agreement for installments that become due prior to the election by the wife to accept the failure of the husband to further perform, as a breach of contract, and those that become due thereafter."

This is sound reasoning, but there should be no reason why the wife's election should not relate back to the time of breach by the husband, thus allowing her, in a suit for separate maintenance, to recover for the period between the breach and her announced election.

Again, what if the wife has prosecuted a suit upon her marital rights, and lost? Is that decision a bar to the institution of a suit for support based on the other ground? An illustration is the case of *Mangone v. Mangone*,¹¹ where the plaintiff, after a breach of the separation agreement by the husband caused by his refusal to pay certain weekly amounts to the plaintiff, sued for a separation and alimony, which were denied her. She then sought to fall back on the contract, but recovery was again denied her, except for the unpaid amounts due her at the time she terminated the agreement by electing to sue for a separation.¹²

Having considered the effect of a breach, what is the nature of a breach that would be sufficient to give the other party the right to sue on the contract or to terminate it. Just as there are disputes concerning the materiality of the breach of a business contract, so there is dissension as to the substantive nature of the act required to breach a separation agreement.

General rules have been given and specific instances have been held so material as to constitute a breach, but there is no definite rule that can be applied in all cases. In the case of periodic payments, the failure to pay \$15 per week for a period of a month was such a disavowal of the agreement that the wife could rely upon her marital rights to seek relief.¹³ Again, where the wife waited over seven months for the husband to make proper weekly payments, she was permitted to sue upon the contract.¹⁴ Three months arrears were held sufficient to entitle the wife to abandon the contract.¹⁵ The

¹¹ 130 Misc. 712, 225 N. Y. Supp. 55 (1927).

¹² Cf. *Benesch v. Benesch*, 106 Misc. 395, 173 N. Y. Supp. 629 (1918), where the wife sued on her marital rights and another suit on the contract was held maintainable because she mistook her remedy.

¹³ *Randolph v. Field*, 165 App. Div. 279, 150 N. Y. Supp. 822 (1914).

¹⁴ *Breiterman v. Breiterman*, 239 App. Div. 709, 268 N. Y. Supp. 628 (1934).

¹⁵ *Commonwealth v. King*, 37 Pa. C. C. 635 (1910).

best statement to be found on this subject is from the case of *Benesch v. Benesch*:¹⁰

" the violation must be in bad faith, to be determined as a question of whether under all the circumstances disclosed, the act complained of was committed without justification or maliciously, or has been repeated so as to indicate intentional annoyance to the husband, [or wife] or whether there has been a breach of a substantial or material part of the agreement, so that the rights of the husband [or wife] under the agreement have been materially affected, and, if found not to be of that character, the provision for support should be upheld and the wife permitted to maintain an action under it."

It is questionable if the same act would in all situations be a failure of consideration so material as to be a breach. This is well illustrated by the contract which calls for its execution by payment of a lump sum or by property conveyances and periodic payments. If the wife has received a major portion of the consideration, and there is a failure to pay the periodic payments, would that breach be considered as material as a breach of contract, soon after it was entered into, where the consideration consists entirely of periodic payments? Surely not, for there is nothing substantial about the breach in the former instance.

There is a further related problem to be considered, and that is the question of just how far the parties may declare in the contract what acts shall constitute a breach so as to enable the other party to renounce the contract. While no cases precisely involving this point could be found, there is no valid objection to a literal interpretation being given such a provision.

It has been shown that a termination of the agreement may be effected by the abandonment of the contract by one party subsequent to the other's breach. Sometimes, however, termination is accomplished by the mutual assent of the parties.¹¹

The commission of adultery on the part of the wife, subsequent to the making of the agreement, will not, in the absence of a provision to the contrary, serve to terminate the agreement. This was the rule in England¹² and has been adopted by some jurisdictions in this country.¹³

A resumption of marital relations by the parties does not necessarily terminate the agreement. A termination depends on just how far the parties intended to renounce the agreement. In other words,

¹⁰ 106 Misc. 395, 173 N. Y. Supp. 629, 634 (1918).

¹¹ *Boehm v. Boehm*, 262 App. Div. 104, 27 N. Y. Supp. 2d 941 (1941).

¹² *Wasteney v. Wasteney*, 1900 A. C. 446.

¹³ *Whittle v. Schlemm*, 94 N. J. Law 112, 109 Atl. 305 (1920).

resumption of marital relations is only evidence as to their mutual assent to terminate the agreement.²⁰

The same idea, intention of the parties, permeates the law on the subject of termination of the agreement by the death of either party. If no specified term has been agreed upon, the prior decease of the husband will terminate the contract.²¹ But the contrary is held where a term is specified, such as the life of the wife, and the husband pre-deceases her.²² And even under some circumstances the death of the wife does not effect a termination, as where a specific sum in installments is to be paid her, it has been held her executor may recover them as they mature.²³

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²⁰ *Dennis v. Perkins*, 88 Kan. 428, 129 Pac. 165 (1913) see *Hartley v. Hartley*, —Ky.— 203 S.W. 2d 770 (1947), where the Court of Appeals decided that a reconciliation of parties who had entered into a separation agreement, voided only the unexecuted portions of the agreement. This supports the view that resumption of cohabitation by parties to a separation agreement does not *ipso facto* abrogate the agreement, but can be consistent with an intent to abide by certain portions of it.

²¹ *In re Stableford's Estate*, 174 Misc. 284, 20 N. Y. Supp. 2d 615 (1940).

²² *In re Fuller's Estate*, 151 Misc. 387, 271 N. Y. Supp. 685 (1933).

²³ *Melton v. Hubbard*, 135 Ga. 128, 68 S. E. 1101 (1910).