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*Present: Dalton and Lyall Grant JJ.*SAMARASUNDERA *v.* PERERA.267—*D. C. Nuwara Eliya, 985.**Breach of promise—Agreement to pay damages after breach—Legality—
Liability of public servant—Ordinance No. 2 of 1899.*

A written agreement to pay a certain sum as damages for breach of promise to marry, which was entered into after the breach, is not illegal.

Such an agreement is not a written security within the meaning of the Public Servants' (Liabilities) Ordinance.

A PPEAL from a judgment of the District Judge of Nuwara Eliya.

On September 20, 1926, the defendant, a public servant, promised to marry S., and undertook to pay her Rs. 2,000 if he failed to keep his promise. In February, 1927, the defendant decided not to carry out his agreement to marry. He accordingly paid S. Rs. 300, and gave her a document (P 1) in which he promised "to pay S., her heirs or successors" Rs. 1,700 in instalments, cancelling the former agreement. S. accepted it, foregoing thereby her right to sue defendant for breach of promise of marriage. Shortly afterwards S. died, and the plaintiff, who was the administratrix of her estate, brought this action to recover from the defendant the balance due on the document P 1.

The defendant pleaded in his answer that the promise contained in the document P 1 was illegal and void as against public policy. He further pleaded that, in any event, that on the death of S.

no right of action survived to her administratrix. Lastly he claimed the protection of the Public Servants' (Liabilities) Ordinance, No. 2 of 1899.

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The learned District Judge dismissed the plaintiff's action with costs. The plaintiff appealed.

Weerasooriya, for plaintiff, appellant.

Peri Sundaram, for defendant, respondent.

January 20, 1930. DALTON J.—

Plaintiff as administratrix of the estate of Sophana Gertrude Samarasundera sought to recover from the defendant a sum of Rs. 1,700 alleged to be due by defendant to the late S. G. Samarasundera on an undertaking given by him to her in writing. The writing (P 1) which defendant admitted he signed is in the following form:—

I, A. W. Perera, of Forest Department, Nuwara Eliya, promise to pay Miss S. G. Samarasundera of Hall View, Nuwara Eliya, her heirs or successors the sum of Rupees One thousand and Seven hundred only (Rs. 1,700) in Ceylon currency by monthly instalments of Rupees Twenty only (Rs. 20).

This cancels my agreement of marriage of Twentieth September, One thousand Nine hundred and Twenty-sixth year (20.9.26).

The above amount she can only claim from me by monthly instalments of Rupees Twenty only (Rs. 20).

(Signed) A. W. Perera.

6. 2. 27

(6-cent stamp.)

Witnesses:

(1) _____

(2) V. A. Thepanis.

6. 2. 27.

In his answer defendant set out that on September 20, 1926, he agreed to marry Miss Samarasundera, and undertook to pay her Rs. 2,000 if he did not keep his promise. In pursuance of this agreement, as he had decided not to marry her, he gave her this document P 1 of February 6, 1927. He pleads that it is of no force or avail, as being "illegal and against public policy for want of consideration." If it is valid and enforceable, he pleads no right of action has survived to the plaintiff beyond a claim to Rs. 60 being instalments alleged to be due to deceased up to the date of her death. He further pleads that he was induced to enter into the agreement, presumably he means the agreement to marry, because the deceased had falsely and fraudulently represented to him that she was a "virgo intacta." Lastly he pleaded he was a public servant protected by the provisions of Ordinance No. 2 of 1899.

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The trial Judge has dismissed plaintiff's action for two reasons, first on the ground that the contract evidenced by P 1 is against the interests of public policy and morality, and secondly, even if the contract was enforceable by deceased, the present plaintiff cannot enforce it. In my opinion the Judge was wrong on both these points.

The loose pleading in paragraph 7 of defendant's answer may be taken to be corrected by the third issue, which is in this form: "Is the plaintiff's claim illegal and against public policy?" It seems to me, the learned Judge has not fully appreciated what the document P 1 purports to be. On September 20, 1926, defendant says he promised to marry the deceased and gave notice of marriage to the Registrar. In his evidence he says he understood at that time she was a virgin. In December, 1926, he says he ascertained she was not a virgin, but that she was pregnant. In February, 1927, he decided not to carry out his agreement to marry her, paid her Rs. 300, and gave her the document P 1 promising to pay her Rs. 1,700 in instalments, cancelling the former agreement. She accepted it, foregoing thereby her right to sue him for breach of promise of marriage. I am quite unable to see how that undertaking on his part was illegal or against public policy. I presume if the deceased had sued defendant for breach of contract, he would not have pleaded that damages could not be recovered as it would be contrary to public policy to award them in such a case. He anticipated any such possible action by agreeing to pay her and her heirs a sum of money in return for which deceased gave up her right to sue for the breach.

Counsel has argued that the agreement between the parties come to on February 6 is tainted with illegality, because on September 20 when the agreement to marry was given defendant promised to pay deceased the sum of Rs. 2,000 in case he failed to carry out his promise. This question has been fully discussed in *De Silva v. Juan Appu*,¹ where however the facts are different from those here. He argues that the document P 1 is nothing but a subsequent security for the same payment. With that I am unable to agree, for the document is in my opinion no security at all but merely a reduction into writing of the agreement entered into between the parties and as such evidence of the agreement. Further, it sets out that from that date defendant is freed from the carrying out of his promise to marry. Even if the agreement of September 20 in respect of the payment is contrary to public policy, and I cannot see that it is, I have no doubt that the agreement entered into on February 6 is not illegal.

With regard to the right of the plaintiff to sue, the learned Judge is apparently treating this as an action to recover damages for breach of promise, saying that deceased could not suffer any

¹ 29 N. L. R. 417.

damage from such breach after her death, since they were personal to herself. But the action here is based upon the contract of February 7, when defendant undertook not only to pay her but also "her heirs and successors." It has been argued that even if those words were not there plaintiff still had a right of action, but that question we need not decide. At that date defendant had been fully aware for some time that the deceased was pregnant. Who was responsible for her condition it is on the evidence impossible to say, but I do not think the evidence justifies all the remarks of the trial Judge about her character. The child, a nine months child, was stillborn on March 7, and the mother died on April 1. Upon the contract entered into by defendant he undertook not only to pay the deceased but also her heirs and successors. Plaintiff therefore is entitled to bring this action.

Other issues the trial Judge has not dealt with, although he does go beyond them and hold that the agreement of February 6 was not a voluntary agreement, but one concluded "under duress." There is no evidence to support this conclusion; in fact it is directly contrary to the evidence of defendant himself. He says, although deceased threatened to sue him for breach of promise of marriage and also to report him to his superiors, he was persuaded to compromise by one Thepanis, who seems to have been a friend of himself and deceased, and he was not forced to sign the document.

On the defence raised under the Public Servants' (Liabilities) Ordinance (Ordinance No. 2 of 1899) the lower Court does not appear to have addressed itself to the issue raised on this point, and one might possibly gather from the evidence that it was not seriously pressed. Defendant, however, even if it has been proved that he is a public servant who can claim the protection of the Ordinance, has failed to satisfy me that the document P 1 is a security within the meaning of the Ordinance. It was at one time suggested it was a promissory note, but this line of argument was not pursued to a conclusion (see *Peter v. Suriapperuma*¹). The limits within which public servants are protected are very carefully prescribed by the Ordinance, and I can find nothing that protects such a person from an action brought to recover money due upon an agreement entered into by him to pay damages for breach of an earlier contract entered into between the parties. That is in effect, so it seems to me, the agreement entered into on February 6, evidenced by this document.

Upon the facts and law here it seems to me that plaintiff is entitled to judgment for the amount claimed, subject to the condition that it should be paid in instalments of Rs. 20 a month. On that basis, taking the time as two years and eleven months from the date of P 1, the sum of Rs. 700 is now due, the balance

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being paid each month hereafter. In the event of any default to pay any future instalment as it becomes due the whole remaining sum will become due at once. Plaintiff is entitled to the costs in the lower Court, the trial Judge's order dismissing her action being set aside and judgment being entered for her as set out above. She will also have her costs of this appeal.

LYALL GRANT J.—I agree.

Appeal allowed.
