

LEMPHERS v. ANTHONY APPUHAMY.

D. C., Galle, 12,112.

1901.

July 30 and
August 5.

Divorced wife—Action against her former husband for delivery of separate estate—Civil Procedure Code, s. 34—Cause of action.

Per LAWRIE, A.C.J., and MONCEIFF, J.—The claim of a divorced wife against her husband for the delivery of her separate property may be made in an action other than the divorce suit, because such claim is not, in the words of section 34 of the Civil Procedure Code, in respect of the cause of action which was concerned in the divorce suit.

THIS was an action brought by a woman, who had been divorced, against her former husband for the recovery of certain money and other movable property given to her by her parents as dowry, and alleged to be unlawfully detained by him. The District Judge dismissed the action on the ground that this claim should have been presented for adjudication in the divorce suit under section 34 of the Procedure Code, and could not form the subject of a separate action.

Plaintiff appealed.

Wendt, for appellant—The action has been prematurely dismissed. The issues raised by the pleadings were whether the defendant was bound by the decree of divorce, inasmuch as he had no opportunity of being heard at the trial; and whether plaintiff could recover in this suit what she could have done in the divorce case. Section 34 of the Code does not apply, because the wife's claim in regard to her separate property could not arise until after the marriage had been dissolved.

Van Langenberg, for the respondent.—This is dowry property. Section 618 of the Code gives the Court power to order the wife's property to be given in the divorce case. A claim should have been expressly made in that case. The plaintiff did not do so then, and section 34 forbids its being done in any but the first suit. Otherwise it means that in every divorce case the Court of its own motion must determine the extent of, and the parties right to, the matrimonial property. Section 618 says that "the Court may inquire". This is merely a power to be exercised on due application. Was it impossible to have added a prayer in the divorce plaint asking for a division of this property? If plaintiff could not have made it, then *cadit quaestio*. Form 97 shows the

1901. form of decree in the divorce case. It is a comprehensive decree
 July 30 and August 5. embracing several points in dispute between husband and wife,
 and the words *et cetera* take in other causes of dispute.

Wendt.—Under section 34 plaintiff can sue in respect of the same cause of action. Adultery is one cause of action, but detention of property is another cause of action.

Cur. adv. vult.

5th August, 1901. LAWRIE, A.C.J.—

The law of *communio bonorum* deprived either spouse from having a separate estate. So long as the marriage subsisted, neither had a right to sue the other for the goods in community.

The Ordinance No. 15 of 1876 recognizes the right of a wife to a separate estate, and I think it follows that she may sue even her husband for restoration or delivery to her of that estate. I do not see that her claim for delivery to her of her jewellery depended on her success in the action for divorce.

The plaintiff doubtless could have joined this cause of action, viz., the illegal detention of her separate estate, with the other cause of action, the adultery and cruelty of her husband, but as these are distinct causes of action, the 34th section of the Code does not (in my opinion) apply.

I would sustain the competency of the action and remit for further procedure. Defendant to pay costs of the appeal.

MONCREIFF, J.—

In 1898 the plaintiff obtained a decree for a divorce *a vinculo matrimonii*, and her decree was made absolute in 1899. She now sues for the return of property, consisting of jewellery, brass ornaments, and Rs. 140 cash, which, according to the plaint, was "given to the plaintiff and defendant as dowry by plaintiff's parents".

If I had been satisfied that the cause of action became definitive upon the decree of divorce, I should have hesitated to say that the claim was not part of the "whole claim", which the plaintiff was entitled to make "in respect of the cause of action", upon which she obtained a decree absolute for a divorce. The claim might have been touched by section 34 of the Civil Procedure Code. But in her evidence she speaks of the property as her own, and I think it was by virtue of Ordinance No. 15 of 1876 part of her separate estate. It does not appear, therefore, that the claim is in respect of the cause of action in the proceedings for divorce. I agree in the conclusion of the Chief Justice.