DONDRIS *v.* KUDATCHI.

C. R., Galle, 2,474.

1902. *December 3,* and 1903. *October 20.*

Husband and wife—Divorce—Effect of, on common property of spouses.

A wife divorced from her husband on the ground of her adultery forfeits for the benefit of the innocent spouse everything which, according to the Common Law or by ante-nuptial contract or otherwise, would have been acquired by her out of his property.

Where D got judgment against L, the only child of A, deceased, who owned a certain land, and seized in execution a moiety of this land as the property of L, and K claimed it as the purchaser under a writ issued in another case against the administrator of A, whose wife N was divorced from A for adultery,—

Held, in an action brought by D against K to have an undivided half of the land declared liable to be sold in execution as the property of L the daughter of A and N, that all the property brought into community by A vested in him exclusively upon the dissolution of his marriage with N on the ground of her adultery, and that the land claimed by K passed absolutely to him by the sale in execution against A's administrator.

THE plaintiff sued the defendant to have an undivided half-share of 31 kurunies of a land declared liable to be seized and sold in execution of a judgment entered in his favour against one Lydia, the only daughter of W. A. Aberan, who was alleged to be originally the sole owner of the entire land.

The defendant claimed this land as his, by virtue of a Fiscal's conveyance, dated 7th March, 1900, granted to him as purchaser under a writ issued in another case against the administrator of the said Aberan's estate. It was alleged by the defendant that Aberan and his wife Nona were the parents of Lydia; that the marriage between her parents was dissolved on the ground of the adultery of Nona; that upon the dissolution of such marriage the property in dispute became Aberan's solely and exclusively; that the administrator of Aberan's estate was Jagodage Amaris, the husband of Lydia; and that both these persons as well as their judgment-creditor, the plaintiff, were estopped from denying that Aberan died possessed of the entire land, in as much as the administrator had inventorized it in the testamentary suit as belonging to Aberan's estate.

The District Judge gave judgment for plaintiff, holding that on the dissolution of Nona's marriage with Aberan on the ground of her adultery, her half vested in Aberan in trust for the child of the marriage, Lydia, the execution-debtor; that only half of the land could have been sold in execution against Aberan; and

1902 *December 3* 1903. *October 20.*

that on Aberan's death in 1895 the other half held in trust by him vested in Lydia absolutely.

The defendant appealed. The case was argued on 3rd December, 1902.

Sampayo, K.C., for dependant, appellant.

Samarawickrama, for plaintiff, respondent.

Cur. adv. vult.

20th October, 1903. WENDT, J.—

This appeal raises an important question as to the effect of a divorce on the common property of the spouses. The question arises on the following facts:—Aberan and Nonohamy were married in 1870 in the community of property. Nonohamy, so far as appears, brought no property whatever into the community. The only issue of the marriage was a daughter, Lydia. In 1876 Aberan acquired by purchase the land in question. In 1882, at the suit of Aberan, the District Court of Kandy dissolved the marriage on the ground of his wife's adultery. The decree contained no directions as to the property of the community. Aberan died intestate, possessed of the land, in 1895, and letters of administration to his estate were granted to Amaris, the husband of Lydia. In 1899, in execution of a decree against Amaris as such administrator passed upon a debt of Aberan's, the land was sold in execution and purchased by the defendant, who duly obtained the Fiscal's conveyance in March, 1900. In August, 1900, the present plaintiff, who had obtained a decree for debt against Amaris and Lydia, caused the Fiscal to seize in execution an undivided half of the land as the property of Lydia. A claim preferred by the defendant was allowed by the Court, and hence the present action is brought under section 247 of the Civil Procedure Code.

The contention for the plaintiff, which the Commissioner has upheld, is that upon the dissolution of the marriage the guilty spouse's moiety of the common estate became vested in her husband in trust for the child of the marriage, and that Lydia became absolute owner of that moiety on Aberan's death. For so deciding the Commissioner relies on the authority of *Perezius* (*Ad Cod. 5, 18, 19*) and *Voet* (*Ad Pand. 24, 3, 19*) to which I shall presently refer. The case of *Philips v. Philips* (*5 S. C. C. 36*) was cited to him, but he dismissed it with the remark that in that case there was no issue of the marriage. That is true, but it is not a circumstance which in my opinion, renders the principle there laid down inapplicable to the present case. It was therefore an authority binding upon the Commissioner, as it is binding upon

me, even if there was reason for considering that the case was wrongly decided. In my opinion no such reason exists.

Van Leeuwen in his Commentaries, which were published in 1678, lays it down (*3, 1, 20; 4, 24, 10*), that the adulterous spouse forfeits for the benefit of the innocent spouse everything that would otherwise have been enjoyed by him or her under the Common Law or by ante-nuptial contract; and after enumerating the punishments for the crime of adultery, he states that "in addition the injured party, whether husband or wife, retains his right against the adulterer for a dissolution of the marriage as well as otherwise for compensation and reparation according to law, which consists herein, that the adulterer forfeits to the injured party everything which according to the common law or by ante-nuptial contract or otherwise would have been acquired by him out of the property of his spouse." (*Bk. 4, 37, 8.*) The same author in his *Censura Forensis* published in 1662 states the law thus (*Bk. 1, 15, 9*—I quote from Dr. Clarke's Translation. p. 176):—"Forfeiture of dower on the part of the adulterous wife follows upon a separation of wedlock, and the forfeiture belongs to the husband, unless he also has been guilty of adultery, or unless the wife's adultery has been with the consent and pimping connivance of the husband. So also an adulterous husband forfeits his donation *propter nuptias* and the third part of his ante-nuptial present, and is further compelled to repay her dowry to his wife. If there has been no dowry or donation *propter nuptias* between the parties, then he or she who has committed adultery can be compelled to pay as penalty a fourth part of all their goods [*i.e.*, his or her goods, *quartam partem omnium bonorum*] to be applied to the benefit of the injured party, if there be no children; or where there are children, to be kept saved for them. Nor has this rule been changed by custom."

The present is a case where there was no dowry or *donatio propter nuptias*, but even a superficial examination of the text shows that it affords no ground for the contention that the penalty of a fourth part of her goods, which the guilty spouse is to pay to the innocent partner, and which is to be saved for the benefit of the children, is to come out of the property of the innocent partner himself when the guilty one has contributed nothing to the common estate. The guilty wife forfeits (as shown in the first passage above cited) her Common Law right in her husband's property generally, as well as her special right to her *dos*. The *dos*, upon a dissolution of the marriage by death, would be repayable to the wife or her heirs, and upon a dissolution on

1902. December 2 1903. October 20. WENDT, J.

account of her adultery this right is forfeited to the innocent husband. Where the guilty spouse has brought property into the community, half of it by the Common Law of community of estate will pass to the innocent spouse, and upon the dissolution of the partnership on account of adultery the guilty spouse will take the other half, subject to the deduction of the fourth, of which VanLeeuwen speaks. The children of the marriage will, besides receiving that fourth, eventually succeed to the innocent parent's entire estate.

Voet, whose Commentaries were published in 1698, dealing with the subject of divorce, says (*24, 2, 9*) that upon a dissolution of the marriage tie by reason of malicious desertion the deserter forfeits all "profits which he might have obtained from the property of the deserted spouse, either by virtue of the dotal pact or by statute, and is moreover bound to restore all gifts to him by the innocent party before the marriage or at the time it was contracted, as also a moiety of the marriage expenses." Commenting later on the *title soluto matrimonio dos quemadmodum petatur*, he says (*24, 3, 19*): "The right of reclaiming the *dos* is terminated if a divorce has been decreed owing to the fault of the wife, unless the husband have slain the wife when taken in adultery, or unless he be himself guilty of adultery or have connived at his wife's misconduct, or the woman have children for whom the dowry is to be preserved." These last words are strictly confined to the case of *dos* brought in by the wife, and are not applicable to any interest derived by her through the community of property from the husband, and besides they refer to some special agreement entered into when the *dos* was constituted prior to the marriage. The passage therefore affords no support to the view of the Commissioner. The matter is made still clearer by Voet in a later passage (*48, 5, 11*), where he thus sums up what he had said in the passage last cited:—*Dotem vel propter nuptias donationem nocenti conjugi ademptam innocenti cedere, una cum quantitate tertiæ partis dotis ex reliquis bonis, nisi extent liberi. Quod et moribus hodiernis obtinet.*

The passage from Perezius, properly understood, is in no way opposed to the authorities already cited. (He is much the oldest writer, his Commentary on the Code having been published in 1651.) I translate it thus: "But by our modern customs the adulterous wife loses not only her *paraphernalia*, but also all other property of whatever kind which belongs to her by contract or by privilege of community. And so the French Legislature (*Parisiensis Senatus*) has determined that she shall be deprived of that privilege of community which by custom is

induced between the spouses, and the laws of Spain punish the woman convicted of adultery with forfeiture of her property and also of a half of those gains (*lucra*) which used to belong to the wife, and give them to the husband, unless there be children [of the wife] by that marriage or by another. For in that case the husband during life will have the usufruct of that property, but on his death the children will succeed to the property of the adulteress." In the first part of this passage the learned commentator deals with the Roman-Dutch Law, and in stating it goes no further than what is contained in the other authors already cited by me. But in the latter part, in which occur the words that the plaintiff relies upon, the law stated is the Law of Spain as the grammatical construction of the sentence shows, and Gomez, to whose work he gives a reference, was, so far as I am able to ascertain, a writer on Spanish Law. In any case I should not be prepared to act upon Perezius's authority unsupported by the better-known jurists who followed him.

The same may be said of Brouwer, whose work *De Jure Connubiorum* was published in 1664. He states (*2, 33, 24*) that some commentators deprived the guilty wife of *arrhae sponsalitiale, doarium, dos, augmentum dotis,* and whatever might have come to her by the community of estate or by *pacta dotalia,* and that others even took away her *paraphernalia,* but he does not agree with either view. He points out that the Civil Law gave nothing to the husband beyond *dos, donatio propter nuptias,* and, where there were no children, a portion of the adulteress' other property equivalent to a third of the *dos.* He states that the true *dos* and ante-nuptial donation of the Civil Law are unknown in Belgium, and after referring to the saving in Article 18 of the Political Ordinance of 1580 of all punishments and penalties enacted in the Imperial and written laws, he gives it as his opinion that besides *doarium* (which by the agreement constituting it is to pass to the surviving spouse) and all property acquired during the marriage by the industry of the spouses, a fourth part of all the offender's property should be adjudged to the injured spouse, but so that such part does not exceed in value a hundred pounds of gold, and that the ownership of it all is reserved for the children of the marriage.

Groenewegen, *De Legibus Abrogatis* (commenting on Nov. 117, cap 8) says. "*soluto autem ex causa adulterii matrimonio adultera non modo dotem omittit verum etiam quicquid ex conventione aut conjugali bonorum communione lucrata fuisset.*" But he adds nothing about a trust for the children. (Groenewegen's great work was published in 1648.)

1902.
December 3
1903.
October 20.

WENDT, J.

I follow the opinions of VanLeeuwen and Voet and hold that in the present case all the property brought into the community by the husband vested in him exclusively on the dissolution of the marriage, and that the land now in question, by the sale in execution against his administrator, passed absolutely to the defendant. I therefore reverse the decree of the Commissioner and dismiss the action with costs.