Present : Schneider and Dalton JJ.

1925.

DE SILVA *v.* DE SILVA *et al.*

53 and 53a—D. C. Colombo, 10,859.

Divorce—Forfeiture of property of the offending spouse—Roman-Dutch Law—Measure of damages—Objections to decree—Authority of proctor—Civil Procedure Code, ss. 617, 618, and 772.

The forfeiture of property of an adulterous spouse contemplated by the Roman-Dutch Law has reference only to the benefits derived by him or her under the marriage, and does not extend to the separate property of the offending spouse.

Under our Code, the Court has power, on entering a decree for the dissolution of a marriage, to make an order charging the property of the offending wife for the benefit of the husband.

In an action for divorce brought by a husband, the nature of damages awarded against a co-respondent is compensatory, not punitive.

The measure of damage is based upon two considerations—

(*a*) The actual value of the wife to the husband ;

(*b*) The proper compensation to him for the injury to his feelings, the blow to his honour, and the hurt to his matrimonial and family life.

The principle laid down in *Butterworth v. Butterworth & Englefield* [1] followed.

A proxy granted to a proctor to act in the District Court is sufficient authority to enable him to give notice of a statement of objection to a decree under section 772 of the Civil Procedure Code.

Observations by Schneider J. on the scope of section 772 of the Code.

ACTION by the plaintiff for a dissolution of his marriage with the first defendant on the ground of her adultery with the second defendant, from whom the plaintiff also claimed a sum of Rs. 100,000 as damages. The plaintiff further claimed a forfeiture of her property in his favour by reason of her misconduct. Neither of the defendants appeared in Court to give evidence, and the only direct evidence was that of the plaintiff, who produced certain documents in his possession. After hearing the evidence the learned District Judge made order decreeing a divorce *a vinculo matrimonii*, and directed a settlement, securing to the plaintiff an income of Rs. 12,000 a year out of the property of the first defendant ; as against the second defendant, plaintiff was awarded a sum of Rs. 10,000 and costs.

From this decree the defendants appealed.

[1] *(1920) 89 L. J. P. D. 151.*

1925.

De Silva v. De Silva

Drieberg, K.C. (with him *Croos Da Brera*) (on a preliminary objection), for first defendant, appellant.—The plaintiff has not appealed but has put in a statement of objections under section 772 of the Code. That statement is ineffectual as it has not been properly stamped. Objection to the decree is a proceeding in the Supreme Court. It should therefore be stamped as in the Supreme Court, but it has only been stamped as if it were a part of a proceeding in the District Court. Besides, the proxy granted to the proctor is to act in the District Court. As objection to the decree is not a proceeding in that Court the proxy does not authorize him to file the objections.

The statement of objections is, therefore, ineffectual, and the plaintiff cannot be heard thereon.

J. S. Jayewardene, in reply, for plaintiff, respondent.—The objection comes too late. Notice has been accepted by proctors of the other side, and the plaintiff ought to be heard on his objections to the decree.

The proxy authorizes the presentation of the petition of appeal. By parity of reasoning this too must be considered a proceeding in the Supreme Court, but the proxy enables the proctor to present it.

On the question of the stamping of the document it is sufficient to state that the document does not become of no effect. At the most the party will be liable to pay the penalty provided by the Ordinance for such cases.

(The Court overruled the objection.)

Hayley (with him *N. K. Choksy*), for appellant in 53.—Concedes that the charge of adultery has been made out, and that he is liable in damages, but submits that the *quantum* of damages is excessive.

The learned District Judge has given no reasons for assessing the damages at Rs. 10,000, and therefore we are unaware upon what basis he assesses it so high.

The Roman-Dutch Law authorities give little assistance as to the principles underlying the calculation of the *quantum* of damages, *vide 3 Nathan 1669.*

Some principles seem to be deduced from two South African cases, viz., *Biccard v. Biccard & Fryer* and *Olivier v. Olivier & Pechover* by *Maasdorp in Vol. I. of his "Institutes of Cape Law."* The important factors according to him would be primarily how far the complaining party himself was to blame, the general behaviour of the complaining party to the defaulting party, and the co-respondent's ability to pay.

The basic principle is that damages are awarded as for an *injuria.* The *injuria* being the loss of the wife's *consortium.*

Applying these principles to the present case the respondent cannot seriously say that his wife's *consortium* was of any value to him at all ; on the contrary from his own evidence it would appear that she was a hindrance to his progress. Further, if at all anyone was to blame it certainly was plaintiff himself, who by his

general quarrelsome conduct and by his finally leaving her alone at the hotel effected the most proximate cause of her fall.

So that applying these tests, the plaintiff would certainly not become entitled to such a large sum as Rs. 10,000 by way of damages.

Furthermore, there is no evidence that the second defendant can pay anything like this sum. All the evidence there is on the record goes to prove the contrary, namely, that he is an " out-of-work " planter.

Though there does not seem to be much assistance from Roman-Dutch Law on this particular question, there is a series of English decisions which show clearly the principles that underlie the assessing of damages in cases of this nature. These cases, though not binding on our courts, are very helpful, and two of them only need be cited.

Butterworth v. Butterworth & Englefield (*supra*) and the later case which adopts it, viz., *Ewer v. Ewer*.[1]

The first case summarizes and reviews all the previous cases, and lays down the following principles :—

Firstly, that the damages are to be in the nature of compensation to the party aggrieved and not penal, for courts in these matters are not moral disciplinarians.

Secondly, that the loss of any pecuniary aid by reason of the separation is not to be considered.

Thirdly, that the true test is the value of the wife considered in the two aspects of her pecuniary value, that is, as housekeeper, business manager, &c., and of her *consortium*.

Viewed in the light of these principles the damages are excessive and some relief ought to be given to the second defendant.

Drieberg, K.C. (with him *Croos Da Brera*), for first defendant, appellant in 53A.—The case for the first defendant might be put as high as this, namely, that there was no jurisdiction for the District Judge to make an order of this nature at all.

In any event the amount awarded Rs. 12,000 per annum is extremely excessive.

The only sections under which the District Judge could have acted in making a settlement of this nature are sections 617 and 618 of the Civil Procedure Code. But neither of these sections would seem to apply to the present case, as there are no children of the marriage, and the only extent to which section 618 would apply would seem to be regarding any settlement in respect of the house called "Heatherley."

Besides, at the date of the marriage the properties were all in first defendant's name, and there is clear authority for the proposition that she could have done anything with them except dispose of them without her husband's consent. The only settlement that was contemplated in favour of the husband was the rents and profits of " Heatherley."

[1] *123 L. T. 240.*

1925.

De Silva v. De Silva.

The plaintiff himself being the defaulting party is not entitled to get the luxurious income of Rs. 1,000 per mensem. On his own showing he is now living on Rs. 300 to Rs. 400 a month, and a sum of Rs. 400 or thereabouts should have been ample provision. His evidence also shows that he has started business, and if he succeeds, as he hopes to, he will be quite comfortable.

The Judge has also not taken into account a very important fact. He has taken the gross income as the basis for his calculation, this is clearly an error. He has failed to realize that the estate is heavily encumbered and that the monies realized have been invested in the purchase of properties that now form part of the very estate, out of which the Rs. 12,000 is to come. If he had taken this fact into consideration he would assuredly have not given so large an amount as Rs. 12,000 per annum.

J. S. Jayewardene (with him *H. V. Perera* and *N. E. Weerasuriya*), for respondent to both appeals.

H. V. Perera in reply to the appellants.—The second defendant states that the amount awarded is too large. Large is only a relative term. Considering the wealth and social position of both parties to the marriage a sum of Rs. 10,000 is a mere nothing in comparison with the harm done.

Like all other matters needing adjustment by payment of compensation, here too the amount ought to be fixed without reference to the second defendant's ability to pay. The wealth of the co-respondent has nothing to do with the assessing of the compensation due. If the second defendant urges, as he does, that he is not sufficiently well off it was for him to have got into the box or proved it otherwise. He has not done so. The mere fact that he is described as an out-of-work planter does not show that he is not wealthy. Many out-of-work planters have earned sufficient to justify a temporary lapse from work. The evidence shows that he was staying at the Grand Oriental Hotel himself even before the plaintiff and second defendant turned up there themselves. So that it must be presumed that he was well off.

The loss of her *consortium* cannot be belittled as there was disagreement. Her fidelity was never attacked. Perhaps she was a woman of strong character, hence her *consortium* is all the more valuable. This being her first lapse, the second defendant, who is responsible for it, must pay for the damage done.

The feelings of the husband have altogether been lost sight of by the appellants. They must also be taken into account. After all plaintiff too belonged to the foremost in the land and the surprise of it all and the scorn of persons, who came to know, must have been hard to bear.

The co-respondent cannot at any rate be sympathized with as he has taken no steps. He has merely waited by and appealed. This court is entitled to look into his conduct before varying the decree that has gone against him.

The first defendant's appeal too must be viewed with little sympathy, as she has not had the courage to face the court.

The appellants try to make out that all the blame was on the plaintiff; that would not appear to be so after a careful perusal of 1D2.

The Court has the power under sections 617 and 618 of the Code to make settlements of this nature. Section 617 is modelled on section 45 of the Matrimonial Act of 1857 and section 618 on the Act of 1859. There are innumerable instances in the English Reports where settlements of this nature have been made by virtue of the powers conferred by the corresponding sections in the English Acts.

Here Counsel cited several cases to the same purport, *Lorraine v. Lorraine*,[1] *Midwinter v. Midwinter*,[2] *Lorryman v. Lorryman*,[3] *Farrington v. Farrington*,[4] *March v. March*.[5]

These cases would apply here on the authority of *Trimble v. Hill*.[6]

J. S. Jayewardene (in support of the cross-objections).—The gifts, although virtually in the name of the first defendant, were meant to be a settlement for the family. Hence they are in the nature of *dos* or *donatio propter nuptias*. These two are liable to be forfeited where the wife is an erring woman. (Vide 1 *Maasdorp, p. 99, Voet 24–2–19.*)

Dos need not necessarily be given to the husband himself (*1 Burge Colonial Law, 313*). So that the mere form of the gift inasmuch as the deed is in wife's name cannot alter the substantial rights of the parties. Counsel also cited *Philips v. Philips*,[7] *Wijesurendra v. Bartholomeusz*,[8] *Dondris v. Kudatchi*.[9]

Drieberg, K.C., in reply.—The forfeiture is limited to benefit, advantage, or profit derived by marriage. Here the first defendant got no benefit and nothing is therefore liable to be forfeited.

(*Van Lewen Censura Forensis 4–24–10 and 4–37–8, Voet 24–2–9, Morice Roman-Dutch Law, p. 19.*)

The cases in *Jone's and Ingram's Notes of South African case at p. 66 et seq.* clearly show that was the effect intended. The illustration given at p. 68 takes the matter beyond doubt.

The case of *Philips v. Philips* (*supra*) cited by the respondent is certainly in favour of non-forfeiture in a case such as the present one.

September 8, 9, 10, and 11, 1925. SCHNEIDER J.—

The decree in this action deals with four distinct matters :—

(1) It grants to the plaintiff a divorce *a vinculo matrimonii* from the first defendant, his wife, on the ground of her having committed adultery with the second defendant;

[1] (*1912*) *Prob. 222.*
[2] (*1893*) *Prob. 93.*
[3] (*1908*) *Prob. 282.*
[4] (*1886*) *11 Prob. 84.*
[5] (*1867*) *L. R. 1 P. and D. 440.*
[6] (*1879*) *5 App. Cases 342.*
[7] (*1882*) *5 S. C. C. 36.*
[8] (*1885*) *6 S. C. C. 141.*
[9] (*1902*) *7 N. L. R. 107*

1925.

SCHNEIDER J.

De Silva v. De Silva

(2) It directs that a settlement be made out of the property of the first defendant to secure to the plaintiff an annual income of Rs. 12,000 ;

(3) It orders the second defendant to pay to the plaintiff Rs. 10,000 as damages ; and

(4) It orders the defendants jointly and severally to pay to the plaintiff his costs of this action.

Against this decree both the defendants appealed. In his plaint the plaintiff had claimed a declaration that his wife the first defendant by her misconduct had forfeited all her property for his benefit. The learned District Judge had dismissed this claim. After the appeals of the defendants had been preferred in the ordinary course, but before they came up for hearing, the plaintiff's proctor filed in this court a writing showing that he had given notice to the defendants-appellants that he would take objection to the decree upon four specified grounds under the provisions of section 772 of the Civil Procedure Code. The first of these grounds was that the Judge had erred in " finding " that the plaintiff was not entitled to the forfeiture of property which he claimed. This " finding " has no place in the decree. The second ground was that the District Judge was wrong in stating that the plaintiff claimed only a sum of Rs. 12,000 a year. This refers to a statement in the judgment which does not and could not find a place in the decree. The third ground was that the settlement of Rs. 12,000 a year for the benefit of the plaintiff ordered by the District Judge was insufficient. And the fourth ground that the damages awarded were insufficient and Rs. 100,000 should have been awarded.

On the appeals being taken up for hearing Mr. Drieberg on behalf of the first defendant-appellant submitted an objection to the sufficiency of the objection to the decree preferred by the plaintiff's proctor. He submitted that it should not be entertained by us as it was stamped as if it were part of a proceeding in the District Court, whereas it should have been stamped according to the higher scale prescribed by the Stamp Ordinance for proceedings in this Court. He submitted that the proxy granted by the plaintiff to his Proctor was therefore ineffectual. We overruled this objection and heard Counsel upon all the matters raised by the two appeals and also by the objection to the decree. To my mind there was more than one good reason for not upholding Mr. Drieberg's contention. First it came too late. All that section 772 entitles an appellant to demand is that he should receive at least seven days' notice. The proctors for both the appellants signed the statement of objection to testify that they had received notice that objection to the decree would be taken by the plaintiff at the hearing of the appeal. This was two months before the appeals came on for hearing. No objection was then taken to the authority

of the proctor who gave that notice. It seems to me that it was too late to question his authority at the hearing of the appeals. If there was any want of authority, objection to it was waived by the proctors for the appellants. Even granting that the proxy had to be stamped upon a higher scale, the fact that it is not so stamped will not affect its validity or operation. Except in certain specified cases expressly provided for, all that the Stamp Ordinance (No. 22 of 1909) provides is that a penalty be imposed and not that an instrument be deemed of no effect in those cases in which an instrument is not duly stamped. Hence, if the proxy in question is not duly stamped, it would still prevail, but the plaintiff or his proctor or both might have rendered themselves liable to pay a penalty. For a third reason I do not think that the proxy should have been stamped as contended for by Mr. Drieberg. As a proxy granted by a party to a proctor to act for him in the District Court is sufficient if it contains the necessary authority to prefer an appeal on his behalf, there seems no sufficient reason why it should not be regarded as sufficient to give notice of a statement of objection to the decree. Mr. Drieberg's contention was that a petition of appeal is preferred directly to the District Court, while a statement of objection to the decree is a part of a proceeding in this Court. I fail to appreciate this argument. Although a petition of appeal is delivered to a lower Court, it is a petition addressed to this Court and is part of a proceeding in this Court. The lower Court is only the channel through which the petition is transmitted to this Court. A statement of objection to the decree is not more than a petition of appeal but less in that its scope is more restricted. If a proctor has the right to prefer an appeal, he has also the right to give notice that he would object to the decree. I said that a statement of objection to a decree is of smaller scope than a petition of appeal, because the language of section 772 of the Code suggests to my mind clearly that what was contemplated by the provisions in that section was objection to a part of the decree, not to the whole of it, and not perhaps to what it omits. A person aggrieved with a judgment or a decree should appeal in the ordinary way. The statement of objection in this case is substantially an appeal upon all the matters the District Judge had to decide. It raises a question upon a matter which does not appear in the decree, but only in the judgment. Decree and judgment are kept distinct by the definitions given to those terms in the Code (section 5). A right of appeal is given from any judgment or decree or other order (section 753), but the language of section 772 confines objection to a decree, to the decree itself. It seems to me therefore that the plaintiff should have appealed in the ordinary way, and that the provision in section 772 was not available to him. But as all the parties were heard upon the statement of objection to the decree, I shall deal with the matters raised by it.

1925.

SCHNEIDER J.

De Silva v. De Silva

Before proceeding to consider the questions raised by the appeals and the statement of objection to the decree, I will consider in broad outline the evidence relevant to those questions. Neither of the defendants has given evidence nor was either of them present at the trial. All the oral evidence was adduced by the plaintiff. The defence rests upon facts elicited in cross-examination and proved by certain documents. The effect of the evidence may be summarized as the following :—

The plaintiff was studying medicine in England when the proposal was first made that he should marry the first defendant. He was persuaded by the parents of the first defendant, and also by the first defendant herself, against his own inclination, and against the wishes of his own parents, to give up his studies and return to Ceylon to be married to the first defendant. He was told that his bride's dowry would be ample to enable them to live in comfort. He returned to Ceylon, and the wedding was celebrated as a great social event in May, 1915. The Governor and the Colonial Secretary of the Colony signed the Register of the marriage as witnesses. The plaintiff is a Roman Catholic, and according to the rules of his Church his marriage should be solemnized according to the rites of that Church. He desired to conform to this rule, but the first defendant insisted upon the marriage being solemnized according to the rites of the Church of England, and the plaintiff had to yield to her wish. In one of the letters which has been put in evidence the first defendant asserts that the plaintiff has made a promise to her to become a member of her Church, but this the plaintiff denies. The plaintiff's own evidence is that their married life was not a happy one. In every matter he had to yield to her wishes. He desired to live in a house of their own, like all other married persons belonging to their community, but the first defendant preferred to live in a hotel. Out of a period of nearly nine years of married life they lived only for two and a half years in a house of their own. The rest was spent in travelling, twice to and from England, and in hotels. He says that no husband and wife of his community had lived for such a long period in hotels as he and his wife had done. The question of religion was a cause of frequent quarrels between them as also the management of his wife's property, and her behaviour. He says, she annoyed him constantly by her insistence, time after time, upon his attending the services of her Church. Heedless of his wishes and complaints she persisted in sitting up night after night till the early hours of the morning playing cards with visitors. On one occasion, in Ceylon, in 1921, her behaviour in this respect led to a violent quarrel between them. He had objected to her entertaining a particular man, who, he thought was too constant a visitor. In the course of this quarrel he says, " she made a number of charges against me," and he was ordered to leave the house, which he did. The correspondence which took place between the parties after this shows that it was a serious

breach between the husband and wife, and that the plaintiff actually wrote to his wife telling her that he was leaving the Island (letter marked 1D10 dated April 8, 1921). This correspondence disclosed the feeling which actually existed between the parties. Excepting for one letter (D5) the letters written by the wife to the husband have not been produced in evidence. But several have been produced which were written by him to her (1D7 to 1D10). These letters disclose the fact that he was smarting under a feeling that he occupied a humiliating position, and that he was worried and annoyed by her attempts to drive him to give up his Church and to join hers. In the evidence he gave in Court, the plaintiff stated that he was suffering from some malady in his fingers and that his wife always threw this at his face whenever a quarrel arose between them. He said in so many words that it was a cause of her aversion from him. In a letter which she wrote to him telling him upon what conditions she would agree to be reconciled and live with him once more, she insists that he should have himself medically treated for the malady from which he was suffering and he should also give her a promise that he would not beat her again or use abusive language towards her. In his evidence in Court the plaintiff denied that he beat her, although his letter (1D8) seems to contain an admission that he had beaten and abused her, but only on such occasions as she herself was guilty of such conduct towards him. He stated in his evidence that his wife had hit him and abused him many times. He admitted that besides the rupture in 1921 that they had quarelled and separated on two other occasions. In the correspondence, he charges his wife with being "a woman of vile temper" and with "having a vicious tongue." He says that he yielded to her as she was "a difficult woman to please." In 1923 he and his wife were living in the Grand Oriental Hotel, Colombo, when the second defendant, who was also a visitor at the same hotel, formed his wife's acquaintance. Shortly afterwards he observed that his wife spent a great deal of her time in the second defendant's company. He spoke to her about it, and also complained of her behaviour to her parents, who lived in Colombo. In the month of March of that year he and his wife were constantly quarelling over a proposal made by his wife to hand over the management of her immovable property to a firm of merchants. She proceeded so far as to have the necessary papers drawn up by a notary for this purpose. Her husband's written consent is necessary under our Law for any dealing with her immovable property. The plaintiff refused to sign the necessary documents. He says, that he refused, because he suspected that she was being set up by the second defendant to hand over her property to the firm of merchants. On March 27, the husband and wife had a quarrel and he left the hotel leaving her there, the second defendant being in this hotel at the time. In the evidence he says his wife got into an ungovernable temper

1925.

SCHNEIDER J.

De Silva v. De Silva

and created a scene when he refused to sign the papers. But this is probably an exaggeration, for in his letter of April 10 (1D2) in referring to this incident he speaks of it as " a little disagreement between us." When he left the hotel on this day he did not tell his wife that he was not returning to her, but two days afterwards he wrote to her the letter (1D1) from an estate belonging to her at Nattandiya, which is many miles away from Colombo. In this letter he says that he did not tell her that he was not returning as he " did not want another of those hysterical outbursts so out of place in a hotel, of which you seem so passionately fond and which you think will make me do anything you wish." He informed her in this letter that he is the right person to have charge of her estates and that he had, in fact, taken charge of them since the day before. He asks her to come to him or to send him his " things," in case she saw no way out of the situation, she had brought about by her own behaviour and actions. From the plaintiff's letter dated March 10, but which should be April 10, (1D2) it is to be gathered that she replied to this letter. In her reply she appears to have retorted that their living together was prevented by the way the plaintiff treated her. In the letter (1D2) the plaintiff tells his wife plainly that they could only live together on the distinct understanding that he was to continue to exercise " controlling rights over her estates." In this letter he also refers to a visit paid by him to the hotel on April 7 which he says was made with the object of arriving at an understanding with her, but that his object had been frustrated by her hysterical conduct. In his evidence the plaintiff describes what happened on this visit of his to the hotel. He says, that after he had spoken to his wife in the sitting room she left him and locked herself in the bedroom, and she had been there about an hour, when her uncle and a mutual friend of the plaintiff and his wife called. They were admitted by the first defendant into her bedroom and she spoke to them there. Subsequently she came to the sitting room when he was speaking to these two persons there, and " then there was a terrible scene by her." He says, that on that day she abused and struck him. He left the hotel on the same day, but remained in Colombo up to April 10 and returned to the same estate from which he wrote the letter of March 29 ; while there he received information that his wife had left the hotel. He returned to Colombo immediately and discovered that the second defendant had also left the hotel. He made inquiries and pursued them to India. In India he found them occupying the same room in a hotel. Adultery is an offence in India. He prosecuted the second defendant for adultery with his wife and the second defendant was convicted and sentenced to a term of imprisonment. The plaintiff then returned to Ceylon and charged his wife with having committed theft by taking away certain articles of jewellery belonging to him which he had left with her. He continued to manage his wife's estates after her

elopement and took all the income. The wife had to sue him subsequently to recover this income.

I will now proceed to consider the appeal of the second defendant first. In his petition he urges that he is not liable in damages at all. His Counsel, Mr. Hayley, who argued his appeal with much ability stated at the very outset of his argument that he did not contest that the charge of adultery had been established and that he was liable in damages, but would only submit that the damages awarded were excessive. He pointed out that the learned District Judge had given no reasons for awarding Rs. 10,000 as damages. This statement is correct. But the facts which the Judge had accepted as proved, and which are relevent to the issue on damages should be regarded as disclosing some of the circumstances which no doubt led him to award the damages which he has given. It is necessary to inquire upon what principle or upon what considerations damages and costs should be awarded in actions, such as the present, in which the husband obtains a divorce from his wife on the ground of her adultery with the co-defendant, which is the term by which the respondent, according to the English procedure, is designated in our Code. The question has not been considered in any of the local decisions cited to us. It is but little assistance of a practical kind which can be obtained from the writings of the older Jurists of the Roman-Dutch Law or from the text books by modern authors on that Law, as it prevails in the present day in the South African Colonies or elsewhere. *Nathan* in his *Common Law of South Africa* [1] cites the following passage from *Grotius* [2] :—

> " A person who commits adultery with a married woman, even though with her consent, inflicts an injury on the husband, and is consequently liable for the same to her husband, over and above any damage which the husband or children may suffer thereby."

and offers the following comment thereon :—

> " In other words, Grotius indicates that a husband may recover damages for the loss of the *consortium* of his wife, and the disturbance to his matrimonial happiness, over and above any actual matrimonial loss sustained by him. There is no South African case in which the children have recovered damages for adultery, and the only action in tort is that of the husband against the adulterer for damages. It should be noted that adultery is no longer punishable as a crime, unless it is accompanied by incest, that is carnal intercourse with a person who is related within the prohibited degrees."

[1] *Vol. III., s. 1624, p. 1669.*
[2] *Introduction to Dutch Jurisprudence, Chap. XXXV. s. 9 (Herbert's Translation), p. 447.*

1925.

SCHNEIDER J.

De Silva v. De Silva

Maasdorp in his "*The Institutes of Cape Law*" [1] cites two cases *Biccard v. Biccard & Fryer* (*supra*) and *Olivier v. Olivier & Pechover* (*supra*) and says—

> "In estimating the amount of the damages in such a case the Court will consider whether the husband himself, being the plaintiff, was not to blame, his treatment of his wife previously to her adultery being an important element in the question; as also will the ability of the defendant to pay. The general behaviour of the plaintiff will also be taken into consideration, both as regards the amount of damages and the payment of costs."

It would appear, accordingly, that the damages are awarded as for an *injuria* in the *actio injuriarum*. The *injuria* inflicted being the loss of the *consortium* of the wife and the consequences following therefrom. The real difficulty lies in the proper application of this principle to the facts of each case. Mr. Hayley cited three leading cases decided by the Courts in England, but I would refer only to two of them. Although those decisions are not binding on us, yet they are of the greatest possible value as illustrations of the application of a broad principle which appears to be common to both the Roman-Dutch Law and the English Law on the subject. The earlier of these two cases is *Evans v. Evans & Platt* [2] which is referred to in this later case of *Butterworth v. Butterworth & Englefield* (*supra*). This latter case and five other cases were decided by one judgment by McCardie J., in 1920. It is a learned and most interesting judgment. No less than forty-one decisions are referred to. It discusses fully the principles to be applied and the considerations to be regarded in assessing damages and awarding costs in divorce proceedings. The learned Judge first holds that the Jury may find in divorce proceedings that the husband, although he establishes adultery, has sustained no damage, and expresses the opinion that in such a case the Court or Jury has the power to withhold even nominal damages. He comes to this conclusion, because section 33 of the Matrimonial Causes Act, 1857 [3] requires that claims for damages be tried on the same principles as such a claim in an action for criminal conversation. In such an action under the English Law the awarding of damages was left to the discretion of the Court. It is an action peculiar to the Common Law of England, but according to the Roman-Dutch Law the adultery itself is an *injuria* to the husband, and thus in itself a ground for damages unless the rule of *volenti non fit injuria* should operate to include the claim for damages. Therefore, according to our Common Law, whether damages have been actually sustained or not, the injured party was entitled to damages. It was a case of *injuria sine damno*. But it appears to me that in enacting section 612 of our Civil Procedure Code, our Legislature

[1] *Vol. 1, p. 89.*

[2] *(1889) 68 L. J. P. 70.*

[3] *20 and 21 Vict. C. 85.*

intended to introduce the principles of the Law of England that damages need not necessarily be awarded, or that at least it intended to modify our Common Law to the extent of giving the Court the power to withhold the awarding of damages. Section 612 unmistakeably leaves the awarding of both damages and costs to the discretion of the Court, but this point does not actually arise in this case and I will therefore say nothing more about it. Proceeding next to discuss the nature of the damages the Judge holds that they are not exemplary or punitive, but compensatory. This would appear to be the view, also taken by the Superior Courts of the South African Colonies. On this point what Sir Francis Jeune said to the Jury in his summing up in *Evans v. Evans & Platt* (*supra*), already mentioned is appropriate here: "It is not your duty to punish the co-respondent, this Court does not sit as a Court of morality to inflict punishment against those who offend against the social law." I am of opinion that the conclusion of McCardie J. as to the nature of the damages is applicable to the damages, which may be awarded by our Courts in actions for divorce.

He next discusses the practical application of the principle upon which damages should be assessed. He thinks that there are two main considerations: (1) the actual value of the wife to the husband, and (2) the proper compensation to him for the injury to his feelings, the blow to his marital honour, and the serious hurt to his matrimonial and family life. He considers the value of the wife as consisting of two aspects, (*a*) "Pecuniary," and (*b*) "Consortium." He explains that the "pecuniary value" generally is least important and depends on the wife's fortune, her assistance in her husband's business, her capacity as a house keeper, and her ability generally in the home. The *consortium* aspect, he says, is broader and depends on the wife's purity, moral character, affection, and her general qualities as a wife and mother. He thinks the adulterer's conduct has but little bearing upon the "pecuniary" aspect and that that branch of the assessment must be decided by the *criteria* of good sense and experience. But to the *consortium* aspect he concludes the adulterer's conduct has the utmost relevancy. If the wife be of wanton disposition or disloyal instincts, her general value to the husband is so much the less, so also if she thrusts herself upon the adulterer or lightly yields to his desire. But if on the other hand, the adulterer has only gained his wish by assiduous seduction, and by practised artifice, it may well be inferred that the moral character and general worth of the wife was an asset of value to the husband. Although, as a general rule evidence of the adulterer's means was inadmissible, he was of opinion that evidence as to his fortune might be given where he had used that fortune to seduce the wife. But the amount of compensation did not depend upon whether the adulterer was poor or rich. "A poor man cannot by the plea of poverty

1925.

SCHNEIDER J.

De Silva v. De Silva

escape from the actual injury he has caused. A rich man should not, merely because he is a rich man, be compelled to pay more than a proper compensation to the husband." It seems to me that not to take this view would render the damages punitive, which they should not be. As the blow and the shock to his feelings depend to a large extent on the conduct of the adulterer, he points out that it would follow that any feature of treachery, any grossness of betrayal, any wantonness of insult, and the like circumstances may add deeply to the husband's sense of injury and wrong, and therefore call for a larger measure of compensation. The husband's whole conduct and affection should be tested as bearing directly not only on the value of the wife, but also upon the question of any shock to his feelings which he may assert. " The character and conduct of the husband is as fully in issue as the character and conduct of the wife." Finally he holds that—

(1) No damages should be given against an adulterer when he is not shown to have known that the woman was married ;

(2) No damages should be given which an adulterer cannot pay ; and

(3) That a co-defendant ought not to be mulcted in costs, because when he has knowledge too late to repair the wrong that has been done, he does not then and there abandon the woman.

All the principles of that decision appear to me to be applicable to our Courts. If these principles are applied in the assessment of damages in the present case, many reasons exist for reducing the damages awarded. There is no evidence that the second or co-defendant can pay those damages. All the evidence about his means is the description of him in the plaintiff's letter as " an out-of-work planter," and the fact that he was possessed of sufficient means to be living in the same hotel as the plaintiff and his wife. Then again the pecuniary value of the wife to the husband in this case might be said to have been " nil." She would not be worried with housekeeping nor did she help in any business. Then upon the *consortium* aspect the character given to her by her husband and his story of their matrimonial life embittered by constant quarrelling and the exchange of blows do not call for heavy damages. Another circumstance in mitigation of damages is the conduct of the plaintiff in leaving his wife alone in a public hotel, and going away without even asking her to go to her parents to whom he had easy access. His conduct exposed her to temptation, and very likely precipitated her elopement.

I would, therefore, reduce the damages to the amount which will be found given in my brother's judgment. At the conclusion of the argument before us, we were agreed as to the orders which should be made regarding the several matters raised by the appeals, and the statement of objection to the decree.

I shall now proceed to consider the question of the forfeiture of property raised by the plaintiff, and the question of the settlement of property raised by the first defendant. The two questions are closely connected and might conveniently be considered together. The plaintiff's claim is that he has become entitled to a declaration of the forfeiture of his wife's property under the provisions of our Common Law. His contention is that the forfeiture includes all the property which his wife is now entitled to. That property consists of (1) a house called "Heatherley," described in Schedule B of the plaint, which was conveyed to her by her father in 1918 in exchange for another house, which he had conveyed to her in May, 1915, shortly before her marriage to the plaintiff, (2) an estate called Dicklanda West, also conveyed to her by her father in 1915, at the same time as the house, (3) an estate called Watagala purchased by her in 1915 for Rs. 115,000, the whole of which sum was raised by her upon a mortgage created by her over Dicklanda estate, (4) an estate in Nattandiya purchased by her in 1918 for Rs. 78,500. The plaintiff said in his evidence at the trial that Rs. 50,000 of this sum was paid by money, which the first defendant had received as a wedding present from her father. The balance was presumably found by her. In the case of the house and estate conveyed by her father, the deeds provided that she is to enjoy all the rents and income as belonging to her own separate estate and free from the control, debts, engagements, or liabilities of her husband. In the case of the house the deed provides that she was not to alienate it, but, that upon her death it should devolve upon the children by the intended marriage between her and the plaintiff, and on failure of such children that her father or his then living heirs should succeed, subject to the right of the plaintiff to enjoy the income during his life. It should be noted that both deeds conveying the house and the estate recite that a marriage was about to be solemnized between the plaintiff and the first defendant, and that in consideration of that fact and the love and affection which the first defendant's father entertained towards her, he was transferring the property to the first defendant. But in the operative part of the deed it is expressly stated that in consideration of the transfer of those properties, the first defendant agreed to renounce her right of claiming a share of her father's estate by inheritance. It is also expressly provided in the deeds that if the intended marriage did not take place, the transfer of the property was not to take effect.

The contention submitted on behalf of the plaintiff at the argument before us was that all the above property came under the description of *dos* and/or *donatio propter nuptias*. The learned District Judge has discussed this contention at some length in his judgment, and he has arrived at the conclusion that it was not sustainable as no one of these properties comes within the description of *dos* as contemplated either in the Roman or

1925.

SCHNEIDER J.

De Silva v. De Silva

in the Roman-Dutch Law. He therefore holds that the plaintiff is not entitled to the declaration of forfeiture which he claims. I venture to agree with the learned District Judge's conclusion on this point. The reason for this conclusion might be stated in a somewhat different form. The authorities upon the Roman-Dutch Law are clear in stating the general principle to be that the offending spouse forfeits not his or her own property, but only the benefits derived by marriage under the Common Law or by ante-nuptial contract. *Jones and Ingram's "Leading Cases on South African Law"* were cited to us beginning at page 66. The authors refer to a number of leading cases and at page 68 give an illustration which renders the principle clear. The illustration is this :—

> "Suppose A on marriage in community to B, brings in a farm worth £1,000 and B brings in another worth £250. B, the wife, is divorced for adultery and a forfeiture of benefits is declared. The estate being worth £1,250 B would, if the marriage had been dissolved by death, have got £625. But owing to her misconduct and the resulting forfeiture of benefits, she would only get £250, *i.e.*, the amount she contributed, it being less than half the estate. But if she had contributed £1,000 and the husband £250 each party would get £625, there being no benefit conferred on the wife which she could forfeit."

On this point reference might also be made to *Maasdorp "The Institutes of Cape Law"* (*supra*), *Van Leeuwen's Commentaries*[1], and *Morice's English and Roman-Dutch Law* (*supra*). As supporting the plaintiff's contention that he was entitled to a declaration of the forfeiture of property, three local decisions were cited to us. The first of these cases *Philips v. Philips* (*supra*) insteadof supporting that contention, is, on the contrary, an illustration of the proper application of the principle that the forfeiture is of the benefits derived by the marriage under the Common Law and not of the property of the offending spouse. It was held in that case that the husband who had been divorced by the wife on the ground of his adultery, and who had brought no property into the community, had by his misconduct forfeited his right to claim a half share of the joint estate to which he would have been entitled had the marriage been dissolved in other circumstances. In the second case *Wijesurendra v. Bartholomeusz*[2] no authorities are cited. I venture to think that it has not been rightly decided in holding that the wife had forfeited an article of furniture, which she had brought as part of her dowry upon her marriage, when a divorce was granted to her husband from her on the ground of her malicious desertion of him. The third case *Dondris v. Kudatchi* (*supra*), contains a well considered and learned judgment by Wendt J. who discusses the

[1] *Kotze' Translation, revised by Decker, Vol. II., p. 204.*

[2] *(1885) 6 S. C. C. 141.*

Roman-Dutch Law authorities, and holds 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 their ante-nuptial contract. He here states the principle in language almost identical with that employed by the Roman-Dutch Law authorities. But I do not feel it necessary to pursue this discussion any further, because I have come to the conclusion that our Common Law, even if it still exists on this subject, has no application to the present case. From about the year 1875 the trend of local legislation in regard to married women's property appears to have been to adopt the Statute Law of England on that subject. In 1870 there was enacted in England an important piece of legislation regarding married women's property.[1] This was followed by an amending Statute in 1874.[2] In 1882 the Statutes of 1870 and 1874 were repealed and the law on the subject consolidated by The Married Women's Property Act 1882.[3] The provisions of those Statutes were directed to relieve married women from some of the disabilities under which they laboured in consequence of the provisions of the Common Law. It is not necessary to consider in detail how much of those provisions were adopted in local legislation. But local legislation was undoubtedly directed towards the same object as the English Statutes. Sections 9, 10, 13, 17, and 18 of our Matrimonial Rights and Inheritance Ordinance (No. 15 of 1876) which came into operation in 1877 are very similar, if not identical with, sections 2, 5, 9, 10, and 11, respectively, of The Married Women's Property Act, 1882 (*supra*). The Ordinance introduced a radical alteration of the Common Law when it enacted in section 8 that there should be "no community of goods" between a husband and wife married after the proclamation of the Ordinance as a consequence of marriage. In 1857 and 1859 two Statutes were passed in England upon a subject closely connected with married women's property. I refer to the Divorce and Matrimonial Causes Acts of those years[4]. Our Civil Procedure Code (Ordinance No. 2 of 1889) was enacted in 1889. Chapter XLII. of that Code deals with matrimonial actions. It embodies several of the more important provisions of those English Statutes. For the purpose of the present case I need only indicate that sections 612 and 617 are closely modelled upon sections 34 and 35 of the English Statute of 1857, and section 618 upon section 5 of the English Statute of 1859. The effect of section 612 was undoubtedly to modify our Common Law to the extent at least of giving the Court a discretion to award damages or not in matrimonial actions, whereas the Common Law gave the injured person a right to demand damages even when no actual damages were proved to have been sustained. The effect of sections 617 and 618 might be regarded either as repealing the Common Law

[1] *33 and 34 Vict. C. 93.*
[2] *37 and 38 Vict. C. 50.*
[3] *45 and 46 Vict. C. 75.*
[4] *20 and 21 Vict. C. 85.*

1925.

SCHNEIDER J.

De Silva v. De Silva

on the subject dealt with in them or of introducing new provisions which are to stand side by side with the provisions of the Common Law, not being opposed to one another, but only alternative each to the other. They give a Court discretion to act under one set of the provisions or the other. For the purpose of this case it is not necessary to go so far as to say that the Common Law was repealed as the result of the enactment of these sections. They undoubtedly empower a Court to make new settlements (section 617) or to vary the terms of any existing settlements (section 618). It seems to me that if the Court elects to exercise its power as it has done in this case under these sections of the Code, there is no room in the circumstances of this case for also declaring a forfeiture of property under the Common Law. If the plaintiff had been obliged to rely upon the Common Law, there can be no question that he would have had no right to claim a forfeiture of the estates, which were purchased by the first defendant. They cannot be brought within the meaning of the terms *dos* or *donatio propter nuptias*. The fact, if fact it be, that she paid part of the price of one of those estates with money she had received from her father upon her marriage, and that she paid the whole of the purchase price of the other with money she raised upon a mortgage over the estate gifted to her by her father cannot vest those estates with the character of a *dos* or *donatio propter nuptias*. Nor would it be correct to say that they are " benefits " in the sense of the Common Law, which she derived by reason of her marriage. The " benefits " which the Common Law declares liable to forfeiture are those derived as the result of the community of property in consequence of marriage, which is induced by the provisions of the Common Law or the property acquired by some ante-nuptial contract. I am accordingly of opinion that the Court was right in rejecting the plaintiff's claim to a declaration of a forfeiture of property, and was also right in proceeding to exercise its powers under the provisions of the Code in ordering a settlement.

The District Judge ordered a scheme for a settlement to be submitted for his approval, securing to the plaintiff Rs. 12,000 a year or Rs. 1,000 a month. The plaintiff asserts that this sum is too little. The first defendant objects that it is too much. There is no reliable evidence as to the actual average income, taking one year with another, which the first defendant derives from her property, but at one stage of the trial the parties appear to have agreed that the nett income was Rs. 40,000 a year after the payment of interest due on the mortgage. The evidence on record given by the plaintiff conveys to my mind the impression that he was inclined to exaggerate facts, or to minimize their effect, to suit his own purpose. He says that his wife allowed him to draw to the extent of about Rs. 25,000 a year, and that after paying most of the bills he was left with Rs. 400 or Rs. 500 a month for his own personal use. When questioned what sum he considered

reasonable to enable him to live on the same scale as when he lived with his wife, his answer was Rs. 1,000 a month. In another part of his evidence he stated that his monthly expenses since his wife's elopement were Rs. 300 to Rs. 400 a month. He stated that he was prevented from completing his medical studies by the fact that he had to go about with his wife a great deal while they were in England over two years continuously, and that in Ceylon his time was wholly occupied with the management of his wife's property. In the events that have happened he is now free to pursue his studies and take up any occupation he might fancy. He is a young man and Rs. 300 or Rs. 400 a month is a sum which is sufficient to live comfortably in this country. When the first defendant's father transferred the property to her prior to her marriage, the plaintiff admits that he was aware that his wife was to receive all the income of the property, and that the only provision made for his benefit was the right of succession to the rents of the house should his wife predecease him leaving no children. It would appear, therefore, that he entered into the marriage knowing full well that he had to depend upon the goodwill of his wife for any assistance he expected to receive. I am inclined to regard the deeds by which the first defendant's father conveyed property to her not so much as marriage settlements, but as conveyances of property in place of property to which she might subsequently have succeeded. Even if the conveyance of the house be regarded as a settlement of the kind contemplated in section 618, because it contains provisions for the benefit of both parties to the marriage, the conveyance of the estate Dicklanda West cannot be regarded as such a settlement. It is clearly not a settlement " made on the parties " to use the words employed in the section to describe the settlements which a Court may vary under the provisions of that section. But although the property donated to the first defendant by her father may not come under section 618, all her property, whether acquired by donation or by purchase, can be dealt with by the Court under section 617. I would, therefore, regard the settlement ordered by the Court in this case as a settlement made under section 617. A number of decisions of the Courts in England were cited to us as illustrating the principles upon which those Courts had acted in making or varying settlements under those provisions of the English Law, which are similar to sections 617 and 618 of our Code. The case of *Trimble v. Hill* (*supra*) is authority for the proposition that when a Colonial Legislature has passed an Act in the same terms as an Imperial Statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the Courts of the Colony. Sections 617 and 618 are undoubtedly in the same terms as the Imperial Statutes, and if we were concerned now with the construction of those sections, we would be bound to follow English decisions, but in the present case we are only

1925.

SCHNEIDER J.

De Silva v. De Silva

concerned with ascertaining what amount should be settled on the plaintiff. All the cases cited to us at the argument of the appeals appear to have been cited in the lower Court. They will be found discussed in the judgment of the learned District Judge. I do not think there is any necessity for me to discuss them. The principle to be applied is simple. In each case the amount should be decided upon a consideration of all the facts of the case. I have mentioned the facts which lead me to reduce the amount awarded.

I would direct that a settlement be made to secure to the plaintiff a monthly income of Rs. 400 from the first defendant's property during their joint lives, and I would also direct that this settlement should leave intact the plaintiff's right to succeed to the income of the house called " Heatherley " in the event provided in the deed.

As regards costs, I agree with the orders, which will be found in the judgment of my brother.

DALTON J.—

The plaintiff has obtained a *decree nisi* in terms of the law declaring his marriage with the first defendant dissolved on the ground of her adultery with the second defendant. He has been awarded Rs. 10,000 damages against the second defendant, and as against the first defendant he has been declared entitled to a settlement of an income of Rs. 1,000 a month from first defendant's property. He has further been awarded costs against the first and second defendants jointly and severally.

From this decree all the parties have appealed.

The first defendant does not now contest the adultery, but claims that the charge of desertion pleaded by her against the plaintiff was proved. She also appeals from that part of the decree which declares the plaintiff entitled to Rs. 1,000 a month from her property, on the ground that no property existed in respect of which the Court could exercise its power of settlement under the provisions of section 617 of the Civil Procedure Code. If the settlement of part of her property, which does not come within the meaning of the terms *dos* or *donatio propter nuptias*, can be made under section 617, the sum of Rs. 1,000 a month is excessive. With regard to the order as to costs, she says, she should not have been ordered to pay plaintiff's costs.

The second defendant appeals on the ground that the damages awarded to the plaintiff are excessive.

The plaintiff appeals from that part of the order awarding him Rs. 10,000 damages. He claims Rs. 100,000 damages, and now says he should have been awarded that amount. He further says that by her adultery the first defendant had forfeited for his benefit all her right to certain property set out in his claim of which she was the owner, and that he should be declared entitled thereto.

The plaintiff and first defendant were married in Colombo on May 10, 1915. The plaintiff at the time was a medical student, who had passed the major part of the examinations for M.B. degree at Liverpool. He is now 37 years of age. As the first defendant was the daughter of wealthy parents, he states, he was persuaded to return to Ceylon and give up his medical studies in order to marry her. There are no children of the marriage.

From May, 1915, to April, 1923, the date of the adultery, a period of eight years, the parties appear to have had a home in Ceylon. *i.e.*, a house of their own, for two periods of two and a half years in all. For the remaining five and a half years of their married life, they lived either with the wife's parents or in hotels, or were on visits to England. From an early date the evidence discloses that differences arose between them, first of all due to the fact that they belonged to different religions (the plaintiff says, he is a Roman Catholic and that his wife was a member of the Church of England), and secondly to the fact that the plaintiff was not given full control over his wife's property. The parties had separated in 1917 for two or three days over a religious dispute, aggravated by charges of other kinds, one against the other. In 1921 also he left her for a short period, being turned, he says, out of her parent's house, where they were then living. The principal cause of the differences, however, appears to have been a financial one. This is amply disclosed by the letters which passed. There is no doubt, whatever the reason may have been, that the plaintiff wanted full financial control of his wife's property. He says that it was humiliating to him that it should be otherwise. He admits her business capacity, and her great generosity to him in respect of the allowances she made to him, but that was not sufficient, and he repeatedly claims full control, which she was unwilling to give. Whilst there may have been cause for his complaint as to the kind of life his wife preferred to lead, it does not seem to me that the plaintiff's attitude as regards his wife's property could not but fail to make continual trouble between the parties, unless the wife was prepared to concede in full all that he demanded. There appears to have been an incompatibility of temperament between the parties, which could only be mended by concessions on both sides.

This was the state of affairs up to February or March, 1923, when the second defendant first met them. He appears to have been a resident at, or visitor to, the hotel where plaintiff and his wife were living. Their former unhappiness is now added to by the wife showing a preference for the company of the second defendant. Of this the plaintiff complains in his letters of March 29 (1D1) and April 10 (1D2). These letters show, however, that he is still thinking more of his wife's property than of her, although he says he never had any cause to distrust her fidelity to him. That he however should complain of her conduct with a man, and then leave her living alone at a hotel with that man, instead

1925.

DALTON J.

De Silva v. De Silva

of putting away for the time being at any rate his old complaints against her, would certainly seem to have been most unwise; there is however no suggestion of condonation but merely that his conduct in leaving his wife at such a time was most indiscreet. The day after the letter of April 10 was written, the first and second defendant left Colombo together and were traced to Madras. The plaintiff then commenced this action.

The first matter arising on the appeal convenient for consideration is the question of damages against the second defendant. On his claim for Rs. 100,000 the learned trial Judge has awarded him Rs. 10,000, but does not say how he arrives at that sum.

The principles upon which claims for damages for divorce are to be tried have been dealt with at length in the case of *Butterworth v. Butterworth* (*supra*), by McCardie J. Since adultery is no longer punishable as a crime, there would appear to be little or no difference between the English and Roman-Dutch Law on this question. The gist of the action is the loss to the husband of the comfort and society of the wife. But in addition to the underlying idea of the power of the husband, at any rate at Common Law in England, over the person and property of his wife, the law has always had regard to and laid stress upon the moral side, the sanctity of married life, and the honour of the husband and the children. The damages are to compensate the plaintiff for the loss or injury he has sustained and not to punish the second defendant for his misconduct. The learned Judge then cites the following passage from *Buller's Nisi Prius* :—

> " As to adultery, the action lies for the injury done to the husband in alienating his wife's affections, destroying the comfort he had from her company, and raising children for him to support and provide for. And as the injury is great, so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case, the rank and quality of the plaintiff, the condition of the defendant, his being a friend, relation, or dependent of the plaintiff, or being a man of substance, proof of the plaintiff and his wife having lived comfortably together before her acquaintance with defendant, and her having always borne a good character till then . . . . are all proper circumstances of aggravation."

He then goes on to deal with the two main considerations upon which damages are to be based, first the actual value of the wife to the husband, and secondly the proper compensation to the husband for the injury to his feelings, the blow to his marital honour, and the loss to his matrimonial and family life.

It is clear from the evidence that considerable inroads on the wife's affection for the plaintiff had been made before February,

1923, and it cannot be said that the plaintiff was leading a comfortable life with his wife up to that time. He says he was continually trying to persuade his wife to change her way in respect of hotel life and late hours and form a home with him. They both were members of families which were recognized, so plaintiff says, "to be of the first rank of the community to which we belong." Of the co-defendant nothing appears save that he is described by plaintiff as "an out-of-work planter." That might possibly aggravate the injury to the husband's feelings, and make him feel keenly the blow to his marital honour. There is no suggestion, however, of anything like treachery on the part of the second defendant; but he knew of course that the first defendant was a married woman. The relations between plaintiff and his wife were also doubtless apparent to him after he came to know them, and he also probably knew that the wife was possessed of considerable property of her own.

With regard to the pecuniary aspect of the wife to plaintiff, she has had little opportunity during her married life of showing any capacity as a housekeeper, although she has proved her business capacity. With regard to the plaintiff's loss of her comfort and society, it is quite clear that in spite of quarrels and unhappiness between them, the plaintiff admits he never had any cause at all to doubt her fidelity to him even up to April 11, 1923. On the other hand, she appears to have surrendered to the second defendant, and left the Island with him somewhat readily. She may, however, in some part have been caused to do so, owing to being left alone at the hotel by her husband at a time when the old quarrels had broken out again, and he was further complaining of her "gadding about all day long" with the second defendant.

In a recent case, *Eliyatamby v. Gabriel*,[1] the Court awarded Rs. 5,000 as damages to the plaintiff from the second defendant. On the facts, that was a case in which aggravated damages were justifiable. It is true, that on appeal, the Privy Council had on the main point found in favour of the second defendant, but that does affect the point for which the case was cited, namely, that assuming the circumstances where friendship was alleged to have been betrayed called for heavy damage, the Court held Rs. 5,000 should be awarded.

As I have stated, the learned trial Judge has not stated how he has arrived at the sum of Rs. 10,000 awarded. The plaintiff's appeal that that sum should be increased has hardly been seriously argued. Having regard to all the circumstances to which I have referred, and applying the principles set out in *Butterworth v. Butterworth* (*supra*), and in the cases and authorities therein cited, I am of opinion that the amount awarded by the trial Judge is excessive, and that the sum of Rs. 2,500 adequately compensates

[1] *25 N. L. R. 373.*

1925.

DALTON J.

De Silva v. De Silva

the plaintiff in respect of his claim for damages. I would therefore allow that sum in lieu of the sum awarded in the lower Court. In coming to this conclusion I have had due regard to, but have been unable to give effect to, the argument of Mr. Drieberg for the first defendant, that desertion by the plaintiff of his wife had been proved. I am unable to agree that the evidence supports that plea set up by the wife, and in my opinion the learned trial Judge was correct in his finding that no desertion by the plaintiff had been proved.

The further matters, the claim by the plaintiff for forfeiture by the first defendant of her property, and the claim by the first defendant either that there is no property liable to forfeiture or that the settlement ordered to be made from her property, can be considered together.

The marriage between the parties was on May 10. On May 8 the father of the first defendant conveyed to her by deed (P1 and P2) a property called "Galle Face Cottage" and a plantation named "Dicklanda West." The deeds set out the intended marriage and state that "in consideration of the said marriage and of the love and affection which he has and bears unto his daughter" the properties are conveyed to the first defendant for her own separate use and benefit, and free from the control debts, liabilities, and engagements of her husband. In one deed however, in the case of the "Galle Face Cottage" property, it is provided that if there be no children of the marriage to take, then if the wife predeceased the husband, the husband shall take a life interest in that one property only. Subsequently (June, 1918) by deed (P10) a property in Bagatelle road named "Heatherley" was substituted for the "Galle Face Cottage" property with the same conditions attached to it.

In addition to these two properties first defendant received a sum of Rs. 50,000 as a wedding present from her father. This she appears to have invested in the purchase of an estate named "Wattegale." Then in November, 1919, she bought another property in Nattandiya, to pay for which she raised Rs. 120,000 by a mortgage of Dicklanda West estate. This mortgage still exists, interest being payable on the mortgage at the rate of 9 per cent.

The plaintiff claims that by reason of her adultery, the first defendant has forfeited to him her rights to all these properties. This claim appears to me to be a most extraordinary one and the apparent faith of counsel in the justice of his claim, and the length of his argument in support of it was indeed too surprising. The contention put forward was that all this property came within the definition of *dos* or *donatio propter nuptias*. Numerous authorities were cited, *Voet*, *Grotius*, *Van Leeuwen*, *Maasdorp*, *Pereira*, *Burge*, and others, but I do not think that any useful purpose will be served by any detailed reference to them here. The learned trial Judge has discussed the question of *dos* at length with due

reference to the authorities, and I entirely agree with his conclusion that none of the property conveyed to or held by the first defendant comes within the term *dos*.

On the other hand, from the very terms of the two deeds (P1 and P2), it is clear that the two properties therein mentioned were conveyed to the first defendant in consideration of her marriage to plaintiff; they were gifts of property by father to daughter on account of her marriage, and so far are certainly in my opinion *donationes propter nuptias*. That cannot however be said of the properties purchased by the first defendant subsequently. But on what principle does plaintiff now ask that these gifts be forfeited to him ? It is clear from the deeds save with regard to a contingent life interest in one case in his favour, that the donor was particularly anxious to keep the properties out of his control. The law cited on his behalf has no regard, it seems to me, to the changes in the Common Law which have been enacted in Ceylon. By Ordinance No. 15 of 1876 the previously existing law relating to the matrimonial rights of married persons with regard to property was amended, marriage in community of property was abolished in respect of marriages subsequent to that Ordinance, and in future the matrimonial rights of every husband and wife are to be governed by the provisions of that Ordinance. A further Ordinance (No. 18 of 1923) amending in certain respects the Ordinance of 1876, further consolidates and amends the law relating to the property of married women. In addition the provisions of section 45 of 20 and 21 *Vict. c. 85*, and section 5 of 22 and 23 *Vict. c. 5* have been imported into this Colony in sections 617 and 618 of the Civil Procedure Code. It seems reasonable to presume that the enactment here of the provisions was necessitated by the aforementioned changes in the Common Law. They are included in a Code of Civil Procedure it is true, but do not provide for mere matters of procedure only.

The changes enacted therefore have all been on the lines of English legislation. It has been pressed upon this Court that this legislation must be interpreted in accordance with the principles of Roman-Dutch Law, the Common Law of this Colony, and I do not hesitate to say that the task of the Courts is not an easy one, and it is one which I have not met now for the first time. Where the whole trend of legislation as here is to import, adapt, or follow English legislation, it necessarily follows that when the time comes to apply or interpret that legislation, difficulties arise in fitting it in with the Common Law. The legislation in its origin presupposes the existence of English Common Law, and is probably a step in the growth of one system of law from the earliest days. When enacted here, however, it is a graft upon a different stem, sometimes a matter of experiment with unforeseen results, whilst on occasion the resulting growth is not easy to name, and is most difficult to use or apply.

1925.

DALTON J.

De Silva v. De Silva

South African decisions are of some little assistance in this case, in spite of the inroads that have been made on the Common Law here for they deal with claims for forfeiture under Roman-Dutch Law. *Colliers v. Colliers*[1] deals with the forfeiture of the benefits resulting from the community following on marriage. From the judgment of Solomon J., it would appear that in South Africa the forfeiture applies, and applies only to the benefits that have accrued to the guilty party from the community, and not to the guilty party's property. Mr. Jayewardene has argued that whatever the South African practice may be, that case does not correctly apply the Roman-Dutch Law as laid down by *Van Leeuwen* and *Van der Keessel*. He refers to *Mulder v. Mulder* [2] in support of his contention. That case was considered but not followed in *Celliers v. Celliers* (*supra*), whilst so eminent an authority as Kotze J. shows the absurdity of the principle of forfeiture upheld in *Mulder v. Mulder* (*supra*) in his judgment in *Ferguson v. Ferguson*.[3] The absurdity of that principle is apparent, it seems to me, in this case now before us, as in the case of the millionaire referred to by Kotze J. although in a lesser degree.

No question arises here of forfeiture of the benefits derived by one spouse or the other from community following on a marriage. It is true that the two deeds referred to are gifts to the first defendant in consideration of marriage, but they are no more than a form of settlement which I understand now commonly obtains in Ceylon either in this form, *i.e.*, a settlement by the parents on one of the parties to the marriage or upon both of them. A settlement of the latter kind was the subject of the action *Valiammai v. Kanagaratnam*[4] decided by this Court as recently as September 11 last. It is not necessary to decide in this case what is the law in this Colony now, in respect of a settlement of property by one spouse on another, whether by means of a trust or otherwise, and whether any question of forfeiture arises should the marriage be legally dissolved ; that the Court has power, however, to deal with such a settlement is clear from the provisions of section 618 of the Civil Procedure Code.

Mr. Jayewardene has not satisfied me that in the circumstances here of this settlement by the father on the daughter, any right of forfeiture exists in favour of the husband on dissolution of the marriage on account of the daughter's adultery. None of the authorities here cited in my opinion support his contention. He referred to some local decisions, including *Dondris v. Kudatchi* (*supra*). That was a case of the dissolution of a marriage in community of property and the question raised was as to the effect of the divorce on the common property of the spouses. Other matters are dealt with *obiter* in the judgment, but as regards donations it would only appear to deal with donations between the spouses.

[1] *(1904) T. S. 926.*
[2] *2 S. A. R. 238.*
[3] *(1906) E D.C. 218.*
[4] *27 N. L. R. 203.*

The same remark applies to *Phillips v. Phillips* (*supra*). This case appears to assume that a *donatio propter nuptias* is a settlement by the husband on the wife, a donation between the spouses, and not by others.

As there is no community of property between the plaintiff and first defendant, and under the circumstances of the settlement of the property by deeds (P1 and P2) on the first defendant, I am of opinion for the reasons I have stated above that no question of forfeiture arises in respect of the first defendant's property, as claimed by the plaintiff.

Holding however as I do, that the two deeds disclose a gift or donation in consideration of marriage of property upon the wife, which is in effect a settlement upon her, the question arises whether the Court should exercise the powers given by sections 617 and 618 of the Civil Procedure Code. The learned trial Judge has under those powers directed a settlement in the plaintiff's favour of the first defendant's property to produce an income of Rs. 1,000 a month for life. The remaining question raised on appeal is whether or not that this is excessive. Mr. Drieberg, for the wife, has even gone further in his argument and urges that under the powers given by these sections, the Court can only deal with property which is liable to forfeiture under the Common Law. If there are no benefits arising out of the marriage or property forfeitable or to be forfeited, the argument is that, as the Common Law still exists, these sections must be interpreted having in view, and subject to the provisions of the Common Law in respect of forfeiture. I am unable to agree with his contentions. It seems to me that the words of that sections are both clear and explicit, and are not capable of bearing the limitation which Mr. Drieberg seeks to place upon them. (See also principle laid down in *Trimble v. Hill* (*supra*)). It is admitted that gifts of immovable property by parents on marriage as we have here are common in Ceylon, and may be deemed to be the common local form of a settlement. Power is given to the Court to inquire into post-nuptial and ante-nuptial settlements. If it be necessary for the purpose of this case, to decide whether or not these deeds constitute a settlement or marriage, I would hold that they are in fact a settlement on the marriage of plaintiff and the first defendant. It is true that they are for her separate use and without power of anticipation, but the Court has power to vary settlements even with those limitations under section 618. The case of *Loraine v. Loraine* (*supra*) which was cited deals with property acquired by the wife by will, and not by marriage settlement, and it was held there that life interest for her separate use of property devised by the will (as opposed to a marriage settlement), as to which she was restrained from anticipation could not be varied by the Court on a petition for the husband for a settlement under section 45 of the Divorce Act, 1857, which is section 617 of our Code.

1925.

DALTON J.

De Silva v. De Silva

Even if, however, there has been no settlement, and I do not think it can be contended that there is anything in the nature of a settlement attaching to the two estates, Wattegala and Nattandiya, the Court can make such an order in respect of a property the wife is entitled to for the benefit of the husband as appears reasonable.

In exercising the powers given to the Court, having in view the source whence the legislation has been taken, it is proper to turn to English authorities to see upon what lines those powers have been exercised.

The first defendant is, judging from local standards, in affluent circumstances. At the time of the marriage the families of both husband and wife are described as wealthy. When he was first married plaintiff received from his parent Rs. 500 to Rs. 1,000 a month. On the death of his father in 1916 his mother continued to allow him Rs. 200 to Rs. 300 a month up to 1918. After that all income from that source failed, owing to the insolvency of his father's estate. His wife's income is placed at Rs. 40,000 a year, of which she allowed him about Rs. 2,500 a year, out of which he paid most of the living expenses and hotel bills, and in addition some of his wife's shop bills. For his personal use he says he had Rs. 400 to Rs. 500 a month out of his wife's income. He admits she treated him very generously. It is clear also that she was a capable business woman, having retained all the property she had on marriage and added to it, in spite of spending money freely during their married life. Although plaintiff had no financial control of his wife's property, he appears to have managed the estates; hence it may be stated that he saved her some expenditure in that way, which, but for him, she must have incurred by employing a manager. He admits that he is now free from that management, and is free to make a career for himself in business, in which he has started, he says, successfully.

In the majority of cases cited in course of the arguments, the question of children have to be considered. Here there are no liabilities upon the plaintiff for the custody, maintenance, or education of children. He is still a young man, and presumably could still complete his medical education if he wished, although it appears he has chosen to go into business. At the time of the marriage he had considerable expectations from his own family, but they have now disappeared. The principles which should guide the Court, whether acting under section 617 or 618, are set out in *Hartopp v. Hartopp*[1] which is followed in *Lorriman v. Lorriman* (*supra*). The Court should have regard to the pecuniary position the husband would have been in if the marriage had not been dissolved, through the fault of the wife, and it should endeavour to adjust as far as possible and without following any hard and fast rule, any alteration in his pecuniary position by reason of the

[1] (*1899*) *P. at p. 72.*

change in the circumstances due to his wife's misconduct. In the latter case Bucknill J. discusses *Midwinter v. Midwinter* (*supra*), and *March v. March* (*supra*). In this last case the Judge Ordinary says—

> " If this union has been broken and the common house abandoned by the criminality of one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong by breach of the marriage vow be wholly deprived of means to the scale, of which he may have learnt to accommodate his mode of life."

From *Chetwynd v. Chetwynd*[1] it is clear that the Court must also look at the conduct of the parties, and here it seems to me as I have pointed out above that the plaintiff cannot say that he is free from fault. It has been urged that the marriage only lasted for eight years, was hardly a happy one, and there was very little home life ; such as it was, however, it has been broken up. The nature of the wife's property has also been referred to. Nattandiya is a rubber estate, and hence the income derived from it is said to be of uncertain amount and dependent on the price of rubber which at present is high. Dicklanda is a valuable coconut property, but there is a mortgage for Rs. 120,000 upon it, with interest payable at 9 per cent. The whole of the capital sum remains due, whilst the interest alone consumes a large part of the income of the first defendant. The question then arises should the sum allowed to the husband be fixed or variable. On this point I think *Midwinter v. Midwinter* (*supra*), supplies a useful guide. The usual practice is to name a fixed amount, and here as there the plaintiff's income from business is likely to be variable. Under the circumstances, I think the usual practice should be followed. The Rs. 1,000 a month allowed by the trial Judge is in my opinion certainly excessive ; in exercising his discretion in the matter I think he has lost sight of the large mortgage still existing, and the probability that there may be a variation in the first defendant's income. Under all the circumstances, I consider plaintiff is entitled to a settlement out of the property to which the first defendant is entitled in the sum of Rs. 400 a month during their joint lives. In addition I would not interfere with or vary his life interest in the property " Heatherly " under deed (P 10), which is contingent on his surviving the first defendant. The matter should therefore be sent back to the District Court for the parties to formulate a scheme for that Court's approval on the lines of this decision.

With regard to the question of costs in the trial Court, I am of opinion that, under the provisions of section 612 of the Civil Procedure Code, the second defendant should have been ordered to pay the whole of the plaintiff's costs. Under the circumstances here, I think the first defendant should pay her own costs. The decree of the Court below should, in my opinion, be accordingly varied.

[1] *L. R. I. P. & D. 39.*

1925.

DALTON J.

De Silva v. De Silva

With regard to the costs of appeal in the result, the plaintiff's appeal is dismissed with costs ; the appeals of the first and second defendants are allowed, as set out above. They are entitled to their costs on appeal.

Decree varied.