1961 *Present :* **H. N. G. Fernando, J., and Tambiah, J.**

M. EMELDA FERNANDO, Appellant, *and* W. S. ELARIS FERNANDO, Respondent

S. C. 164—D. C. Negombo, 81/L

Divorce action—Rights of parties to bring separate actions in respect of settlement of property—Civil Procedure Code, ss. 617, 618—Rule of forfeiture of benefits as between spouses—Inapplicability of the rule in regard to the separate property of the offending spouse—" Ante-nuptial contract "—Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, s. 8.

Where, in a divorce action, the parties do not invite the Court to grant any relief by way of settlement of property under section 617 or section 618 of the Civil Procedure Code they may be permitted by the Court, on their election, to reserve their rights to file separate actions under the common law for the recovery of any property in the hands of each other.

" The common law remedy was not abrogated as a result of the enactment of those sections (sections 617 and 618 of the Civil Procedure Code), but rather remedies envisaged by these sections are complementary to the action available under the common law. However . . . the parties cannot have the benefit of both remedies but should elect to claim either the remedy under the common law or those available under the Civil Procedure Code. "

Under the common law the rule of forfeiture of benefits as between spouses does not apply to the separate property of the offending spouse.

Two months prior to the marriage between the plaintiff-appellant and the defendant-respondent (wife and husband respectively) the plaintiff's brothers donated certain property to the plaintiff and defendant in equal shares " as a token of mental pleasure and for their future prosperity " which the donors had " towards the marriage of the said donees ". After dissolution of marriage on the ground of malicious desertion by the plaintiff, the plaintiff and the defendant claimed in the present action each other's share of the donated property. The trial Judge allowed the claim of the defendant and dismissed that of the plaintiff.

Held, that the defendant, while he was entitled to retain the share which had been donated to him, was not entitled to the share of the plaintiff, despite the fact that the plaintiff was the offending spouse. It could not be said that the share which vested in the plaintiff under the deed of donation was as a result of an ante-nuptial contract. Nor could it be said that the share which the plaintiff received was a benefit she derived from her spouse by marriage. She was already vested with title when she married and, therefore, this was her separate property and, as such, it was not subject to forfeiture.

Wijesundere v. Bartholomeus (1885) 6 S. C. C. 141, not followed.

APPEAL from a judgment of the District Court, Negombo.

J. A. L. Cooray, with *N. U. Jayawardena*, for the Plaintiff-Appellant.

H. Wanigatunga, with *D. C. W. Wickremasekera*, for the Defendant-Respondent.

Cur. adv. vult.

June 23, 1961. TAMBIAH, J.—

This action is the sequel to a divorce action filed by the respondent against the appellant on the grounds of adultery and malicious desertion.

About two months prior to the marriage between the appellant and the respondent, the appellant's brothers, by deed No. 10264, dated 1st November 1943, marked P1, donated a half-share of the property described in the Schedule to the plaint, to the appellant and respondent in equal shares " as a token of mental pleasure and for their future prosperity " which the donors had " towards the marriage of the said donees ". After dissolution of marriage, the appellant brought this action for the settlement of a quarter-share of the said land. The respondent denied the appellant's right to this relief and claimed, by way of reconvention, a decree settling the one-fourth share of the said land on the respondent, since he had obtained the divorce on grounds of adultery and malicious desertion by the appellant. The learned District Judge, after trial, dismissed the appellant's action and granted relief claimed by the defendant in reconvention. The appellant has appealed from the order of the learned District Judge.

The appellant married the respondent on the 13th of January 1944. On the 2nd of March 1958, the respondent filed an action for divorce against the appellant on the grounds of adultery and malicious desertion by the appellant. After an ex parte trial, a decree nisi was entered in favour of the respondent on both grounds. Before the decree was made absolute, the appellant intervened and prayed that the order nisi be set aside. She alleged that her married life had been exceptionally unhappy as her husband had a propensity towards the commission of unnatural offences. She also alleged that she had separated from her husband on the understanding that he should file an action for divorce against her on the ground of malicious desertion but the respondent had fraudulently obtained a decree for divorce against her on the ground of adultery and malicious desertion, without due service of summons on her. The appellant's application to set aside the decree nisi was inquired into by the learned District Judge who vacated the decree nisi dissolving the marriage on the ground of adultery and entered a decree nisi dissolving the marriage on the ground of malicious desertion. The parties were permitted to file separate actions for the recovery of any property in the hands of each other.

The learned District Judge, after citing some authorities, held that the appellant had no cause of action to ask for a reconveyance of the quarter-share of the said land which had vested in the respondent by the deed referred to earlier. He also held that the respondent was entitled to succeed in the claim for reconvention. Although we see no reason to differ from the finding of the learned District Judge in holding that the appellant had no cause of action to ask for a reconveyance of the quarter-share, we cannot agree with the learned

District Judge when he came to the conclusion that the respondent was entitled to succeed in his claim in reconvention. After a careful consideration of the authorities on this subject, we are of the view that the learned District Judge has misdirected himself on this matter.

In the divorce action, the parties did not invite the Court to grant any relief under Section 617 or 618 of the Civil Procedure Code (Ordinance No. 2 of 1889). Section 617 empowers the Court which pronounces a decree for dissolution of marriage on the ground of adultery by the wife to order a settlement of the wife's property on the husband or children. Section 618 further empowers the Court, after a decree absolute for the dissolution of marriage or a decree of nullity of marriage, to inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree. The section also empowers the Court to make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents as to the Court seems fit. The proviso to this section states that the Court cannot make any order for the benefit of the parents or either of them at the expense of the children. Sections 617 and 618 of the Civil Procedure Code are closely modelled on the English Divorce and Matrimonial Causes Acts of 1857 and 1859 (20 & 21 Vict. C. 85) respectively.

Under the Roman-Dutch Law, the innocent spouse, after dissolution of marriage, is entitled to maintain an action against the offending spouse to recover certain benefits which the latter may have derived as a result of the marriage. In such an action, the Court has no discretion to withhold order for forfeiture of benefits when claimed (Vide *Murison v. Murison* [1] and the authorities cited therein). The preliminary question which arises for consideration is whether the statutory provisions contained in Sections 617 and 618 of the Civil Procedure Code have abrogated the action available under the common law.

This question was adverted to by Schneider J. in *De Silva v. De Silva* [2]. He stated : " The effect of Sections 617 and 618 might be regarded either as repealing the Common Law on the subject dealt with in them or of introducing new provisions which are to stand side by side with the provisions of Common Law, not being opposed to one another, but only alternative each to the other ". The learned Judge, however, did not venture to express his opinion on this matter as the Court was only dealing with an application under Section 617 of the Civil Procedure Code and consequently it was not necessary to decide this point. After a careful consideration of the authorities, we are of the opinion that the common law remedy was not abrogated as a result of the enactment of these sections, but rather the remedies envisaged by these sections are complementary to the action available under the common law.

[1] *(1930) A. D. 157 at p. 163* [2] *(1925) 27 N. L. R. 289 at 305-306.*

However, as pointed out by Schneider J. in *De Silva's* case (supra at page 306), the parties cannot have the benefit of both remedies but should elect to claim either the remedy under the Common Law or those available under the Civil Procedure Code. In the instant case, as the parties have not claimed any proprietary reliefs under Sections 617 or 618 of the Civil Procedure Code, but have elected to reserve their rights to bring separate actions, their rights under the common law to bring separate actions have been preserved.

The scope and ambit of the rule of forfeiture of benefits as between spouses, is discussed in precise terms by the Roman-Dutch authorities. Voet states (vide Voet 24.2.9. Gane's Translation Vol. 4 page 293) " When however one or other spouse is declared a malicious deserter by the decision of the judge, the penalty on the deserter is that *he loses all gain which he could have made out of the property of the deserted spouse in virtue of dotal agreement or of statute. He is held liable in addition to hand back all gifts contributed to himself by the innocent party before marriage or at the very time of marriage as well as moiety of the expenses of marriage.* So far is this so that an innocent spouse also transmits to his or her heirs the right to claim all these things if he or she has himself or herself been impeded from demanding them by the happening of a fatality. "

Van Leeuwen in his Commentaries, lays down (vide V.L. 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.* " (4, 37, 8).

Professor Hahlo (vide The South African Law of Husband and Wife—Hahlo—(Juta) p. 362) aptly summarises the Roman-Dutch Law on the subject as follows :—" Since the law considers that a spouse should not be allowed to benefit financially from a marriage which has been wrecked through his (or her) fault, the plaintiff, in an action for divorce on the grounds of adultery or malicious desertion, may claim as against the defendant *the forfeiture of all financial benefits, past and future, which the latter has derived from the marriage or is to derive from the marriage in future, whether by way of community of property or under an ante-nuptial contract.* "

The South African courts do not favour the forfeiture of any property of the offending spouse, which cannot justifiably be considered as a financial benefit acquired from the other spouse as a result of the marriage. In *Celliers v. Celliers* [1] the parties were married in community

[1] *(1904) T. S. 926.*

of property and one of them obtained a divorce on the ground of malicious desertion. It was held that the innocent party was entitled to claim a division of the joint estate and ask for forfeiture of any benefits which the guilty party may have derived from the marriage. However, the Court also held that *the innocent party cannot deprive the guilty party of the share of the joint estate which he or she may have contributed to the community.* Solomon J., in the course of his judgment, stated : " Certainly in the courts of Cape Colony the law and practice on this subject have always been considered as settled, and the universal order which is made in those courts is not for forfeiture of the property *but for forfeiture of the benefits which may have accrued by virtue of the marriage.*

The principle of forfeiture of benefits was considered by Van Den Heever J.A., in *Allen v. Allen* [1]. The learned Judge stated : " The germ of forfeiture of benefits in Roman-Dutch law is to be found in the 18th Article of the Political Ordinance, 1580. This Article deals expressly only with divorce on the ground of adultery and reserved to the plaintiff his Roman Law rights conceived as a penalty for the disruption of the marriage. At first it was doubted whether malicious desertion was a ground for divorce (see Grot. *Inleyd* (1.5.18) ; Boel *ad Leon. Decis. Cas.* 16 ; Hamerster, *Stat v. Friesland* Bk. 2, tit. 11 art. 5). The deserted spouse invoked the assistance of the legislature (cf. G. P. B. 6 p. 540). Later the protestant jurists and divines, on their interpretation of the Bible, added malicious desertion as a ground upon which divorce could be claimed. In Holland this became the *communis opinio* except that some authorities attributed to malicious desertion a greater disruptive effect than to adultery, holding that whereas adultery merely gave cause for divorce, malicious desertion itself put an end to the marriage so that the court did not dissolve a marriage on this ground *ipso jure* by the desertion and granted the injured party leave to remarry (Boel *ad Loen.*, cas. 16 ; Van der Linden, *Jud Pract* (2.6.7.) ; Arntzenius, *Inst. Jur. Belg.* (3.7.25) .) The former more logical view prevailed in South Africa. "

" When malicious desertion was generally recognised as a ground for divorce the Dutch jurists by analogy of the 18th Article of the Political Ordinance had recourse to Roman law for its penalty. Since the Roman unilateral repudiation without just cause was in effect malicious desertion, they found it i.a. in C. 5. 17. S. 4. according to which the guilty spouse if the wife, forfeited her *dos* and the *donatio ante nuptias.* Some authorities e.g. Wessel (*De Finiend. Connub. Bonor. Societ.* (Tr. 2.4.1. et seq.)) held that the guilty spouse forfeits only gains and anticipated gains, not as in Roman law, a portion of his or her own estate brought into the marriage. The more liberal view has prevailed in South Africa ; one need refer only to *Celliers v. Celliers* (supra) and the decisions therein referred to. "

[1] *(1951) 3 S. A. L. R. 320 at 326 and 327.*

In Ceylon, there are two conflicting decisions of this Court on the question of forfeiture of benefits as between spouses. In *Wijesundere v. Bartholomeus* [1] it was held by a Bench of two judges that an offending wife in a divorce action forfeited an article of furniture, which she brought in as part of her dowry property, when the divorce was granted to the husband on the ground of her malicious desertion. The learned judge, who decided the case, has not cited any authority in coming to this conclusion and we are inclined to agree with Schneider J. in *De Silva v. De Silva* (supra at page 304) when he stated that the case of *Wijesundere v. Bartholomeus* was wrongly decided. In *Dondris v. Kudatchi* [2] Wendt J., after an exhaustive review of the Roman-Dutch authorities, held that the forfeiture did not apply to the separate property of the offending spouse. The weight of the Roman-Dutch authorities is in favour of this view.

In *De Silva v. De Silva* (supra at page 304), Schneider J., in an obiter dictum, also took the view that the forfeiture did not apply to the separate property of the offending spouse. The learned Judge stated " 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 the 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 '. "

In the instant case, the appellant's right to the property is derived from the deed of gift executed by the appellant's brothers. As community of property is no longer a consequence of marriage in Ceylon (abolished by section 8 of the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876), there is no community of property between the appellant and the respondent. The learned District Judge appears to have formed the erroneous view that the wife obtained this property by an ante-nuptial contract. " Ante-nuptial contracts, being of wide application " says Vander Keesel (vide V.d.K. 228) " can scarcely be otherwise defined than as *agreements between future spouses or other interested persons regarding the terms or conditions by which the marriage is to be regulated* ". It cannot be said that the share which vested in the respondent by deed No. 10264, was as a result of an ante-nuptial contract. We need not consider whether the benefits which the respondent obtained on the said deed were on an antenuptial contract as he is not the offending spouse so long as the decree for divorce stands.

It cannot be said that the share which the plaintiff received by virtue of deed No. 10264, is a benefit she derived from her spouse by marriage. She was already vested with title when she married and, therefore, this was her separate property and as such it is not subject to forfeiture.

[1] *(1885) 6 S. C. C. 141.*

[2] *(1902) 7 N. L. R. 107.*

For these reasons, we set aside the order of the learned District Judge giving judgment for the respondent and allow the appeal. We hold that the respondent is not entitled to succeed in his claim in reconvention and we dismiss his claim. As both parties have failed in their respective claims, there will be no costs in the District Court. The appellant is entitled to the costs of the appeal.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.