1937 *Present :* **Maartensz and Hearne JJ.**

KARUNANAYAKE *v.* KARUNANAYAKE.

36—D. C. Galle, 34,107.

Divorce—Amount of alimony—Determination of alimony—Dissolution of marriage—Wife's right to recover dowry—Roman-Dutch law—Matrimonial Rights and Inheritance Ordinance, s. 19.

Permanent alimony granted to a wife on the dissolution of a marriage is, as a rule, larger than alimony pending the action which is fixed by section 614 of the Civil Procedure Code at a sum not less than one-fifth of the husband's average nett income for the three years preceding the date of the order.

An order for the payment of permanent alimony should be made after the decree *nisi* dissolving the marriage is made absolute.

The amount of alimony may by consent of the parties be determined before the decree absolute.

On the dissolution of a marriage between parties who are governed by the Matrimonial Rights and Inheritance Ordinance of 1876, the wife is not entitled to recover movable property given to her as dowry, which becomes the absolute property of the husband, under section 19 of the Ordinance, unless the husband has contracted himself out of the provisions of the section.

THE plaintiff sued the defendant, her husband, for a dissolution of their marriage on the ground of his adultery, for the return of a sum of Rs. 6,550 given to him as dowry and for alimony of Rs. 300 a month.

The learned District Judge gave judgment for the plaintiff ordering a dissolution of the marriage, condemned the defendant to pay her a sum of Rs. 5,000 as respecting her dowry and Rs. 225 per month as alimony.

Brooke-Elliot, K.C. (with him *H. V. Perera, K.C., S. Nadesan, C. Seneviratne,* and *A. L. Jayasuriya*), for defendant appellant.—The Roman-Dutch law doctrine of forfeiture of benefits applied to those benefits derived from the aggrieved party. Here therefore, the plaintiff cannot resist the defendant's claim to the sum of Rs. 5,000 given as dowry to the defendant—vide *de Silva v. de Silva* [1], which held that it was just the benefit derived from the other party that was forfeited. Here the gift of Rs. 5,000 was by the parents in consideration of the defendant's marriage. Forfeiture applies only to gifts between the parties, as by the wife to the husband. The gift should be earmarked; there should be an intention to preserve the money or to convert it into some property.

A Court having matrimonial jurisdiction cannot try a claim for damages for breach of trust.

As regards the quantum of alimony—vide *Deane v. Deane* [2] (one-fifth of husband's income).

Apart from the question of damages, one is not vindictive in the grant of alimony.

R. L. Pereira, K.C. (with him *E. G. P. Jayetilleke* and *Colvin R. de Silva*), for plaintiff, respondent.—it is wrong to state that the quantum of alimony should be one-fifth of the husband's income. Vide *Brown &*

[1] *27 N. L. R. 289.*

[2] *(1858) 4 Jurist N. S. 268.*

Latey on Divorce, p. 160—Alimony *pendente lite* should be on the basis of *one-fifth* of *joint* income.—(The words in section 614 of the Civil Procedure Code are: "In no case *less* than one-fifth".) And permanent alimony is on the basis of *one-third of joint* income. The Court has discretion to award a larger or less sum. Vide *Cooke v. Cooke* [1]—where the joint income was £800 the Court awarded £400; also *Smith v. Smith* [2]—where again the alimony awarded was one-half of the joint income, £1,000 out of £2,000. Also *Avilla v. Avilla* [3]; *Warren v. Warren* [4]; *Deane v. Deane* (*supra*).

Brooke-Elliot, K.C., in reply.—The English authorities show that permanent alimony can be one-half of the income. The words joint income would mean that the husband is not to be unduly beggared.

[MAARTENSZ J.—We desire to hear argument in this case on the following questions which appear to arise from the proceedings, and which were not discussed when the appeal was argued on September 21 and 22:

(1) Whether in view of the provisions of section 615 of the Civil Procedure Code an order for the payment of permanent alimony can be made before the decree nisi was made absolute as was done in this case.

(2) Whether the provisions of section 19 of the Matrimonial Rights Ordinance, No. 15 of 1876, preclude the plaintiff from claiming restitution of the sum of Rs. 5,000 which she alleges was given to the defendant as her "dos".]

H. V. Perera, K.C., for appellant.—The order for forfeiture must be in respect of existing property. I need restore the money only if that money is available. The Rs. 5,000 could have dwindled down to Rs. 50. Can there then be an order for restoration as distinguished from damages?

[MAARTENSZ J.—Because you choose to spend the money, are you not bound to restore it?]

Being movable property, it belongs to the husband—c.f. *Nathan, vol.* I., paragraphs 420-98. Property given on her behalf is distinguished from property given for her benefit.

Section 4 of Ordinance No. 18 of 1923 repeals section 19 of the Matrimonial Rights Ordinance. Forfeiture exists only if the fund exists. It must be possible to earmark the property.

R. L. Pereira, K.C., for respondent.—Section 19 of the Matrimonial Rights Ordinance has no application here. The words used are: "entitled at time of marriage or during marriage". *Vide* judgment of Schneider J. in (*de Silva v. de Silva* [5]) regarding the scope of section 618.

Brooke-Elliot., K.C., in reply.—The Court has statutory powers, section 618, *e.g.*, inquiry into an antenuptial settlement only after the dissolution of the marriage. Thus in this case the Court has no jurisdiction as the marriage was, at the date of the order, inforce till it was dissolved. The marriage was dissolved long after the inquiry. In the *Aserappa v. Aserappa* [6] case the defendant admitted the fact of jurisdiction and he was therefore estopped.

Cur. adv. vult.

[1] *(1812) 2 Phil. 40.*
[2] *(1814) 2 Phil. 235.*
[3] *(1862) 31 L. J. P. M. and A. 176.*
[4] *(1890) 63 L. Times 264.*
[5] *27 N. L. R. 289.*
[6] *37 N. L. R. 372.*

October 13, 1937. MAARTENSZ J.—

The plaintiff in this action sued the defendant, her husband, for a dissolution of their marriage on the ground of his adultery, for the return of a sum of Rs. 6,550 given to him as dowry, and for alimony at the rate of Rs. 300 a month. She also prayed that the defendant be ordered to give security for the due payment of the alimony.

The District Judge gave judgment for the plaintiff ordering a dissolution of the marriage and condemned the defendant to pay her Rs. 5,000, Rs. 225 a month as alimony, and to hypothecate property to the value of Rs. 20,000 to secure the payment of the alimony.

The defendant-appellant contends in appeal that he is not liable to return the sum of Rs. 5,000, which was not given to him by way of dowry but as a wedding present, that the amount fixed as alimony is excessive, and the amount of security ordered beyond his means.

I shall first deal with the contention that the amount payable as alimony is excessive.

The District Judge assessed the appellant's income at Rs. 5,600 a year, made up as follows :—

Rs. 3,600 a year, being salary payable to him, after deductions, as Station Master ;

Rs. 1,200 a year derived by him from his properties planted with rubber ;

Rs. 600 a year from properties planted with coconut ;

Rs. 200 a year being rent which he would receive if his ancestral home was rented.

In determining the amount payable as alimony out of this income, the District Judge took into consideration the misconduct of the appellant and the unfounded allegations he made against his wife, the plaintiff.

It was urged (1) that the District Judge's assessment of the income derived by the appellant from his rubber and coconut properties, and the amount at which he considered the house could be let was incorrect ; (2) that he was wrong in taking into consideration the defendant's misconduct and his allegations against the plaintiff in determining the amount the appellant should pay by way of alimony.

The largest property planted with rubber is Medahena, 27 acres in extent. According to the extract from the Register of Rubber Lands, the standard production for 1935 was 8,320 lb. and the exportable maximum 4,160 lb.

The defendant's evidence is that he and his brother are entitled to 51 per cent. of the exportable maximum, and that he gets coupons for 1,591 lb. How the figure 1,591 is arrived at does not appear from the evidence. He produced five deeds D 12, D 13, D 14, D 15, and D 16, in favour of himself and his brother for 4/10 plus 1/12 of the land.

The rubber was planted by Robert Abeysinghe Gunasekere under a planting agreement No. 1,807 (D 17) by which the planter was to receive half the soil and plantation as planter. The planter assigned his interests in the planting agreement to the defendant and another by deed

No. 14,632 (D 18), dated September 16, 1925. The defendant, according to these documents became entitled to a half share of the planter's interest and 29/60 of the land. Thus practically the whole of the rubber plantation vested in himself and the other grantee of the deed, of which the defendant was entitled to a half share.

These deeds were executed in favour of the defendant between the years 1925 and 1929, and it would appear that he acquired all the plantations subsequently, for in the extract from the Rubber Register (P 10) he is described as the owner. The defendant's explanation that he registered himself as owner for the sake of convenience, and that he kept his share of the coupons and handed over the others to his brother to be distributed to the other co-owners is not supported by any receipts or entries in books of accounts; considering that coupons are valuable documents, I should have expected him to produce evidence of that nature in support of his explanation. The defendant admitted he had an account book which shows the amount spent by him on the land. He has not produced this account book. I think an inference adverse to his explanation can be deduced from the non-production of this book.

The defendant is admittedly the owner of the entirety of the other two lands planted with rubber. The extracts from the Rubber Register, P 9 and P 11, show that the exportable maximum is 1,588 and 650 lb. of rubber. The exportable maximum of the three lands is 6,398 lb. of rubber, the figure adopted by the District Judge.

The defendant asserted that he had three caretakers who were paid Rs. 10, Rs. 15 and Rs. 15 a month respectively. With regard to the other two lands too he has an account book in which he has entered the expenses and income from the lands and which he has not chosen to produce, and the same adverse inference can be drawn from their non-production.

I am of opinion that the defendant has not established that the District Judge's assessment of his income from the lands planted with rubber is incorrect.

As regards the land planted with coconut and the rental of the house, there was, no doubt, exaggeration on the part of the plaintiff's father who gave evidence as regards the income from these properties, and the defendant, of course sought to minimize the income as much as possible. The defendant has certainly not been frank about his income ; for instance, when he gave evidence as regards his income at the inquiry held to determine the amount he should pay as alimony *pendente lite*, he said Pussellewatta is a bare land of 21 acres and that he got no income from it. At the present inquiry he admitted that it was planted with 608 trees.

As regards the house, the plaintiff's father said it could be rented at Rs. 75 a month. The Vidane Arachchi, C. Ratnaweera, a witness for the defence, said it could not be let for more than Rs. 10 a month.

The District Judge no doubt using his experience has assessed the income derivable from the coconut properties and the house at a figure which he considered reasonable after considering the evidence led in the case.

I am unable to say that his assessment of the defendant's income is excessive.

As regards the sum which should be paid by way of alimony, the appellant's Counsel submitted that there was a rule that it should not exceed one-fifth of the husband's income. I am not aware of such a rule. On the contrary the proviso to section 614 of the Civil Procedure Code enacts that alimony pending the action shall in no case be *less than one-fifth* of the husband's average net income for the three years next preceding the date of the order. And the rule in England is that permanent alimony is always larger than alimony *pendente lite*. See *Browne & Powles on Divorce, p. 139.*

Some evidence was led as to what it would cost the plaintiff to live in Balapitiya, and it was urged that on that evidence Rs. 75 a month was sufficient for the plaintiff to live on. I am unable to agree with this contention; there is no rule that a wife is only entitled to the least amount on which she could live by way of alimony.

The defendant at page 10 of the record has stated as follows: "I would estimate my monthly expenses at Rs. 200 to Rs. 250. I would consider it an amount necessary for my wife as well". I think this evidence is a fair basis for estimating the amount of alimony the defendant should pay the plaintiff. The District Judge's estimate of Rs. 225 a month is in my opinion too high, as it amounts to nearly fifty per cent. of the defendant's income, part of which must fluctuate with the fluctuation of the price of rubber and coconut.

I am of opinion that the alimony should be reduced to Rs. 200 a month.

The decree ordered the defendant to pay the plaintiff permanent alimony from June 13, 1935, that is, from the date the action was filed. This order was clearly made *per incuriam*, for under the provisions of section 614 of the Civil Procedure Code, 1889, alimony *pendente lite* is payable until the decree is made absolute, and permanent alimony becomes payable from that date.

Section 615 of the Code indicates that an order for the payment of permanent alimony should be made only after the decree nisi dissolving the marriage is made absolute.

As this section was not referred to at the first hearing of the appeal, we heard Counsel on September 30 on the question whether an order for the payment of permanent alimony could be made before the decree was made absolute.

The appellant's Counsel contended that the Court had no jurisdiction to make the order before the decree nisi was made absolute; and that there must be a fresh inquiry and a fresh order made after the decree is made absolute.

It would be most regrettable if we were constrained to uphold this contention. In my opinion we are not bound to do so.

The Court clearly determined the amount payable as permanent alimony, when it did, at the invitation of the parties, as one of the issues agreed to was "(7) What amount is plaintiff entitled to as permanent alimony?" I can see no reason why the parties should not by consent

have this question determined before the decree is made absolute. I took this view in the case of *Silva v. Silva et al.*, D. C. Colombo, No. 10,899, which I tried as District Judge. In that case I made an order under the provisions of section 617 of the Civil Procedure Code before the decree was made absolute at the invitation of the parties, although, as I pointed out in my judgment, such an order could properly be made only after the decree nisi was made absolute.

There was an appeal from this judgment, and my order under section 617 was varied as regards the amount of income I had ordered the first defendant to pay the plaintiff, but it was not set aside on the ground that I had no jurisdiction to make the order.

As regards the property to be hypothecated as security for the payment of alimony, the appellant complains that his property may not be worth Rs. 20,000. To obviate the possibility I direct him to hypothecate as security the three lands planted with rubber, namely, Galpotta-ela-mamana, Medahena and Ketakellagahahena for the sum of Rs. 20,000.

The next question for decision is whether the plaintiff is entitled to restitution of the sum of Rs. 5,000 which she claims was given by her father on her behalf to the defendant as her *dos*. The defendant averred that the sum of Rs. 5,000 was given to him as a wedding present.

The District Judge has held that the sum of Rs. 5,000 was dowry intended for the plaintiff, and I see no reason to dissent from his finding of fact.

Under the Roman-Dutch law " 'dos' or dowry consists of the property which is given by a wife or by some person on behalf of the wife to the husband for the purpose of sustaining the burdens of marriage " and " included, in the absence of proof to the contrary, all the property given to the husband for administration by the wife " (Nathan's *Common Law of South Africa, s. 420, pp. 266 and 267*).

" Where a marriage has taken place in community, the dowry or its value must be brought into collation, for the purpose of ascertaining the sum total of the estate owned in community and dividing the same " (*Ibid.* page 268).

The marriage in this case did not take place in community of property and the plaintiff would under the Roman-Dutch law be entitled to claim restitution of the sum of Rs. 5,000. *Nathan* in section 505, page 317, commenting on *Voet's* statement that the right to claim restitution of the dowry may be forfeited by misconduct on the part of the wife, says : " It is submitted, that if there is to be any restitution whatsoever of dotal property, it must proceed upon the supposition that it belongs to the wife, and not to the husband. Dotal property is not to be looked upon as a benefit arising out of the marriage, except in so far as, during marriage, the husband has the usufruct of the same ; and therefore a decree of forfeiture of benefits, following on divorce, given as against the guilty spouse, should not deprive the wife of her total property, provided the parties are married out of community ".

It appears to me from the above statement of the law that the right to restitution of the *dos* results from the fact that the *dos* is the property of the wife, and not of the husband.

The Roman-Dutch law as regards the matrimonial rights of husband and wife in respect of property has been abrogated by the Matrimonial Rights and Inheritance Ordinance, 1876.

Section 6 of this Ordinance enacts as follows :—" The respective matrimonial rights of every husband and wife domiciled or resident in this Island, and married after the proclamation of this Ordinance, in, to, or in respect of movable property shall, during the subsistence of such marriage and of such domicile or residence, be governed by the provisions of this Ordinance ".

Sections 10 and 11 enact that the wages and earnings of a wife, her jewels, implements of trade and agriculture shall be deemed and taken to be part of her separate estate.

Section 19 enacts as follows :—" All movable property to which any woman, married after the proclamation of this Ordinance, shall be entitled at the time of her marriage or may become entitled during her marriage, shall, subject and without prejudice to any settlement affecting the same, and except so far as is by this Ordinance otherwise provided, vest absolutely in her husband ".

In terms of this section, if there was no settlement affecting it the sum of Rs. 5,000 became the absolute property of the defendant.

There was admittedly no settlement of this sum in writing.

The plaintiff's father who provided the money stated : " The Rs. 5,000 was money given to my daughter for her upkeep. We handed it to defendant but it was meant for the upkeep of my daughter ". Again he said : " I gave that money to my daughter. I may have handed the money to the defendant as it is the custom. Defendant had to preserve that money for the plaintiff ".

Now if the Rs. 5,000 was money given to the daughter without reference to her intended marriage, that money would on her marriage become the absolute property of her husband in terms of the provisions of section 19 of the Ordinance. I am unable to distinguish between such a gift and a gift of Rs. 5,000 given to her as dowry in the absence of any agreement on the part of the intended husband that that sum should not become his absolute property on the marriage taking place.

I am accordingly of opinion that where movable property to which section 19 applies is given as dowry, that property becomes the absolute property of the husband in the absence of any proof that he has contracted himself out of the provisions of the section.

It is the custom in this Island to give a dowry to the wife. Money is almost invariably a part of the dowry, and it is significant that this is the first case to my knowledge in which restitution of the dowry was claimed.

I am of opinion that the order of the District Judge directing the defendant to pay the plaintiff the sum of Rs. 5,000 must be set aside.

The decree of the District Court is varied as follows :—

(1) By the deletion of the order directing the defendant to pay the plaintiff the sum of rupees five thousand (Rs. 5,000) given to her as dowry.

(2) By substituting " Rs. 200 " for the sum of " Rs. 225 ", and the words " from the date the decree is made absolute " for the words " from the 13th day of June, 1935 ".

(3) By substituting the words "that the defendant shall within one month of the return of the record to the District Court enter into a bond in the sum of Rs. 20,000 and hypothecate as security the lands called Galpotte-elamamana, Medahena and Ketakella-gahahena.

I would not interfere with the order of the District Judge as to costs. There will be no costs of this appeal.

HEARNE J.—I agree.

Judgment varied.