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July 6.

Present: Mr. Justice Wendt and Mr. Justice Middleton.

FERNANDO *et uxor v.* AMMAL.

D. C., Colombo, 23,809.

Res judicata—*Woman married after Ordinance No. 15 of 1876—Judgment against husband in respect of the wife's separate estate — Estoppel — Abolition of community of property — Rights of wife — Roman-Dutch Law — Ordinance No. 15 of 1876, ss. 8 and 20 — Civil Procedure Code (Ordinance No. 2 of 1889).*

A judgment obtained against the husband alone of a woman married, after Ordinance No. 15 of 1876 came into operation, in respect of her separate property, does not bind the wife.

The repeal of section 20 of Ordinance No. 15 of 1876, which enabled a wife to appear in Court as a party to an action by the Civil Procedure Code, did not revive the law that existed prior to the passing of the said Ordinance.

MIDDLETON J.—The alteration of the law relating to married woman by Ordinance No. 15 of 1876 must of necessity have conferred on a married woman the right to appear in Court as a party to an action, assisted by her husband.

APPEAL by the plaintiffs from a judgment of the District Judge (Joseph Grenier, Esq.) dismissing their action. The facts material to the report sufficiently appear in the judgments.

Bawa (with him *B. F. de Silva*), for plaintiffs, appellants.

Walter Pereira, K.C., S.-G. (with him *Tisseveresinghe*), for the defendant, respondent.

Cur. adv. vult.

July 6, 1909. WENDT J.—

The facts upon which this appeal turns are fully set out in my brother Middleton's judgment, and I need not deal with them in detail. The most important question argued before us was as to the effect upon the first plaintiff's rights in the house No. 45 of the decree obtained against her husband alone in a former action, No. 19,170, of the same Court. The plaintiffs were married under the Ordinance No. 15 of 1876, and the house was the first plaintiff's separate property under section 9 of that Ordinance. It was not liable for the debts or engagements of her husband, and her receipts alone or those of her agent were constituted a good discharge for the rents, issues, and profits arising from such property. She had as full power of disposing of such property as if she were unmarried, with the one qualification that for any disposition *inter vivos* her husband's consent in writing was necessary, although even that might be dispensed with by the Court if unreasonably withheld, and in certain other

cases. The community of ownership between husband and wife which existed under the Roman-Dutch Law was abolished (section 8), and so was the exclusive administration of the common property formerly vested in the husband. By section 20 of the Ordinance a married woman, whether married in community or under the Ordinance, was empowered to maintain or defend in her own name any action in respect of her separate property, and had in her own name for the protection of such property the same remedies as if she were unmarried, with the proviso that her husband might with her consent in writing maintain or defend any such action in her behalf. That is to say, that she might in writing authorize her husband to sue in her name, or, if she were sued in her own name, to defend the action on her behalf. In either case the wife was to be the party to the action, even when married in community. Nothing is said as to the necessity of suing the husband, nor anything that implies the possibility of his being substituted for his wife. Section 20 is no longer in force, having been repealed by the Code of Civil Procedure, Ordinance No. 2 of 1889. The Code contains no provision as to the liability of a married woman to be sued, either generally or in respect of her separate estate, or as to the mode of suing her. The law (if such existed) which prevented the appearance of a wife in Court and necessitated the suing of her husband, even in cases in which, if a *femme sole*, the wife would have been suable, was swept away by section 20 already referred to, and the repeal of section 20 alone did not revive the law which it had repealed, because section 2 of the Code expressly declared that such repeal "shall not revive any enactment, right, office, privilege, matter, or thing not in force or existing at the commencement of this Ordinance." There is therefore nothing to exclude the operation of the ordinary rule that in order to bind a person by a decree you must make him a party to your action. The first plaintiff is therefore not bound by the decree in case No. 19,170.

The evidence shows that the second plaintiff (the husband) was in action No. 19,170 sued purely as a wrongdoer, irrespectively of ownership or interest in house No. 45. He admitted that his co-defendant, a builder, was at his instance building on premises No. 45, but said that he was "lawfully entitled" so to do, and his answer comprised a denial of the existence of the rights which plaintiff complained he had infringed. In an affidavit filed with his answer, in order to support an application for the dissolution of the interim injunction, the present second plaintiff disclosed that his wife was the owner of house No. 45 by deeds dated September, 1900, and February, 1903 (the cause of action having been laid in August, 1903). The title so disclosed was from a source entirely unconnected with second plaintiff. Plaintiff there took no steps to make the wife a party to the action, although he was seeking to impose a servitude upon her land, but proceeded to trial.

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The learned District Judge has not expressly ruled, nor does his judgment imply, that the former decree against the second plaintiff was *proprio vigore* binding on the first plaintiff, but he thinks " the wife is clearly estopped from now putting forward a plea of this nature. She stood by and allowed her husband to contest the action, tacitly ratifying and confirming his acts; and she cannot now, after the lapse of five years or so, challenge or deny his authority to do what he did." The District Judge has not specified the acts or omissions which he considered to amount to a standing by and a ratification on the part of first plaintiff. There is no evidence that she knew of the pendency of the action 19,170. In 1901 (as nearly as I can fix the date from the evidence) the witness Emmanuel de Silva Wijeratna, first plaintiff's paternal uncle, visited the premises while defendant's intestate was rebuilding his house No. 44. He says he was asked to do so by first plaintiff's stepfather, who was then ill, and who died in January, 1902. This witness was not a predecessor in title of the first plaintiff, who had inherited an undivided one-tenth of the house No. 45 from her father in 1882, and had acquired in 1900 by gift from her mother and brothers seven-tenths more—apparently on her marriage. The remaining two-tenths belonged at that time to her two sisters. First plaintiff was apparently a major, for she executed the deed of donation of 1900. At any rate it is not shown that her stepfather or uncle had any legal right to represent her, or her sisters either. The witness Emmanuel de Silva Wijeratne does not say she knew anything about his action or ratified it. He had no authority directly from her. Even assuming that he acted on her behalf, which is not clear, it is impossible to hold that his conduct estops the first plaintiff. I do not think that it would have estopped the witness himself had he been then the owner of No. 45, and now the plaintiff in this action.

Had I accepted the learned District Judge's finding as to *res judicata* or estoppel, I should have found it difficult to hold that it concluded the whole action, because there remain the sunshades, cornices, and pilasters, &c., which overhang first plaintiff's land, and the defendant cannot justify the maintenance of these on the ground that, in a different place, his old roof had overhung plaintiff's land to the same extent. Unreasonable delay in taking action, however, if found by the Court, might induce it to give damages in lieu of a mandatory injunction. There would have remained also the question of other windows and openings, additional to that dealt with in case No. 19,170, and although one cannot object to a neighbour making openings in his wall and overlooking one's property, yet, in view of defendant's claim of the right of light and air through those openings, plaintiffs would perhaps be entitled to a declaration that no such right exists.

I agree to the order formulated by my brother Middleton.

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This was an action by the first plaintiff, with her husband the second plaintiff, to vindicate title to a house bearing No. 45, First Cross street, Pettah, against the defendant, as administrator of the estate of the late Pillay, owner of the adjoining No. 44, First Cross street, praying (1) that the first plaintiff be decreed the owner of a strip of land marked pink in plan X; (2) that the defendant be ordered to remove all buildings whatsoever from the said land; (3) that the defendant be ordered to cut off and remove certain overhanging roofs, cornices, or mouldings, pilasters, and sunshades projecting over the first plaintiff's land and shown in Y, and to break and remove certain windows and close up certain openings for light and air marked in the same plan; (4) for damages Rs. 4,500 and costs.

The defendant denied the encroachments on the plaintiffs' land alleged in the plaint and the correctness of the plaintiffs' plan Y and the damage alleged, and averred that the projections were erected with the knowledge and consent of the plaintiffs' predecessor in title, and pleaded, as regards one window in the alleged encroaching wall, that the same was an ancient light, and had been so declared in action No. 19,170, D. C., Colombo, between the second plaintiff and the defendant's testator, the judgment in which action was *res judicata* of the present action. The correctness of plaintiffs' plan X was not traversed specifically.

The defendant in an amendment to his answer further averred that the alleged encroaching wall was thirty years old in 1900, and that upon a dispute as to the boundary arising between plaintiffs' predecessors in title and the defendant's intestate in 1900, the present boundary was agreed upon as the correct one, and pleaded prescriptive possession, and further set up prescriptive title to maintain the projections over the plaintiffs' property.

The issues agreed on were as follows :—

(1) Does the decree in D. C., Colombo, 19,170, bar the plaintiffs from maintaining this action and from claiming the right, if any, of raising their building higher ?

(2) Can the defendant claim any right in respect of the said openings which he omitted to claim in the said action; and is such claim barred by section 34 of the Civil Procedure Code ?

(3) Have the plaintiffs been guilty of laches; if so, are they entitled to the 2nd and 3rd prayers of the plaint ?

(4) Did Pillay break down the old partition wall between the two premises and rebuild it so as to encroach on plaintiffs' premises to the extent of 110 feet ?

(5) Did the portion coloured pink in plan X belong to the plaintiffs, and if so, had Pillay and his predecessors in title acquired a title to the same by prescription ?

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(6) Did the plaintiffs and Pillay agree in 1901 that the wall as it now stands is the correct boundary between their premises ?

(7) If they did, are the plaintiffs estopped from denying that the said wall is the correct boundary between their premises and that of Pillay ?

(8) Were the projections A, B, C, D, E, and F over the plaintiffs' premises and the windows and openings marked 1 to 16 erected with the knowledge of and without protest on the part of the plaintiffs' predecessor in title ?

(9) Did the roof of defendant's old building project over the plaintiffs' premises, and to what extent, and did defendant acquire any servitude in respect thereof ?

(10) If so, did the right to maintain such a projection of the roof give the defendant the right to substitute the projections complained of, and has the defendant acquired a prescriptive right so to do ?

(11) Was the first plaintiff prevented from continuing the building of her house by any act on the part of the defendant ?

(12) If so, to what damage is first plaintiff entitled therefor ?

The District Judge found in favour of the defendant on the first issue, and dismissed the plaintiffs' action.

The plaintiffs appealed, and the main question which was raised and argued before us was whether the second plaintiff, the husband of the first, was a privy of the first plaintiff, in view of the judgment in D. C., Colombo, 19,170, so as to estop the plaintiffs' right to bring this action.

It was argued by the Solicitor-General that under the Roman-Dutch Law the wife had lawfully no judicial standing, was in fact a minor under the guardianship of her curator, her husband (*Voet 23, 2, 41; Grotius 1, 5, 22; Voet 5, 1, 18*), and could not appear in Court as a party to an action ; that section 20 of Ordinance No. 15 of 1876 had given her the right to do so, but the repeal of that section by Ordinance No. 2 of 1889, and no substitution of any other enactment in its place, had left the law in the same state as it was before the section was passed.

I cannot believe that this was the effect of that repeal, or that it was the intention of the Legislature that it should be so. The Legislature in passing Ordinance No. 15 of 1876 were emancipating women from the thraldom of the Roman-Dutch principle of the community of property on marriage. The immovable property of a woman married after June 29, 1877, belongs to her " for her separate estate (Ordinance No. 15 of 1876, section 9), and is not liable for the debts or engagements of her husband." She has full power of disposing of it and dealing with such property by any lawful act *inter vivos* with the written consent of her husband, but not otherwise, or by last will without such consent as if she were unmarried,

and her receipts alone are a good discharge for the rents arising from such property. These rights, in my opinion, must of necessity have conferred on the woman a right to appear in Court as a party to an action concerning such immovable property and defending or asserting her rights to her separate estate, but I think in conjunction with her husband, without whose written consent she could not alienate it. This, I think, must therefore have been the view of the Legislature when it repealed section 20.

In suing her husband alone in action No. 19,170, his wife was not, properly speaking, made a party to that action. It is conceivable that the whole case may have been carried on without her knowledge or consent. The doctrine of community of property was abolished, and with it went the theory of partnership involved in it by that doctrine. The husband does not represent the wife in matters concerning her separate immovable estate. He has only a veto on its alienation, which may be over-ruled by the Court if unreasonably imposed, but otherwise no control. I do not think, therefore, he is competent in the eye of the law to represent her in any acts relative to her separate estate unless duly appointed to do so, and in the case of an action she must sue and be sued in conjunction with him. Can he, then, if sued alone in respect of a separate estate, be said to be privy to the wife so as to bind her by a judgment obtained against him in respect of such estate? I think not. He is neither privy in blood, in representation in estate, in respect of contract, or in law. A judgment against a husband suing or defending in right of his wife would be an estoppel in any future action by or against him in respect of the same right, and to that extent he would be a privy in law of his wife, but in my opinion the wife here is not privy in law to the husband so as to be bound by an action brought against the husband alone in respect of her separate estate.

It is further contended that the wife is estopped by her conduct in standing by and allowing the wall to be rebuilt in its present position, and in support of this contention it is urged that the witness Wijeratna was the wife's agent at the time of the dispute about the defendant's wall, and acquiesced in its being rebuilt in its present state.

It is sufficient, I think, to say that the evidence does not warrant the conclusion that Wijeratne was the plaintiff's agent, or even that he acquiesced on her behalf in the rebuilding of the wall where it now stands. The wall may have been rebuilt in its present position so far as the evidence goes without his knowledge or consent. Even if this were proved, it would not prevent an action for damages, though it might stand in the way of the Court's granting a mandatory injunction (*Pillai v. Tambi*[1]).

I think, therefore, the first plaintiff is not estopped from denying that the wall is the correct boundary between her premises and that

[1] (1893) 2 *S. C. R.* 59.

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of Pillay, and maintaining this action. On the principle that the parties are not the same as in No. 19,170, the defendant would not be estopped under the second issue. As our decision on this point involves a new trial as to the rights litigated in action No. 19,170, I do not propose to give any decision on the other issues agreed to, as findings on them may be affected by the evidence and finding on the question of an ancient light and the position of the wall. I would set aside the judgment appealed against and order a new trial, giving the parties leave to avail themselves if before the same Judge, of the evidence already heard.

The costs of the appeal must be borne by the defendant, the other costs will be costs in the cause.

Appeal allowed; case remitted.