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## SAMARAWEERA *v.* JAYAWARDANA.

*D. C., Matara, 2,133.*

*Action for divorce—Vagueness of allegation of misconduct—Judgment of District Judge founded on evidence heard by another District Judge—Irregularity —Courts Ordinance, s. 89.*

**An allegation of misconduct, in an action for divorce, ought to specify the date and place of the act complained of.**

**Though The Courts Ordinance, section 89, provides that in the case of a removal of a judge, while the suit is pending, another judge may take up the case and act on the evidence already recorded, yet such a course should not be followed except where such evidence is of a merely formal character.**

**In a case where the decision depends altogether upon the credit to be given to the plaintiff and his witnesses, it is not proper for a judge who has not heard the plaintiff and his witnesses to decide on their veracity and trustworthiness, when he has the means in his power of judging for himself by calling and examining them.**

THIS was an action for a divorce on the ground of adultery of the first defendant (plaintiff's wife) with the second defendant. No specific act of adultery was charged, but the following averment was made in the plaint:—" Since the last few " months the fifth defendant has been living in adultery with the " second defendant, and she also threatens and abuses the plaintiff, " and has often attempted to strike and injure him." The first defendant pleaded that the plaint was insufficient and vague, in that it did not state the date when, or place where, the alleged acts of misconduct were committed. She denied the general charge of adultery alleged against her, and averred that plaintiff himself was living in adultery with a certain woman.

The case came on for hearing before Mr. G. Woodhouse, who, after recording evidence for the plaintiff, did not call upon the defendants for the defence, as he thought that the evidence adduced was too vague and indefinite to prove adultery. He dismissed the plaintiff's action.

On appeal, the Supreme Court was of opinion that the plaintiff had made out a *primâ facie* case, and that the District Judge ought to have called on the defendants to lead evidence. Their Lordships sent the case back for further trial, with certain directions as to the proof of marriage between the plaintiff and first defendant.

The further trial came on before Mr. W. E. Thorpe, who having heard two witnesses for the plaintiff and the first and

second defendants, delivered judgment dismissing plaintiff's action with costs.

Plaintiff appealed.

*Sampayo*, for appellant.

*Bawa*, for respondent.

BONSER, C.J.—

This is an action for a divorce, and I think there has been a miscarriage of justice. The plaintiff alleged the misconduct complained of in this way:—" That since the last few months the " first defendant, who is the wife, has been living in adultery with " the second defendant, and who also threatens and abuses the " plaintiff and has often attempted to strike him." That is the allegation of misconduct. The defendant took the reasonable objection that this allegation was too vague. It seems to me that the District Judge ought to have given effect to that objection, and to have called upon the plaintiff to specify the particulars as to dates, &c., of the acts of misconduct on which he relied. This was not done, and at the trial certain issues were framed. The first issue is the only one which refers to the alleged adultery, and it is in these terms:—" Whether the first defendant is living in adultery with second defendant." That certainly is a very extraordinary issue, because it makes the right to a divorce depend on the question whether the wife and the co-respondent were living in adultery on the day of trial. However, the parties went to trial on that issue, and after hearing the plaintiff and his witnesses the District Judge dismissed the action. The plaintiff appealed to this Court; and this Court being of opinion that a *primâ facie* case had been made out, sent the case back to the District Court to proceed with the trial. It is quite clear that the attention of this Court was not called to the issues; for if it had been, I am sure the case would not have simply been sent back in the way it was.

When the case got back to the District Court another District Judge was sitting. He, instead of hearing the plaintiff and his witnesses over again so that he might be able to form an opinion as to their veracity, took up the case where it had been left by his predecessor and heard the defence, and then dismissed the action. Now, in taking up the case and acting on the evidence already recorded, the District Judge was within the powers conferred upon him by section 89 of The Courts Ordinance, which expressly provides that this course may be taken in the case of the removal of a judge while the suit is pending; but that ought never to be done except in the case of merely formal

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evidence. In a case such as this, where the decision depends altogether upon the credit to be given to the plaintiff and his witnesses, it is preposterous for a judge who has not heard the plaintiff and his witnesses to decide on their veracity and trustworthiness, when he has the means in his power of judging for himself by calling and examining them.

In my opinion the proceedings should be quashed. The plaintiff should be required to deliver to the defendants a statement of particulars within a fortnight of the record being received by the District Court. If he does not do this, the action will be dismissed. If he does do it, the trial should be had on the issues raised by these particulars. In a case like this I am of opinion that the judge should avail himself of the assistance of assessors, as provided by section 72 of The Courts Ordinance. The costs of appeal will abide the result of the action.

MONCREIFF, J.—

I am of the same opinion. I cannot understand how the District Judge could do justice in this case without hearing all the witnesses, or how a proper decision could be come to upon the issues which were framed.