Present: Mr. Justice Middleton and Mr. Justice Grenier.

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WRIGHT *v.* WRIGHT.

D. C., Kandy, 15,273.

Judicial separation—Jurisdiction—Residence of defendant—Cruelty—English law—Roman-Dutch law—Bodily injury—Incompatibility of temper—Injury to mental feelings—Suit for restitution of conjugal rights—Civil Procedure Code, ss. 9, 596, and 608—*Courts Ordinance (No.* 1 *of* 1889), *ss.* 64 *and* 65—*Proclamation of* 1799—*Charters of* 1801 *and* 1833.

It is competent for a plaintiff to institute an action for divorce in the court within the jurisdiction of which the defendant resides, the provisions of section 608 of the Civil Procedure Code being merely permissive and not imperative.

The matrimonial law applicable to British or European residents in Ceylon is the Roman-Dutch law and not the English law.

Le Mesurier v. Le Mesurier, 1 *N. L. R.* 160, followed.

In order to justify a separation a *mensa et thoro*, on the ground of cruelty, according to the law of Ceylon, the cruelty complained of must, from the display of personal violence or menace accompanying it, be such as to give rise to reasonable apprehension that life, limb, or health would be endangered to the complaining party, if separation were not decreed.

Mere incompatibility of temper or disposition or inability to live together or injury to feelings, where no bodily harm is threatened, would not justify a decree for separation.

Evans v. Evans (1790) 1 Hag. Con., 35 p., 115 followed.

A suit for restitution of conjugal rights is not maintainable in Ceylon.

Andres v. Bastiana, D. C., Galle, 17,665 (*Ram.* 1860-62, *p.* 133) followed.

APPEAL from a judgment of the District Court of Kandy decreeing a separation *a mensa et thoro*.

The facts and arguments are fully stated in the judgment of Middleton J.

Walter Pereira (*Elliott* with him), for defendant, appellant.

Dornhorst, K.C. (*Van Langenberg* with him), for plaintiff, respondent.

Cur. adv. vult.

9th November, 1903. MIDDLETON J.—

This is an appeal from a judgment of the Acting District Judge of Kandy granting a decree of separation *a mensa et thoro* in favour of the plaintiff against the defendant, her husband, on the ground of cruelty and desertion, and decreeing alimony. The plaint in paragraph 3 sets out particulars of certain specific incidents relied

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on by the plaintiff as founding her claim for relief from the court on the ground of cruelty and malicious desertion, and prays for separation, the realization and division of the matrimonial estate, or in the alternative for an annual allowance as alimony.

The defendant in his answer denied the allegation of the plaintiff as to cruelty and desertion and purported to explain or deny the incidents relied on by the plaintiff, and, further alleging that the plaintiff had maliciously deserted the defendant, prayed in reconvention for the dismissal of the plaintiff's action, and that plaintiff be decreed to resume cohabitation with the defendant.

A replication on the part of the plaintiff was filed purporting to explain or deny certain of the facts alleged in the answer and averring, as matter of law, that the courts in Ceylon had no power, authority, or jurisdiction to grant to the defendant his prayer in reconvention, and further that defendant, having made no averment of not having committed adultery during his desertion of the plaintiff, was not entitled to a restitution of conjugal rghts.

Twelve issues of facts were settled in addition to one of law as to the jurisdiction of the court of Kandy to hear the case.

The question of jurisdiction was the first point raised before us by the appellant's counsel, who argued from the plaintiff's averment in the plaint that she lived in Colombo, and a proper construction of section 608 of the Civil Procedure Code, which alone governed the question, read by the light of a judgment of Mr. Justice Browne reported in 3 *S.C.R.* 12, that the plaintiff could only proceed by plaint in the district court of Colombo and not in the court of the district within which the defendant was resident.

The appellant's counsel subsequently referred to section 518 of the Code in regard to testamentary matters as supporting his contention.

Now section 64 of "The Courts Ordinance, 1889," confers jurisdiction on the District Court in matrimonial matters.

Section 596 of the Code (Civil Procedure) of 1889 lays down the procedure to be followed in actions for separation *a mensa et thoro*, which are to be by plaint and answer, and subject to the rules and practice the Civil Procedure Code provided with respect to plaints and answers in ordinary civil actions, so far as the same be made applicable, and the procedure generally in such matrimonial cases (subject to the provision of chapter 42, which contains section 596) is to follow the procedure set out in the Code with respect to ordinary civil actions.

Section 65 of "The Courts Ordinance" gives jurisdiction to district courts to determine all actions in which a party defendant shall be resident within the district within which such actions shall be brought.

Section 9 of the Civil Procedure Code enacts that, subject to the pecuniary or other limitations prescribed by any law, actions shall be instituted in the court within the local limits of the jurisdiction of which a party defendant resides.

Section 608 uses the word " may " when giving husband or wife a right to file a plaint in the district court within the local limits of the jurisdiction of which he or she resides.

The view I take of the matter, therefore, is that such an action may from the sections I have quoted be instituted within the jurisdiction of the court within which the defendant resides; that there is no pecuniary or any other limitation prescibed by law affecting such actions other than the terms of section 608, which permit them to be brought within the jurisdiction of which the injured husband or wife resides.

It seems to me that if section 608 bore the interpretation put on it by counsel for the plaintiff, *i.e.*, that it was not competent to bring such an action in the court of the defendant's residence, the word "shall" would have been substituted for " may," as was done in section 584 as regards minors, and the fact that it is used here in a case where the procedure is by plaint and answer in the form of an action between plaintiff and defendant clearly indicates its permissive significance.

As regards cases under section 518, an executor may disclaim and need not apply for probate, and the procedure is not by way of an action as against any particular person, but a petition by way of summary procedure until there is opposition by caveat or otherwise.

I am of opinion, therefore, that the District Judge rightly decided that these proceedings could be taken in the District Court of Kandy, which is the court within the limits of the jurisdiction of which the defendant resides.

It is not necessary under these circumstances to consider whether the residence of the plaintiff is that of her husband, as to which I doubt if the arguments used by counsel for the respondent as to domicile are apposite.

We have now to consider what is the law applicable to the case before us, whether English or Roman-Dutch; and if the latter, what is the soundest authority and upon what principles that authority should be applied.

The learned District Judge has held that English law applies, and in doing so has not overlooked the decision of His Majesty's Privy Council on the 28th June, 1895, in the case of *Le Mesurier v. Le Mesurier* reported in 1 *N.L.R.* 160, but has deemed it his duty to enter into a variety of reasons founded on his personal research amongst the legislation of the Island to show that their Lordships were mistaken in the view they took when they said: " But it does not appear to their Lordships to admit of doubt, that as soon as

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these enactments (*i.e.*, of the Royal Charter of 1801) were swept away by the legislation of 1833 (Charter) the Proclamation (*i.e.*, of 1799) was restored to its original force, and the matrimonial law applicable to British or European residents in Ceylon again became the Roman-Dutch law which had prevailed in the colony before the annexation. ''

I shall not attempt to follow the learned District Judge in his reasons and arguments for holding the contrary, but will be content to adopt the ruling laid down by the supreme tribunal of the Empire so far as the colonies are concerned, and to conform to what is unquestionably the law, so long as that judgment remains unquestioned by the august tribunal which pronounced it.

As authorities on the Roman-Dutch law we have been referred by counsel for the appellant to Voet and Van Leeuwen and by counsel for the respondent to Van der Linden and a German jurist named Leyser, the author of *Meditationes ad Pandectas* published in 1772. Voet at *s.* 17, *tit.* 2, *bk. XXIV.*, says: '' *Plane, quemadmodum ob nimiam sevitiam atque duritiem conjugis in conjugem, aut rixas diffensionesque perpetuas aut imminens alteri ab altero vitæ periculum cohabitatio conjugum ad unius petitionem authoritate publica dirimi, adeoque separatio thoro et mensa fieri potest manente interim illæso ipso matrimonii vinculo ac interdictis utrique aliis nuptiis.*''

Van Leeuwen (*Censura Forensis, lib.* 1 *cap. XV., ss.* 17 *and* 18): ''*Quæ cum tantum sit separatio temporalis, sub perpetua spe reconciliationis intentata, facilius admittitur quam divortium, et ut plurimum decernitur ab utriusque vel alter-utrius sævitiam, machinationem mortis, continuas rixas, et insidias. Eaque est communis omnium Canonistarum opinio. Ut si propter nimiam sævitiam, aut mores intolerabiles, alteri conjugum trepidanti, sufficiens securitas provideri non possit, quantum ad cohabitationem matrimonium dissolvatur.*''

Van der Linden, as translated and cited by Henry, says, p. 89; '' Besides the divorce there is also with us a kind of provisional separation introduced from the Canon law termed a separation of bed, board, cohabitation, and goods.''

'' This can no more than a divorce, be effected by the mere private agreement of the parties. Lawful reasons must be set forth in the application tending to show that the continuing to live together is *dangerous* or at least *insupportable.*''

There is a note also presumably by the author which indicates that such separations had been granted by the courts for too trivial reasons, and an observation to the like effect of the great jurist Bynkershoek is quoted.

Now I think it may be gathered at least from Van Leeuwen and Van der Linden that the fundamental basis of action on the part of

canonists and courts was the danger to life which would accrue if the cohabitation were not dissundered and the parties ordered to live apart.

In Voet the grounds for separation are put disjunctively, and danger to life is an alternative ground to perpetual quarrels and dissensions, excessive cruelty, and harshness.

In considering the grounds laid down by Voet and Van Leeuwen a court must of necessity lay down some gauge of the consequences accruing from these grounds which would justify its intervention.

We have been asked by counsel for the appellant to apply the English rulings as to cruelty in determining to what extent the reasons given in the Roman-Dutch authorities for granting separation must preponderate to permit the courts here to act.

On the other hand, counsel for the respondent has begged us to employ the more modern doctrines enunciated in the judgments of Lord Halsbury and the minority of the House of Lords in *Russell v. Russell* (1), and to hold practically that incompatibility of temper and disposition was sufficient ground on which to found a decree for separation under the Roman-Dutch law.

I cannot think that the Roman-Dutch law, apparently derived from the canonists, who looked upon marriage as an indissoluble sacrament, contemplated that even its less weighty reasons for separation, such as perpetual quarrels and dissensions and intolerable habits, should be construed as bearing the meaning contended for by the learned counsel for the respondent.

I incline to think their view must have been that expressed by Lord Stowell in *Evans v. Evans* (2), that in such matters it is the duty of the courts to act strictly, and not to allow legally married persons to be separated merely on the ground that they cannot live together in harmony.

At the time when Voet and Van Leeuwen wrote sensitiveness of disposition and neurotic tendencies had probably not reached that stage in human nature they have attained at the present age, and it is highly improbable that those jurists had them under consideration to any extent, when enunciating the crude and simple grounds upon which they deemed the courts had a right to act. There is no indication that they had in view what merely would be mental feelings, but rather actions accompanied by personal evidence or the menace of it. No decisions in the Roman-Dutch law have been quoted to us to show that there has been any modification of ideas amongst the Dutch jurists founded on these reasons, since their promulgation, and we are left as best we can to give a construction to them consistent with right reason and sound sense in the present day.

(1) (1897) *A. C.* 395. (2) (1790) 1 *Hag. Con.*, 35, *p.* 115.

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It is true that counsel for the respondent referred to the German jurist Leyzer as modifying the original stricter notions of the canonists, but I am not sure of the weight of his authority. Leaning, therefore, as I do on the great authority and learning of Lord Stowell, I would hold that the excessive cruelty and harshness must, from the display of personal violence or menace accompanying it at least, be such as to give rise to reasonable apprehension that life, limb, or health would be endangered to the complaining party, if separation were not decreed. It may be said that in holding this I am practically enunciating what is the English law on the subject, but that law is, I have no doubt, derived from the same fount as the Roman-Dutch law, and my construction of the latter in accordance with the principles of an English jurist like Lord Stowell, when there is no authority to the contrary, is, I take leave to think, in harmony with the principles followed by the courts of the Island and conformable to the interests of its inhabitants.

Now let us look at the facts of the case.

The particular incidents on which the plaint is founded are set out in paragraph 3 under alphabetical headings, and we start with the concession made by counsel for the plaintiff that he does not attach much importance to the incidents occurring during the first part of the parties' married life at Mousagalla.

The parties were married on the 19th February, 1895, and lived together at Mousagalla estate till 1898, when the plaintiff proceeded to Ireland, returning to Colombo on the 26th August, 1899. In the interval the defendant had purchased another estate called Galpela, and to this estate the plaintiff and defendant proceeded on the 29th August, 1899.

On the 13th November, 1899, the plaintiff went to her parents in Colombo, and on the 16th November returned to Galpela estate, remaining there until the 27th November, 1899, when she again returned to her parents in Colombo and had never resided with her husband since.

In judging of the conduct of the defendant it is very necessary for the Court to have some indication as to the temperament and mental character of the plaintiff and defendant.

We have it from the District Judge that the plaintiff is a lady of highly sensitive temperament with a tendency to shrink from the expression of any symptoms of wounded feeling, and devoted to music; and the defendant admits, his counsel says, that he may sometimes have hurt her feelings without being aware of it. The defendant would appear to be a man popular with his own sex, jocular, and fond of games and outdoor life.

Experience teaches us that hypersensitive people are only too apt to take offence, and are often a source of discomfort to themselves and of irritation to their friends and relations. Again, the pachydermatous joker not infrequently forgets that other people have feelings.

As regards the statements put into the defendant's mouth by the plaintiff under headings (*a*) and (*b*), they are, I presume, selected as the two worst specimens, during the life at Mousagalla, of what plaintiff deems to be the cruel course of conduct pursued towards her by the plaintiff.

The defendant (pp. 127 and 130) denies uttering them, and as regards the latter part of (*b*) the defendant's denial is in a measure fortified by the evidence of Mr. Powell (p. 108); I do not think therefore that they are proved.

As regards the other incidents to which the plaintiff deposes as having occurred during the two and a half years of their life at Mousagalla, they appear to be of a trivial character, and, at the worst, indicate no more than the bickerings and coldness which too often arise when people who are unsuited to each other find they have taken the irrevocable step which involves their association in practically every action of their lives.

There is some attempt on the part of plaintiff's counsel to attribute the plaintiff's visit to Ireland to a poor state of health arising from the effect of plaintiff's conduct and indifference to her ; but plaintiff's evidence that her health was very good (p. 53), but that she caught a chill, became very ill, and was obliged to go to England, where an operation upon her was contemplated, seems to me to obviate the necessity of considering this point.

What we have to consider then is the defendant's conduct to the plaintiff between the 26th August, 1899, and the 27th November, 1899. It begins with plaintiff's reception on the steamer by defendant, when he told her she "looked ghastly," and after breakfast went to play croquet with a friend.

I think we may leave these incidents out of our consideration as too trivial for comment, especially as plaintiff says (p. 55) she never complained to defendant or any one else about them.

The same observation applies to the remark about the drooping eye, which is elucidated by Mr. Powell (p. 106), and the reading at meals.

As regards defendant's remarks in respect to the book Vendetta and the elements essential to a successful divorce suit, he admits (p. 136) that he may have made observations in joke with regard to the novel Vendetta and (p. 132) have spoken, but not in a nasty way, as regards getting a divorce for incompatibility of temper. These

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observations may not have been in very good taste under the circumstances, and considering, perhaps, the sensitive temperament of the plaintiff, ought never to have been uttered; but at the worst they only show want of good feeling and not excessive cruelty or harshness.

Then (p. 64) there is the incident of the revolver ; I have carefully read the accounts given of the matter by both parties, and I cannot help thinking there is perhaps an unconscious exaggeration on the part of the plaintiff.

If she had believed that defendant was pointing the revolver intentionally at her either with a view to express feelings of dislike towards her or to intimidate her, she surely would have taxed him with it there and then or would have communicated her fears to her parents, or left the house at once.

My view of the matter is, that defendant may have been looking at the revolver, and have clicked the trigger in the course of doing so, which startled the plaintiff for the moment.

According to plaintiff (p. 86) she and the defendant were sitting on the same sofa at the time, and it seems unlikely that the occurrence took place quite as described by the plaintiff (p. 64), considering plaintiff took no further apparent notice of the incident and remained in the house some days afterwards. This incident is alleged to have occurred on the 18th November, and amongst the letters put in evidence is one, dated 19th November, written by plaintiff to her father, in which no mention is made of the revolver incident.

At that time also plaintiff, if her letters are read carefully, was in a state of mental antagonism to the defendant, which would have made her only too ready to avail herself of any course of offence.

We now come to the visit to Darawela, and the incident occurring on the night of 10th November, 1899, which in my opinion is the *fons et origo* of these proceedings.

On that night the defendant appears to have paid more attention to a young lady who was present at the dance than the plaintiff deemed right, and a quarrel ensued after their retirement to rest, during which it would appear the defendant did in fact say he loved the young lady.

The defendant explains this by saying he eventually admitted it to stop the plaintiff's further argument on the subject, although he did not really mean that he did love her (p. 139).

From the incidents occurring on the night of 10th November the plaintiff in her evidence before the district court evolved, and for the first time asserted, a charge of adultery against the defendant and the young lady in question.

No such charge appeared on the particulars in the plaint, and there is in my opinion absolutely nothing beyond the plaintiff's statement

on the matter, uncorroborated by any evidence whatever, that she entertained any such idea with regard to the defendant until she apparently startled her own legal advisers and every one connected with the case by making this serious accusation upon her examination in chief.

This is a charge which in my opinion should have never been made under these circumstances; it was a matter not in issue in the case, and ought not to have been alleged by the plaintiff, and strictly speaking should not have been inquired into but unreservedly withdrawn.

It is difficult, however to say, that it should have been allowed to remain uncontradicted, considering the imputation laid upon a lady living in a small English community in Ceylon who had become engaged four days after the 10th November, 1899, and was married in the following May, and who would naturally be anxious to repudiate such a charge. Counsel at our request did not go into this part of the case during the argument, but I have read the evidence given before the District Judge, and I would wish to say that I entirely acquit the lady in question of the imputation on her character, and would further say that the making of such an accusation at such a stage in the case was in the highest degree wrong and improper, and has a savour of malice which strongly reflects the feelings of an intensely jealous woman towards the " little beast of a B " about whom plaintiff wrote to her mother in letter A 2.

To return to what followed on the night of 10th November, the plaintiff wrote a letter to her mother saying she was heartbroken at the defendant's acknowledgment to her, and returned to Colombo on the 13th, and plaintiff's father very naturally and rightly wrote the letter marked A 3 on the 14th November.

The defendant on the 15th replied in letter A 4, admitting that he liked the girl, but excusing himself on the ground that other men had been placed in a similar position, and acknowledging very rightly that the plaintiff was blameless, and suggesting that, if she did not care to live with him, other arrangements might be made, but that if she did care to go on living with him he would be as good to her as possible.

The defendant says in cross-examination that he ought to have told Mr. Browne he was making an unfounded charge, and defendant's conduct in allowing his wife and her father to remain under the misapprehension that he was in love with the young lady, although that was not the case, was unfeeling in the extreme.

It would however appear that defendant knew he was in the wrong at this stage, but was prepared to act rightly, but not to disclaim what he had written to Mr. Browne.

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On the 15th the plaintiff returned to the estate, but was not met at the station in the way she wished, and in her letter of the 17th November to her mother she mentions that the defendant is going out snipe-shooting with some one on Saturday week, and somewhat reproaches herself for having failed to be a good wife to him.

In her letter of the 19th November, 1899, to her father the plaintiff writes that " if I go home to England and leave Tom, nothing will induce me ever to write to him, or return to him, so help me God; " and she is evidently preparing to do so. The incident connected with the Tamil children described in plaintiff's letter to her father of 23rd November appears to point to a mind diseased by jealousy even to the thought of battery with a croquet mallet.

There is nothing in those or any other following letters that are written by the plaintiff up to her departure from the Island to show that there were any quarrels between plaintiff and defendant or any ill-treatment of her on his part.

The state of feeling on her part appears to have been coldness, and on his part indifference.

On the 23rd November she writes to her mother that she does not " care an atom for him any longer, and only hopes that he be made to give her a fair allowance, and that he cannot stop supporting her in two or three years' time; " that she eats and drinks milk, cocoa, and porridge all day " and that " Tom is so cursedly dour."

It seems that from 16th November to 25th November the plaintiff and defendant occupied the same bedroom, but she says that from October, 1899, at his request " we had nothing to do with each other."

On the contrary, he says that on the night she returned, *i.e.*, the 16th November, marital relations were renewed, and the fact of their occupying the same room raises a presumption in favour of the defendant's assertion.

There is some suggestion in a letter by the plaintiff to her mother, that defendant appeared anxious to compromise her with a Mr. Tothill, but there appears to be nothing to support this. The defendant appears on the 25th November to have gone snipe-shooting, as he had previously told the plaintiff, and on the 27th the plaintiff left the defendant's house never to return, the reason for doing so apparently being that plaintiff was left alone on the estate.

But plaintiff certainly knew on the 17th that defendant contemplated this expedition, and it might have been arranged in good time for some one to stay with her.

It is alleged in letters written by plaintiff's father to the defendant that the plaintiff was " medically dying by inches " and had lost a stone in weight since her return to Ceylon.

This apparently did not occur until after September, 1899, when she appears to have increased in weight, if defendant is correct as to his weight at the factory (p. 177).

It may be of course that plaintiff did as she says (p. 71) lose weight, and that loss may have been the result of mental worry arising from the state of feeling which had arisen between her and the defendant. But even if that physical shrinking which had affected the plaintiff's health, of which there is no evidence other than statements in her father's letters, was produced by defendant's coldness or indifference working on a highly sensitive and jealous mind without personal violence or words of menace, I do not consider that, upon the standard I have imposed for my guidance, this would be sufficient ground for granting a separation.

The plaintiff herself said in cross-examination (p. 80): "There were no quarrels, no rows. The first row took place on the night of the 10th November; that was a very quiet row."

The worst that can be alleged against the defendant was his conduct in allowing his wife to assume that he had an affection for the young lady who was the cause of the quarrel on the night of 10th November.

If he really loved her it was possibly more his misfortune than his fault, but if, although he only wrote that he liked her, he permitted his wife to deceive herself, thinking he loved the girl, regardless of the fact that it would be likely to gall and wound the feelings of a sensitive woman to whom he owed all his affection, it cannot be doubted that such action was unfeeling and callous and morally unjustifiable, although I doubt if it amounted to cruelty.

The defendant (p. 163) says he was obstinate and would not give in because he thought his wife had no cause for her conduct, but his unwillingness to retract what he had written to plaintiff's father on 15th November (AA), followed by his apparent indifference on her return to the estate, no doubt led up to the coldness of feeling and outward and actual indifference on the part of the plaintiff which culminated in her leaving his roof on the 27th November. I cannot however say this is conduct which is contemplated as a cause for a separation in the authorities quoted from the Roman-Dutch law.

There is no physical cruelty or harshness, no perpetual quarrels or dissensions, nothing which threatens danger to life, no intolerable habits, no plotting the death of a spouse, but only at the worst a wrongly obstinate mind maintaining a condition of things it knows to be untrue, and inducing thereby on its sensitive marital counterpart a feeling of coldness and indifference culminating in mutual dislike.

After the plaintiff left the estate on the 27th November various letters passed between defendant and Mr. and Mrs. Browne, but in

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response to their efforts to induce reconciliation the defendant replied it would be absolutely useless for the plaintiff and him to live together, finally replying it was " impossible," and that " his love for her was dead."

However, on the 9th December defendant wrote to plaintiff that although their love for each other was dead, there was always a home for her at Galpela.

The plaintiff wrote a final letter to the defendant on 6th January, 1900, suggesting an allowance of £300 a year, and the same month the defendant went to South Africa to serve in the war then proceeding there, making an allowance of Rs. 150 per month to his wife during his absence in addition to the interest on her settlement money.

It would not have been possible for plaintiff to remain at Galpela alone while defendant was in South Africa, but it seems to me that by mutual concession some arrangement might have been made for plaintiff's residence there with convenience to herself and to her relations.

He appears to have had a personal interview with her before leaving, but not to have acquainted her with his intention of going before he decided to do so.

During his stay in South Africa no correspondence took place between the parties, and on his return to Ceylon in February, 1901, defendant says he endeavoured to induce plaintiff to return to him without success, and so he stopped the allowance.

The plaintiff however stated that, at the interview before leaving for South Africa, the defendant intimated that all was over as regards their living together on his return.

Shortly before these proceedings were instituted the defendant instructed his proctor to threaten proceedings, and the proctor did threaten dissolution, on what grounds I fail to see.

The District Judge has founded his decree on the ground of malicious desertion for two years, but no attempt was made before us to support his judgment on that ground, and I think it can hardly be contended that there was such desertion on the part of the defendant, who was absent from Ceylon in the service of his country. The only ground on which the judgment was really supported was that the evidence showed such incompatibility of temper between the parties that the court ought to grant relief.

The District Judge, however, found in paragraph 64 of his judgment that defendant had so treated his wife and manifested his feelings towards her as to have injured her health, and that his acts amounted to cruelty.

Apart from the question as to whether the facts the learned Judge relied on were proved to have occurred in the way he conceives in his

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judgment, the plaintiff herself does not, so far as I can see, state anywhere in her evidence, as the judge alleges in paragraph 60 of his judgment, that defendant's course of harsh, irritating conduct had caused her such pain and distress as to endanger her health, nor is there any proof to this latter effect on the record.

The majority of the Court of Appeal in *Russell v. Russel* laid it down that there must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty, and to that definition Lord Herschell, who headed the majority in the House of Lords, affirming the principles hitherto followed in the matrimonial Courts as regards cruelty, practically acceded. In my opinion it was not proved that the defendant's course of conduct would be dangerous to the life, limb, or the bodily or mental health of the plaintiff, or even that it would raise a reasonable apprehension of such danger; nor do I think the facts here would fall within the spirit of the ruling in *Kelly v. Kelly* (1), a case which goes very far. All that was proved was that the plaintiff may have lost weight, and she herself said that her "life was a hell"—a state of mind that may have been partly produced by her ultra-sensitiveness of nature and jealousy.

In my opinion, therefore, the judgment of the court below cannot be sustained either on the application of English or Roman-Dutch law, and the appeal must therefore be allowed and the judgment of the District Court set aside with costs of the appeal.

As regards the claims in reconvention it was laid down by a Full Court of this Island in a case reported in *Ramanathan*, 1860-1862, p. 133, that a suit for restitution of conjugal rights is not maintainable in Ceylon.

The defendant's claim in reconvention must therefore be also dismissed. Under the circumstances I consider that each party should pay his and her own costs in the District Court.

GRENIER, A. J.—I am of the same opinion.

(1) *L. R.* 2 *P. and D.* 59.