1932 *Present :* **Garvin S.P.J. and Maartensz A.J.**

GOONEWARDENE *v.* WICKREMASINGHE

154—D. C. (Inty.) Galle, 29,292

Divorce—Evidence of malicious desertion—Intention to repudiate marriage state—Sufficiency of proof.

In an action for divorce on the ground of malicious desertion, evidence of desertion must be of such a character as would justify the inference that the spouse, who is alleged to have deserted the other, did so deliberately and with the intention of repudiating the marriage tie.

APPEAL from a judgment of the District Judge of Galle.

Rajapakse, for defendant, appellant.

H. V. Perera, for plaintiff, respondent.

February 5, 1932. GARVIN S.P.J.—

This is an appeal by a wife from a decree granting a divorce *a vinculo matrimonii* to her husband. The ground upon which it was sought to obtain a dissolution of this marriage was that the defendant had maliciously deserted her husband. The answer denied the averments in the plaint and further pleaded that the defendant had been ill for some-time and remained at her parents' house with her husband's consent. She further pleaded that she was "now somewhat well and quite prepared to go with the plaintiff". At the trial a further offer appears to have been made by or on behalf of the defendant to return to her husband. This the plaintiff rejected, giving as his reason that he thought it was not sincere.

The parties were married on June 12, 1924. At the time the petitioner was employed in the General Post Office, Colombo. After a short stay at Matara, which was the home of the wife, they went to Colombo where they lived in one house with the petitioner's brother. In October, 1924, the petitioner was transferred to Matara where he lived with his wife for about a year. He then appears to have been transferred to Kalutara. In the year 1926 a child was born to the parties at the respondent's parents' house and the petitioner says that after the birth of the child his wife did not return to him and continued to live with her parents. He says she refused to go to Kalutara and gave as her reason that she was not willing to live with him. He did not, however, treat this as an act of malicious desertion, and in view of the evidence to which I shall presently draw attention his failure to do so would seem to be attributable to the fact that he knew his wife's condition and thought that it was best under the circumstances that she should remain with her parents. The petitioner was transferred to Colombo in April, 1929, and he appears to have rented a house in November, 1929. His wife returned to him and they lived together as man and wife with their child. The petitioner says nothing of their life together, presumably because there was nothing special which called for comment or mention. On June 16, 1930, he says that when he returned from office he had his dinner and then stepped out of the house. He noticed his wife standing leaning against a pillar. She had declined to partake of the meal for apparently no reason whatsoever. While he was outside he heard the cry of his child and he entered the house and asked what the matter was. Then, to use his own words "Defendant jumped at me (him) and bit my (his) hand. I understood that the child had been asking the defendant to take her dinner. She had been pushing the child. I understood that if not for the servant woman the child would have been injured". The next day he says the respondent wanted to return to her parents' house and he immediately made arrangements to take her there and did so. Nothing appears to have transpired from June 17 till August 9, when he says he went to Matara and invited her

to return and that she refused to come. He says that he then wrote her a letter which has not been produced to which she replied by the letter P 2, the terms of which are as follows :—" Letter sent was to hand. I cannot come over there leaving my parents' house. Therefore, it is better for Mahatmaya to get made other arrangements. I am, &c." He says that he then sent his mother to ask her to come back and as she refused he instituted this action on November 20, 1930.

The petitioner is apparently wholly unable to account for this sudden and extraordinary outburst on the part of his wife which he says took place on June 16, 1930. She said nothing in explanation and he evidently had done nothing to provoke her nor had the child. There is no evidence that this lady was given to outbursts of this description or to commit acts of violence such as she appears to have committed on this occasion. That the incident did occur is proved by a number of other witnesses.

Unfortunately in this case we have not had the advantage of hearing the respondent. She appears to have been called into the witness box twice in the course of this trial and on each occasion the District Judge says that she would not take the affirmation and would not speak ; and the District Judge's own impression formed after having watched her throughout the course of this trial is that she appeared to be mentally defective. He says that he first thought that she was shamming but later he formed a definite impression to the contrary. A serious doubt therefore arises as to whether in any event these proceedings can be permitted to stand, but it is unnecessary to consider that aspect of the matter further for the reasons which will presently appear.

Now there is a considerable body of evidence in this case that this woman has had mental trouble and that her condition becomes graver and more acute whenever she is pregnant. She has been treated by a priest who is said to be a mental specialist. Another Veda Aratchy says that he treated her in 1926 at a time when she was with child and was " a little off her head ". Finally, Dr. Paul Perera states that he treated her in December, 1928, and February, 1929, for mental trouble. The prescription he gave her, he says, was for neurasthenia and a general run down condition. Having observed the respondent in Court he expressed the opinion that she seemed to be melancholic. There is in addition the evidence of one Martin Wickremasinghe, a witness to whose evidence the learned District Judge attaches considerable weight, who is a relative of the respondent's father, and who for some time lived at Borella close to the petitioner's house. He was apparently on friendly terms with them and he says that the respondent was of unsound mind, stating definitely that she was mad, and adding " occasionally she appeared to be sane ". All this evidence is strongly corroborative of the evidence of the respondent's father, who says that his daughter was of unsound mind and that the petitioner was aware of it. He says he had her treated and stated that she was worse during her pregnancy. His evidence affords an explanation of her lengthy residence with her parents after the birth of her first child and continuing till November, 1929, when she returned to her husband. It is a far more probable explanation than that which the petitioner gives, namely, that she refused without reason to return to him.

Now, it is significant that at the time of this outburst on June 16, 1930, the respondent must have been pregnant, because she gave birth to a child, which, the petitioner admits, was his in March, 1931. If, as the father says, there was a marked tendency for mental disturbance to manifest itself at this period, one has a perfectly natural explanation of this amazing outburst for which no other explanation has been offered.

The father's story is that the respondent was brought to his house by the petitioner and that she remained there with him till the child was born and that it was only after that event that she gradually began to improve. Now, there is no doubt that the learned District Judge was himself inclined to take the view that this story was substantially true. There are certain minor points on which the respondent's father on the one side and the petitioner's mother on the other side come into conflict. The learned District Judge says that both parties have strayed a little from the truth in certain matters. But, upon the whole; he seems to have accepted the story of the father of the respondent, and, for my own part, I can see no reason, in view of the large amount of corroboration which exists in this case, for taking any other view. There is here a good deal of evidence, which justifies the inference that about the middle of June, 1930, this unfortunate lady had a relapse and that her mental condition has continued to be bad ever since. It may well be as the learned District Judge says that there might have been a lucid interval and this may possibly account for the apparently rational character of the letter P 2. That letter is certainly capable of the explanation that it was written by the woman at a time of intense depression proceeding from a consciousness of her own condition.

The question we have to ask ourselves is whether in this state of the evidence it is possible to hold that the petitioner has succeeded in establishing that there was in this case desertion and that the desertion was malicious.

It is unnecessary to enter upon any definition of what exactly is meant by malicious desertion, but this at least is clear, that it must be of such a character as would justify the inference that the spouse who is alleged to have deserted the other did so deliberately and with the intention of repudiating the marriage state. With the exception of the letter P 2 and the evidence of the petitioner's mother as to the refusal of the respondent to return to her husband, there is nothing to support the case for the petitioner. On the other hand there is this large volume of evidence which points to the conclusion that this lady has during the whole of this period between the middle of June, 1930, and the trial of this case, and for a considerable period prior thereto terminating about November, 1929, been of unsound mind. Apart from the direct evidence of the father upon the point there are indications in certain of the letters written by the petitioner himself that he was aware of her condition. It seems to me that in these circumstances it was impossible to treat this as desertion at all, and that if the evidence of the father is to be believed the presence of his daughter in his house which commenced

when the petitioner himself brought her there continued for no other reason than that she was not in a fit condition to return. In my opinion the petitioner has failed to establish his plea of malicious desertion.

The judgment under appeal must, therefore, be set aside, and the plaintiff's action dismissed with costs in both Courts.

MAARTENSZ A.J.—I agree.

Set aside.