Present: De Sampayo J. and Dias A.J. 1920.

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389—D. C. Colombo, 50,344.

Judicial separation—Grounds for—Cruelty.

It is not necessary to enable a wife to get a decree of judicial separation that there must be proof of cruelty or harshness or display of personal violence as to give rise to reasonable apprehension that life, mind, or health would be endangered to plaintiff if separation were not decreed.

Among other grounds, continuous quarrels and dissensions, or other equally valid reasons, which render the living together of the spouses insupportable, will justify a judicial separation. Although a wife or husband may reasonably be expected to bear with occasional outbursts of illtemper, yet occasional assaults, however slight, accompanied by habitual intemperance, will make co-habitation insupportable.

THE facts appear from the following judgment of the District Judge (W. Wadsworth, Esq.):—

The parties were married in September, 1914, at St. Paul's Church, Pettah. He was a Protestant and she a Roman Catholic. Defendant's parents did not consent to the marriage, and the marriage took place very quietly, there being no invitations, no reception, and not even a wedding cake.

The defendant took his wife to her sister's house. The third day after the marriage there was a wedding breakfast at defendant's sister's house, when a few close relations sat at table. The plaintiff noticed defendant paying attentions to her sister, grew perhaps jealous, and in a rage, presumably due to the influence of liquor imbibed, flung her plate at defendant and left the breakfast table. The others also dispersed.

This was the first incident which culminated later in the distrust of the defendant by plaintiff, and that not without good reason. On the other hand, plaintiff received on the marriage day a gold wristlet watch from one Cyril Fernando with his name engraved on it. Defendant took objection to it and wanted the name to be erased or the watch returned. The defendant and plaintiff thus appear to have started life together with mutual distrust and a lurking suspicion. These suspicions and distrust had grown more and more, and defendant appears to have objected to Cyril Fernando visiting her, and to plaintiff going out of the house without his knowledge, and on the other hand, plaintiff viewed with suspicion defendant being away from the house. It may be noted that defendant is a Railway Guard, who was obliged in the course of his duties to be absent from home for some days continuously.

The parties were also addicted to drink, and whether they took liquor in small or large quantities, it is not surprising that they indulged in

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quarrels, and iff exchange of words, where the lady appears to have got the better of the two, as defendant says for every word of his she replied with ten.

The defendant on returning from his duty found her away from the house, neglectful of her duties and care towards him. But still they pulled together for some time both in Colombo and at Moratuwa, where the defendant was transferred on duty.

On their return from Moratuwa, the plaintiff would not go and live with defendant, as before, in his sister's house, but when defendant fell ill she went there and continued to live there till April 9, 1917.

In about June, 1916, the defendant met a nurse who had travelled by train. This nurse appears to have taken a fancy to the defendant and wrote amorous letters to him. The defendant did not consider it improper to reply to these letters.

The original charge against him was that defendant committed adultery with this woman. There is no proof of this. But the letters which were found in defendant's trunk, and admitted by him to have been received from this woman, show that the defendant was not faithful to his wife.

On April 9, when defendant left the house for a game of cricket, plaintiff took the keys of defendant from his pocket, went to the Railway Office, where defendant kept his trunk, stealthily opened it, found the letters therein, took them, went back to the house, took her things, and left defendant's roof.

It is not difficult to understand a wife taking the step of leaving the husband's roof on discovery of such letters. However reprehensible her conduct is in the taking of the letters, once she saw these letters, her first impulse would have been to leave the husband, who had, as appeared to her, diverted his attentions, and perhaps affection, to another woman.

This is, in my opinion, the real cause of the plaintiff leaving the defendant.

There was an allegation of cruelty against each other. I do not believe that there was actual physical cruelty by either. I do not believe the evidence of the two women or of the boy who were called to prove cruelty. I attach no importance whatever to their evidence.

There was one incident, a very unhappy one, on April 3. Defendant had dressed up and was going out. Plaintiff must have suspected him, and did not want him to go out. Plaintiff also must have felt that the husband was trying to enjoy himself outside home without giving her sufficient money for herself. When he was about to go she snatched his hat off his head, put it down, and trampled it. This was in the verandah of the house. Defendant naturally lost his temper and flung the cane he had in his hand at her. This struck her at the eye. There must have been some altercation also. I do not find in this any evidence of cruelty. A single act done in the heat of the moment, and provoked by the plaintiff herself, cannot be considered as cruelty. Plaintiff, perhaps, would not have thought anything of this, as she also was to blame in the matter, if not for the fact that a few days after she discovered the tell-tale letters which drove her to take the step of leaving the house. I attach little importance to her going to the doctor after she left the house, and after she saw that defendant advertised in the papers that he would not be responsible for her debts.

I do not believe plaintiff's evidence that defendant used personal violence to plaintiff at any time, or drove her out at night out of the house. It is not unlikely that there were brawls and quarrels, not

infrequently due to effects of drink. There was incompatibility of temper. There was no forbearance or patience on the side of either. There was suspicion and mutual distrust. It is human that under these circumstances that any word spoken or act done by the one will appear in its worst colour to the other.

The idea of habitual cruelty is only an after-thought. For in the allegation in the original plaint, on which the cause of action for separation is based, the plaintiff stated that defendant was guilty of such ill-treatment and misconduct on his part as compelled her to leave the house.

As I find, it was not the illtreatment which compelled her to leave the house. It was the suspicion, rightly based, of misconduct that compelled her to leave the house. The "such illtreatment" has therefore no meaning. Is is illtreatment of the worst kind for a husband to be unfaithful to the wife. But I do not believe that there were any acts of cruelty or bodily harm by defendant to plaintiff.

The law on the point is fully and clearly set forth in the judgment of Middleton J. in the well known case of *Wright v. Wright*.[1] Applying the principles therein laid down, I find that there is no cruelty or harshness on the part of defendant or of any display of personal violence such as to give rise to reasonable apprehension that life, mind, or health would be endangered to the plaintiff if separation were not decreed.

The mental cruelty displayed by a husband is often intolerable, and a wife who has reason to find that the husband has turned his affections on another, and is not true to her, may find this the worst form of cruelty, more painful than any bodily pain or suffering, but unfortunately the law does not give relief to a mental suffering of this kind. Neither the Roman-Dutch law nor the English law would give relief. In fact, the English law gives greater latitude to a husband.

The defendant morally is to be condemned, but the law will not permit me to grant the relief asked for by plaintiff. If the law permitted, I would, seeing that both parties are to blame, have ordered a separation, with alimony at Rs. 30 a month to be paid to plaintiff. But as the law will not permit me to do so, it is with reluctance I dismiss plaintiff's action.

I make no order as to costs.

H. J. C. Pereira (with him *Canakaratne*), for plaintiff, appellant.

A. St. V. Jayawardene, for defendant, respondent.

Cur. adv. vult.

June 9, 1920. DE SAMPAYO J.—

This action was brought by the plaintiff against her husband, the defendant, for dissolution of marriage on the ground of adultery and malicious desertion, or in the alternative, for separation *a mensâ et thoro* on the ground of cruelty and illtreatment. At the trial the claim for dissolution of marriage was abandoned, and the action was restricted to the alternative claim. The plaintiff appeals from the judgment of the District Judge refusing her this relief.

[1] *(1903) 9 N. L. R. 31.*

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It is not necessary to deal with the facts at length, as the findings of fact of the District Judge may be accepted. The only question is, whether, on these findings, the plaintiff was not entitled to a decree for judicial separation. The plaintiff and the defendant appear to have been a very ill-sorted couple. There was trouble between them from the beginning of their marriage. The plaintiff relied on evidence intended to show that the defendant had violently assaulted her at various times, and on one occasion had driven her out of the house at night. The District Judge does not believe there were such acts of serious illtreatment, but he finds, generally, "there were brawls and quarrels, not infrequently due to effects of drink. There was incompatibility of temper. There was no forbearance or patience on the side of either, and there was suspicion and mutual distrust." As regards assaults, there is no doubt about one incident. On April 3, 1917, the defendant was about to go out for a cricket match, but the plaintiff, thinking that he really intended to visit some other woman, objected to his going out, and there was an altercation, in the course of which the defendant gave her one or two blows, which produced a blackeye and an injury on the chest and side. In this state of tension between the parties, the plaintiff's discovery of some letters in defendant's box on April 9, 1917, brought about a crisis. The letters were written to defendant by a young woman, and on the face of them showed undue and improper familiarity between her and defendant. They even afforded *primâ facie* evidence of misconduct. In consequence of this discovery the plaintiff finally left the house on April 9, 1917, and brought this action a few months afterwards. The District Judge's remarks on this point were : "It was not the illtreatment which compelled the plaintiff to leave the house. It was the suspicion, rightly based, of misconduct that compelled her to leave the house . . . . It is illtreatment of the worst kind for a husband to be unfaithful to the wife." Such mental cruelty, the District Judge added, was often intolerable, and was more painful than bodily suffering, but he thought that the law did not permit him to grant relief to plaintiff on such a ground, but that if it did, he would have ordered a separation with alimony at Rs. 30 a month to be paid to plaintiff. He concluded his judgment by saying that he dismissed plaintiff's action with reluctance.

I think the District Judge took too narrow a view of the law, both as regards the nature of physical illtreatment required and the effect of immoral conduct on a claim for judicial separation. He purported to follow the decision in *Wright v. Wright*,[1] but, I think, he misconstrued that decision as holding that there must be in every case such cruelty or harshness or display of personal violence as to give rise to reasonable apprehension that life, mind, or health would

[1] *(1903) 9 N. L. R. 31.*

be endangered to plaintiff if separation were not decreed. Middleton J., who delivered the judgment of the Court, said that Van Leeuwen and Vander Linden in the citations he made appeared to lay down the law in that sense, but he immediately referred to Voet, in which he said the grounds for separation were put disjunctively, and danger to life was an alternative ground to perpetual quarrels and dissensions, excessive cruelty, and harshness. *Maarsdorp's Institutes, vol. I., p. 75,* sums up the Roman-Dutch law and states that, among other grounds, continuous quarrels and dissensions or other equally valid reasons, which render the living together of the spouses insupportable, will justify a judicial separation, and that although a wife or husband may reasonably be expected to bear with occasional outbursts of illtemper, yet occasional assaults, however slight, accompanied by habitual intemperance, will make cohabitation insupportable. Vander Linden likewise says that lawful reasons must be set forth in the application tending to show that the continuing to live together is dangerous or at least insupportable. The facts of this case, as found by the District Judge, appear to me to fall within the principle thus enunciated. The District Judge, I think, is also wrong in refusing to act on the evidence of misconduct. It is well known that a judicial separation may be obtained on the same grounds as divorce. As no specific issue, however, was stated as regards adultery and the evidence was not particularly directed to that question, the evidence of misconduct cannot, I think, be utilized further than as showing that, combined with the perpetual quarrels and dissensions the living together of these two people is, in fact, insupportable.

I would allow this appeal, with costs, and direct that a decree of separation *a mensâ et thoro* be entered with a sum of Rs. 30 a month to be paid by defendant to plaintiff as alimony.

DIAS A.J.—I agree.