1938 *Present :* **Poyser S.P.J. and Maartensz J.**

KEERTHIRATNE *v.* KARUNAWATHIE.

208—D. C. Kegalla, 10,950

Judicial separation—Grounds for decree—Malicious desertion—Roman-Dutch law.

In Ceylon a decree for judicial separation may be granted on the ground of malicious desertion.

THE plaintiff in this action sued the defendant, his wife, for divorce on the ground of malicious desertion. The defendant denied desertion and asked for a decree of judicial separation on the ground that the plaintiff had deserted her.

The learned District Judge granted the defendant a decree of separation *a mensa et thoro.*

Hayley, K.C. (with him *C. E. S. Perera* and *Chelvanayagam*), for plaintiff, appellant.—Under the Roman-Dutch law, malicious desertion is not a ground for granting judicial separation. *Wright v. Wright*[1] enumerates the various grounds upon which separation *a mensa et thoro* can be claimed, but no mention is made of desertion. The remarks of Sampayo J. in *Orr v. Orr*[2] are merely *obiter.* Malicious desertion entitles the injured party to divorce only, but not to judicial separation.

Plaintiff and his witness were not questioned in cross-examination regarding the facts deposed to by the chief witness for the defence. Plaintiff's case must therefore be taken as unchallenged—*Phipson's Law of Evidence (7th ed.), p. 460 ; Evidence Ordinance, s. 145 (2).*

H. V. Perera, K.C. (with him *N. E. Weerasooria* and *E. A. P. Wijeratne*), for defendant, respondent.—On the question whether decree for judicial separation can be granted for malicious desertion, the point is covered by authority. Apart from the remarks of Sampayo J. in *Orr v. Orr (supra)*, Van Zyl's *Judicial Practice, vol. II. p. 660* mentions various grounds, one of which is wilful neglect of duty. *Johnstone v. Johnstone*[3] is exactly in point.

Cur. adv. vult.

February 2, 1938. POYSER S.P.J.—

In this action the plaintiff claimed a divorce *a vinculo matrimonii* on the grounds of the malicious desertion of the defendant.

The defendant, in her answer, denied deserting the plaintiff and prayed that a decree of separation be granted her on the grounds of the plaintiff's malicious desertion.

The District Judge has accepted the evidence for the defence and found that the plaintiff had maliciously deserted the defendant ; he consequently granted her a decree of separation *a mensa et thoro.*

The evidence abundantly supported this finding and it is unnecessary to refer to it in detail.

It was however argued on behalf of the appellant that the evidence of Mr. A. A. Wickremesinghe, who was called for the defendant, was not

[1] *9 N. L. R. 31.* [2] *22 N. L. R. 57.* [3] *(1917) A. D. 292.*

put to either the plaintiff or his father in cross-examination, that the plaintiff was prejudiced thereby, and there consequently should be a new trial.

The evidence of this witness, which was accepted in its entirety by the Judge, was to the effect that he knew the parties and tried to effect a reconciliation, that the defendant was willing to return to the plaintiff but that the plaintiff's father would not permit a reconciliation and in consequence of his attitude the plaintiff would not allow the defendant to return to him and instituted these proceedings.

This evidence was not put in detail to the plaintiff or his father, but its substance was, *e.g.*, the father in cross-examination stated he had no objection to the defendant returning to her husband and the plaintiff stated his father did not ask him to give up his wife.

I do not therefore think the plaintiff was in any way prejudiced by the fact that every detail of Mr. Wickremesinghe's evidence was not put to him ; in fact this case seems largely in its early stages to have been contested on the question of alimony, and I see no reason for ordering a fresh trial on this ground.

A further point, and one of some importance, taken by Mr. Hayley was that under the Roman-Dutch law only a divorce, not a judicial separation can be granted for malicious desertion. This point does not seem to have been specifically decided in Ceylon. There is the following dictum of de Sampayo J. in the case of *Orr vs. Orr*[1] : It is well known that a judicial separation may be obtained on the same grounds as divorce", but this point was not specifically raised in this case and the dictum may consequently be regarded as *obiter*. In the case of *Wright v. Wright*[2] Middleton J. discusses at length the grounds on which a separation *a mensa et thoro* will be granted and he does not mention desertion as one of the grounds.

On the other hand my brother Maartensz tells me that it has been the practice in Ceylon for many years past to grant a judicial separation on the same grounds as divorce and such practice has hitherto not been questioned. He also drew my attention to a passage in Volume II of Thomson's *Institutes of the Law of Ceylon*, at page 106 :—" Separation may be by the Court, or by consent, in certain cases. The former of these is called divorce *a mensa et thoro*, *i.e.*, a judicial separation from bed, board, cohabitation, and goods ; and this separation may be prayed for by the party, even where a divorce *a vinculo* might have been asked, and the Court could not, in such case, give more than a judicial separation ; for the suit, in either case, is founded upon the prayer of the party injured, and not actually upon the injury, as if it were a trespass or a penalty. (*Van Leeuwen, bk. 1, chap. 15. s. 2, p. 84.*) Besides, the law loves to leave a door ajar for reconciliation, and will prefer to decree judicial separation rather than a divorce *a vinculo* (*V. der Linden, 1., 3, s. 9*). Judicial separation may, therefore be decreed for adultery subsequent to marriage, and malicious desertion, and also when for other reasons the continuance of the cohabitation would become dangerous or insupportable. So that

[1] *22 N. L. R. 57.*

[2] *9 N. L. R. 31.*

a judicial separation may be decreed on account of cruelty, or protracted differences, or for gross, dangerous, and unsupportable conduct in either spouse. (*V. der Linden I., 3, 9, p. 89; Grot. I., 5, s. 18-20; p. 26*)."

In Walter Pereira's *Laws of Ceylon*, at page 251 the grounds are set out upon which a separation *a mensa et thoro* will be granted and malicious desertion is not set out as one of such grounds, but it is not stated that a separation would be refused when grounds for a divorce were disclosed.

The point however has been decided in South Africa. In the case of *Johnstone v. Johnstone*[1], it was held that a decree of judicial separation may be granted on the grounds of malicious desertion and may be granted absolutely without any previous order for restitution of conjugal rights.

The following passages at pages 299 and 300 in the judgment of Solomon J.A. state the reasons for this finding:—"That being so, the next question that arises is whether this is a ground, *i.e.*, malicious desertion, for decreeing judicial separation. This point was formally taken at the hearing of the appeal, but was not seriously argued. The same question had been previously raised before the same learned Judge in the case of *Tod v. Tod* not yet reported, where it was held that by our law malicious desertion entitles the innocent party to obtain an order of judicial separation. In his judgment in that case the Roman-Dutch text-writers were fully reviewed, and it was pointed out that though there is little direct authority on the subject, that is the inevitable conclusion to be drawn from them. Nor indeed is it surprising that there should be an absence of direct authority. For inasmuch as by our law malicious desertion is a ground for divorce, it would seem to follow as a matter of course that it must also be a sufficient cause for judicial separation. For the larger remedy of divorce includes separation *a mensa et thoro*, and if the injured party is satisfied to ask for the smaller remedy it is difficult to see on what grounds it could possibly be refused. From the nature of the case it would only be very rarely that where there has been malicious desertion the proceedings should take the form of an action for judicial separation, and so far as I know, the case of *Tod v. Tod* is the only direct decision on the point. But on the ground both of authority and of principle I am of opinion that that case was rightly decided and should be followed ".

As this decision, so far from conflicting with any local decision, is in accordance with local practice and the passage in Thomson above referred to, I certainly think we should follow it.

The appeal is accordingly dismissed with costs.

MAARTENSZ J.—I agree.

Appeal dismissed.

[1] *S. A. Law Rep. Appell. Div. 1917, p. 292.*