Present: Lascelles C.J. and Wood Renton J.

1912.

APPUHAMY *v.* JULIHAMY *et al.*

303—D. C. Chilaw, 4,530.

Divorce—Action by husband against wife on ground of adultery and desertion—Husband communicating venereal disease to wife—Cruelty—Divorce not granted.

The plaintiff sued his wife, the first defendant, for divorce on the grounds of malicious desertion and adultery with second defendant. The Supreme Court refused to grant a decree for divorce though the adultery was proved, as the plaintiff was guilty of cruelty to his wife, inasmuch as he had communicated venereal disease to her.

Communication of venereal disease by a husband to his wife, if wilful, constitutes legal cruelty.

Where a husband did not come forward and assert his ignorance of his condition the Court would hold the charge of wilful infection established, the principle being that the husband's health was presumably within his own knowledge.

THE facts are fully set out in the judgment.

Bawa, K.C., for the plaintiff, appellant.—The Judge has found that the respondent was guilty of adultery and desertion. The plaintiff was entitled to a decree for divorce on that finding. There is absolutely no evidence to support the finding of the Judge that the plaintiff was guilty of adultery; the fact that the plaintiff communicated venereal disease to the respondent is no proof of the fact that the plaintiff had committed adultery after his marriage; the plaintiff might have contracted the disease before the marriage.

Communication of venereal disease by the husband to his wife is not cruelty unless it was wilful. See *Dixon on Divorce, 3rd ed., p. 154; Collett v. Collett;*[1] *Brown v. Brown.*[2] Even if the husband was guilty of cruelty, the wife had condoned the cruelty by continuing to live together in spite of the disease.

No issue as to cruelty was raised at the trial.

Chitty, for the defendant, respondent.—There is sufficient evidence to prove that the communication of the disease was wilful. The Court will infer from the facts of communication of the disease that the communication was wilful. The evidence of the husband was not accepted by the Court; in the absence of an explanation by the husband, the Court will presume that the communication was wilful. Counsel argued on the facts.

Cur. adv. vult.

[1] *1 Curb. 678.*

[2] *(1865) L. R. 1 P. & D. 46.*

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Appuhamy v. Julihamy

December 17, 1912. LASCELLES C.J.—

This is an appeal from a decision of the District Judge of Chilaw dismissing the plaintiff's claim for a dissolution of his marriage with the first defendant-respondent on the ground of her desertion and adultery. The learned District Judge has found that the first defendant was guilty of wilful desertion and adultery, but in the exercise of the discretion vested in the Court by section 602 of the Civil Procedure Code has dismissed the claim for divorce on the ground that the plaintiff himself was guilty of adultery. The mental process by which the learned District Judge arrives at the conclusion that the plaintiff has been guilty of adultery is curious.

It was admitted that both the plaintiff and the first defendant were infected with syphilis. The plaintiff swore that he contracted the disease from his wife two or three days after their marriage. The defendant, on the other hand, deposed that she was infected by her husband, and that the disease appeared two months after the marriage, and that her husband subsequently re-infected her. The learned District Judge accepts the defendant's version, which I think is the more probable, and concludes that the plaintiff must have committed adultery.

But it does not follow from the fact that the husband was suffering from this disorder at or shortly after his marriage; that he was guilty of adultery during the marriage. The facts are quite consistent with the plaintiff having contracted the disease before marriage.

But accepting the finding of the District Judge as to the first defendant having been infected by the plaintiff, the question naturally arises whether it is not the duty of the Court to refuse to enter a decree in favour of the plaintiff on the ground of his cruelty towards his wife. Communication of this disease by a husband to his wife, if wilful, constitutes legal cruelty. The question, therefore, is whether there is sufficient evidence that the communication of the disease by the husband was wilful.

In *Squires v. Squires* [1] it was held that where the husband did not come forward and assert his ignorance of his condition the Court would hold the charge of wilful infection established, the principle being that the husband's health was presumably within his own knowledge. In the present case the husband has come forward with an explanation of his condition, which the Court has entirely discredited. So far from asserting that he unwillingly communicated the disease to his wife, he charges his wife, as the District Court held falsely, with infecting him. There is also the evidence of his wife, which I understand was accepted by the District Court, that her husband re-infected her after she had recovered from the original infection.

[1] *33 L. J. 172.*

On the whole, I think that communication of venereal disease amounting to legal cruelty has been proved, and that a decree for dissolution of marriage ought not to be granted.

For the above reasons I would dismiss the appeal with costs.

WOOD RENTON J.—

The plaintiff-appellant in this action sued his wife, the first defendant-respondent, for divorce on the grounds of malicious desertion and of adultery with the second defendant, who is not a respondent to the appeal. The respondent in her answer denied the desertion and the adultery, and pleaded that shortly after her marriage the appellant had communicated to her venereal disease, which made it impossible for her to live with him as his wife. The second defendant denied the adultery. The learned District Judge held on the evidence that both the desertion and the adultery had been proved, but refused to grant the appellant the divorce which he claimed, on the ground that he had himself committed adultery after the marriage—a fact evidenced by his having communicated venereal disease to his wife shortly after the marriage had taken place. He accordingly dismissed the appellant's action with costs in favour of the respondent, but left the second defendant to pay his own costs.

In the argument before us on appeal the findings of the District Judge as to the desertion of the appellant by the respondent and as to the adultery with the second defendant were not seriously disputed. The points mainly pressed upon us were that the commission of adultery by the appellant after his marriage with the respondent had not been established, and that the communication by him to his wife of venereal disease would not amount to cruelty unless it was affirmatively shown to have been wilful. That is a proposition of law which admits of no dispute. As an authority in support of it I may refer to the case of *Brown v. Brown*.[1] The only questions that give rise to any difficulty in the present case are questions of fact. The appellant's evidence was to the effect that, so far from having communicated venereal disease to his wife, he had been himself infected by her. He stated that he had received the infection two or three days after the marriage, and that his wife had then admitted to him that she had been intimate previous to the marriage with the second defendant. Her proved intimacy with the second defendant subsequently to the marriage, of course, lent some colour to this suggestion, which the second defendant did not seek to disprove by submitting himself to medical examination and placing the results of that examination before the Court at the trial. In spite of these circumstances, however, of which he took full account, the learned District Judge disbelieved the appellant's evidence in this matter, and I see no reason to think that he was

[1] (1865) *L. R. 1 P. & D. 46.*

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wrong in doing so. The evidence of the respondent showed that, notwithstanding the fact that he was suffering from venereal disease, the appellant continued to live with the respondent as his wife. I am not disposed to believe that a man in the appellant's position, who had been infected by his wife with venereal disease, would have continued to expose himself, by further cohabitation with her, to the risk of re-infection. Disbelieving, as he does, the appellant's explanation of how he came to contract venereal disease, the District Judge draws the inference that he had himself been guilty of adultery during the subsistence of the marriage, and was therefore, if for no other reason, disentitled to a divorce. In coming to this conclusion, the District Judge relies on the statement of the respondent that the disease first attacked her two months after the marriage. The appellant's statement, however, is that he became ill two or three days after the marriage. There is no medical evidence on either side showing the stage that the venereal disease had reached at the time of the alleged infection, and in view of the conflict between the evidence of the respondent and that of the appellant on the point, I do not think that the facts are sufficiently strong to warrant the conclusion of the District Judge that the appellant had become infected after his marriage with the respondent. There remains, however, the question whether there is not sufficient evidence on the record to support the judgment on the ground of cruelty. The appellant's counsel contended that no issue on this point had been raised at the trial. There is, however, evidence in regard to it on the record, and the Court is, I think, entitled of its own motion, under the proviso to section 602 of the Civil Procedure Code, to take account of all discretionary bars of this character, whether they are expressly put in issue between the parties or not. The communication of venereal disease was relied upon by the respondent in her answer as a defence to the charge of desertion, and that being so, it came, in my opinion, properly under the cognizance of the Court as evidence in support of a charge of cruelty. There is, I think, sufficient material here to enable us to support the finding of the learned District Judge on this ground. It is pointed out in the case of *Brown v. Brown* [1] that, while the communication of venereal disease to a wife by her husband is not cruelty unless it is shown to have been wilful, wilfulness may be presumed from the surrounding circumstances, from the condition of the husband, and from the probabilities of the case after such explanation as he may offer, and that *primâ facie* the husband's state of health is presumed to be within his own knowledge. In the present case the evidence shows that the appellant was aware that he had contracted venereal disease. He gave a false explanation as to how he came by it. He knew that his wife was suffering from it also, and, according to her evidence, he had re-infected her by

[1] *(1865) L. R. 1 P. & D. 46.*

repeated acts of intercourse while he was still uncured. In *Brown v. Brown* [1] the Court treated re-infection as evidence of wilfulness. In the present case the appellant did not satisfactorily explain his conduct. His story was that, although his wife continued to live with him in the house, he had never had intercourse with her after he had been cured of the disease which he said she had imparted to him. I see no greater reason to accept the appellant's evidence on that point than with regard to the respondent's alleged admission of ante-nuptial incontinence, on which he has been expressly disbelieved by the learned District Judge. It was urged on the appellant's behalf that in any case the respondent had condoned his cruelty by continuing to live with him as his wife after her first infection. While I think it, however, almost inconceivable that if the appellant had been infected by the respondent he would have continued cohabitation with her, women in the position of the respondent are subject to a great extent to their husband's influence and control, and it is quite possible that she went on living with him without any very clear perception of what she was doing.

The case is a squalid one, and neither side is entitled to much sympathy. But, on the whole, I think that the decision of the learned District Judge is right in the result, and should be affirmed with costs.

Appeal dismissed.