1954 *Present :* Rose, C.J., and Sansoni, J.

WIJESINGHE, Appellant, *and* WIJESINGHE, Respondent

S. C. 390—D. C. Colombo, 2,027

Husband and wife—Judicial separation—Cruelty—Proof—Right of plaintiff to choose between separation and divorce.

Cruelty, as a ground for a decree of judicial separation, need not be physical; moral cruelty will suffice. To entitle a wife to a decree on this ground it is sufficient for her to show that her husband has been guilty of conduct which has impaired her health and made it intolerable for her to continue to live with him.

Decree for judicial separation may be entered although the party seeking it is entitled on the evidence to ask for the greater relief of a divorce.

[1] *(1944) 60 Times Law Reports 492.*

APPEAL from a judgment of the District Court, Colombo

Sir Lalita Rajapakse, Q.C., with *Eric Labrooy* and *G. D. C. Weerasinghe*, for the defendant appellant.

J. N. Fernandopulle, with *E. B. Vannitamby*, for the plaintiff respondent.

Cur adv. vult.

July 23, 1954. SANSONI, J.—

This is an appeal by a husband against a judgment which granted his wife a decree of judicial separation and dismissed his claim in reconvention for a divorce. The grounds upon which the plaintiff-respondent based her claim were that for some time past the defendant-appellant had treated her with harshness and cruelty which made her life intolerable and caused her to fear that continuing to live with him might endanger her life. The defendant-appellant in his answer pleaded that his wife, at the instigation of her mother and brothers, without any cause whatsoever, left his house on 10th December, 1948, as she had done previously on 18th May, 1947. He further pleaded that in spite of a reconciliation effected after that earlier departure from his home she occupied a separate room and refused to talk to him or to attend to his needs, and was thus guilty of cruelty. He claimed a divorce on the ground of malicious desertion and cruelty.

The parties were married in 1931 when the wife was 16 and the husband 30 years old. The eldest child, a girl, was born in 1932 ; a boy was born in 1933 and another girl in 1940. Not long after the marriage the wife took employment as a subpostmistress on a salary of Rs. 125. Out of this sum her husband admittedly took Rs. 35 to cover part of the house rent on the ground that their house had to be bigger than would otherwise have been necessary ; she also had to pay her brother Rs. 25 for assisting her. The learned Judge has accepted the wife's evidence that her husband took her entire salary from her every month.

In 1943, when the wife's mother and brothers were also living with this couple, a brother named Bennet got married and there arose some disagreement over that. The wife says it was because her husband disapproved of Bennet getting engaged against his wishes ; the husband says that what he disapproved of was their extravagant plans for the wedding reception. He admits, however, that he was displeased with his wife because she did not comply with his wishes. The next incident was the purchase of a car by Bennet and the husband. Bennet apparently wanted his share of the purchase money back, and the husband got annoyed with the wife when she suggested to him that he should comply with Bennet's request.

In 1945, their eldest daughter attained puberty and there was an argument as to the observance of certain ceremonies in that connection. In the course of a quarrel the husband admittedly assaulted the wife in the presence of the wife's mother. After this incident the husband asked

his mother-in-law to leave his house, which she did. She never again lived with her daughter and son-in-law. The wife complains that after this her husband became indifferent to her; he failed to provide her with sufficient money for running the house; she also had to render an account to him of all monies she had received from him. It was at this time that she says her health began to be affected by this treatment.

Early in 1947 the car was stolen when the husband was in Kandy. The wife sent him a telegram informing him of the theft, but when he returned home he found fault with her for having gone to her brothers before she went to the Police. According to the wife she was always being blamed by her husband for the loss of the car, and he totally neglected her and failed to maintain her. She also says he asked her to leave the house. I might here draw attention to the husband's admission that he did ask her to leave the house, though he has not specified at what stage of their dissensions he made the request. At any rate the wife says that she could not bear to live with her husband any longer and she accordingly left the house on 17th May, 1947, when he was away at Galle. She informed the Police that she was leaving on account of ill-treatment and that she was going to live with her brother. She also left behind a letter to her husband in which she complained, "I am compelled to take this action after years of agony with you. I bore up your mean and callous treatment for the great love I have for my children". She asks him not to expect her to return to him unless he was prepared to completely reform himself.

In September 1947, through the good offices of a Mr. Seneviratne the parties were reconciled, but not before the husband laid down certain conditions which he wanted his wife to observe. The husband said in evidence :—"The condition of reconciliation was that she should not go out of the house without permission, and not talk to her mother and brother without permission". Apparently the wife was persuaded by Mr. Seneviratne to agree to these conditions. It seems to me a shocking thing that a husband should require his wife to observe rules such as these which were calculated to make her a prisoner. He also admits that he listened to outsiders who told him that his wife was not complying with these conditions, and also questioned the children to ascertain whether their mother was breaking his commands. Their children went the length of obliterating the wheel marks left on the carriage way of the residence, no doubt because they feared the sequel to the discovery of the wheel marks by their father. The husband complained that within a month of the reconciliation his wife spoke to her mother when the latter visited a relative who lived in the neighbourhood, accompanied her mother to hospital to visit a sick cousin, and went to her uncle's house on the pretext of borrowing a saree. I do not think it is relevant to inquire whether the wife did any of these things or not. Even if she did, I cannot believe that a reasonable husband would have resented such conduct. The wife complains that there were quarrels over alleged breaches of his commands in the course of which she was assaulted. The learned Judge has believed her evidence that one such assault took place in April 1948.

The climax came on the 10th December, 1948, when a young man came to the house to return a music book, which the wife had lent him. She says it was her daughter's book, and she had lent it to the young man when he came to borrow it in her daughter's absence from the house. The husband apparently objected to this young man's arrival to return the book ; he admits he scolded his wife and attempted to slap her. The learned Judge was satisfied that he actually assaulted her, and abused her in filthy language and even coupled her name with that of the young man. The wife left the house the next day, having complained to the Police that she was assaulted and abused on the 10th night. It is unfortunate that in this complaint she also said of her husband, " As far as I believe he has other attachments ". No such allegation has been made by her since, and it should never have been made. The learned Judge accepts the evidence of the Inspector of Police who says he observed redness on the wife's face when she was making her complaint. He has also accepted the evidence of a neighbour who said he had heard the husband scold his wife in obscene language, and seen the wife crying on those occasions. The learned Judge formed the opinion that the husband occasionally assaulted his wife, and that he was " a fiery tempered person, very assertive and dominating in his house " who even displayed his bad temper and offensive manner in the witness-box. On the other hand the wife struck the learned Judge as " a frail and timid woman " who would not have ventured to raise her voice in opposition to her husband. The learned Judge also formed the view that the husband was fonder of his money than of his wife and children. However, what seem to have weighed most with the learned Judge when he granted the wife's application were " the continual bickerings between the husband and wife in all of which the husband was the aggressive party. He was abusive and insulting. He restricted his wife's freedom of movement ". The learned Judge also referred to the fact that the husband had ordered his wife to leave the house, and made use of trivial incidents to find fault with her. He has not dealt in his judgment with the husband's complaint that the wife would not speak to him or associate with him for two or three months at a time. But I think the wife's attitude of non-co-operation, if she adopted it at times, was a weapon of defence which she used to counter the aggressiveness of her husband. There is every indication in the judgment under appeal that the learned Judge took the view that the husband was always the aggressor, and that the wife was always on the defensive.

This is eminently a case where the findings of fact made by the learned Judge should be given full weight. The following passage in the judgment of de Villiers J.A. in *Cheek v. Cheek* [1] is in point :— " Now it has very often been laid down in this Court, that in coming to a conclusion as to the credibility of witnesses, a Court of Appeal must of necessity be greatly influenced by the opinion of the learned trial Judge. He sees the demeanour of the witnesses and can estimate their intelligence, position and character, in a way not open to the Courts who deal with the later stages of the case." The principle thus laid down applies with

[1] *(1935) A. D. 336.*

especial force in matrimonial disputes, for as stated by Innes, C.J., in *Oberholizer's case* [1], " these matrimonial cases throw a great deal of responsibility upon a judge of first instance, with the exercise of which we should be slow to interfere. He is able not only to estimate the credibility of the parties, but to judge of their temperament and character. And we, who have not had the advantage of seeing and hearing them, must be careful not to interfere, unless we are certain, on firm grounds, that he is wrong ".

The learned trial Judge in this case has formed very definite convictions about the parties in this case. There are no particular features in the wife's evidence which can be regarded as unsatisfactory, nor are there such improbabilities in her story such as might outweigh the effect produced by her demeanour on the Judge and induce a Court of Appeal to reverse his opinion of her. It follows that unless the learned Judge misdirected himself on the law his judgment should stand.

Now Sir Lalita Rajapakse who appeared for the husband in this appeal urged that since the learned Judge has held that the assaults themselves were not of such a nature as to endanger the wife's life there was no justification for a decree of judicial separation. But it is clear that the learned Judge has formed the definite opinion that the husband has been guilty of conduct which has impaired his wife's health and made it intolerable for her to continue to live with him. He has cited in support of his finding on the law the following passage from the judgment of Solomon, J., in *Wentzel v. Wentzel* [2] :—" When the ground relied on was cruelty the test is, Has it not been proved that by reason of the defendant's misconduct it has become intolerable for the plaintiff to live with him ? No general rule can be laid down and much will depend upon the physical and mental condition of the wife as well as upon her character and disposition ". Cruelty need not be physical ; moral cruelty will suffice. It is clear law now that " when once a spouse by unlawful conduct makes it dangerous or intolerable for the other spouse to continue cohabitation, the latter is entitled to a decree of judicial separation "—see *Armsbury v. Armsbury* [3]. de Villiers J.A. in *Cheek v. Cheek* (supra) stressed the necessity for the plaintiff not only to prove that the spouses find it intolerable to live together but also that such a condition of things was caused and created by misconduct on the defendant's part. An isolated incident is not enough, especially if the parties continue to live for a long time thereafter. There is no doubt that in this case the guilty party is the husband.

The next submission made on behalf of the husband was that, in view of the plaintiff's statement in evidence that under no circumstances will she go back to the defendant, the marriage is now a mockery and should therefore be dissolved. This submission must fail for the reason that it does not lie in the mouth of the husband, who is held to be the guilty party, to complain if his wife chooses that the marriage relationship should continue. She is entitled to ask only for a judicial separation, even if the greater relief of a divorce would have been justified upon the

[1] *(1921) A. D. at p. 272.*

[2] *(1913) A. D. 55.*

[3] *(1929) A. D. 109.*

evidence, although I doubt if the husband's conduct in this case was of a sufficiently grave character to warrant the granting of a divorce. It was decided in *Orr v. Orr* [1] and *Keerthiratne v. Karunawathie* [2] that a judicial separation may be obtained on the same grounds as a divorce. Poyser, S.P.J., in the latter case quoted with approval the words of Solomon, J.A., in *Johnston v. Johnston* [3] :—" 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 ".

I would dismiss this appeal with costs in both Courts. I would, however, draw the attention of the District Judge to the form of the decree signed by him in this case. It has been pointed out to us by Sir Lalita Rajapakse that the decree that has been entered is a decree of divorce. This is obviously wrong, and a correct decree for separation *a mensa et thoro* should be entered.

Rose, C.J.—I agree.

Appeal dismissed.