Present: Bertram C.J. and Schneider J.

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SILVA *v.* MISSINONA

438—D. C. Galle, 20,352.

Divorce—What constitutes malicious desertion?—When decree should be entered?—Interval between decree nisi *and decree absolute—Civil Procedure Code.*

Desertion to be a ground for divorce must be malicious, that is to say, it must be a deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state. It must be *sine animo revertendi*. Divorce should only be granted if the desertion complained of was a repeated desertion, and the offending spouse has contumaciously refused to return to married life.

Voet observes that even after judgment for desertion and separation, attempts should be made to bring about concord to the full extent to which this is possible.

"Our procedure gives opportunity for the application of the same principle through the fact that every decree for divorce is, in the first instance, a decree *nisi*. The period of three months before it is made absolute is only a minimum period, and in cases of malicious desertion this preliminary period should, in my opinion, be substantially longer, and we should give effect to the principles of the Roman-Dutch law by holding that in cases of malicious desertion the object of this interval is to allow an opportunity for reconciliation, and that the decree should not be made absolute, unless it appeared that the complaining spouse had, in the interval, provided a reasonable opportunity for a resumption of married life, and that this had been contumaciously and unreasonably refused by the other party."

THE facts are set out in the judgment.

H. J. C. Pereira, K.C. (with him *Soertsz* and *M. H. W. de Silva*) for defendant, appellant.

Elliott, K.C. (with him *H. V. Perera* and *Jayasuriya*), for plaintiff respondent.

Cur. adv. vult.

August 4, 1924. BERTRAM C.J.—

This is an appeal in an action for a divorce by a husband against his wife based on the allegation of malicious desertion. The learned District Judge has found that the plaintiff was "fully entitled to a divorce," and he has accordingly entered a decree *nisi* to become absolute after the very brief interval of three months. I do not

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think that the learned Judge has fully considered the principles governing divorce on the ground of malicious desertion, and it is clearly very important that these principles should be understood.

I will first consider the facts: The parties were married on May 16, 1913, and for over two years after the marriage lived together at the house of the wife's father at Kogalla in the Southern Province. Two children were born, one of whom died. All the husband's furniture was taken to his father-in-law's house, but he says that it was a temporary arrangement, and that his father-in-law promised to give him some land, on which he was to build a house of his own. By July, 1915, however, a very marked state of friction had arisen. It is clear that the husband wanted to get away from his father-in-law's house and take his wife with him. He made complaints to the officer-in-charge of the police station, to the District Judge, and to the Provincial Registrar, and sent two petitions, complaining against his father-in-law, to the Police Officer at Galle. He then went away to Matale where he had property, his wife declining to accompany him. The parties then lived separate for 5½ years until February, 1921. I am not clear that the husband was away at Matale all this time. The wife says that he was at Kataluwa, about a mile from Kogalla, at his aunt's house, and that she repeatedly wrote to him and saw him several times, taking her children with her. She wanted her husband either to live in her father's house, or at his own *mulgedera* at Kataluwa, a mile off. The husband, however, wanted to live at Mirissa, about 10 miles away, where he had leased a house for the purpose. In February, 1921, there was a reconciliation. The husband came and stayed for a week at his father-in-law's house at Kogalla. On February 10 his wife went with him to Mirissa where he stayed one night, not at the leased house, which was not ready, but as guests in the house of one of her husband's relations. The child cried, the situation was uncomfortable, and the family went back to the father-in-law's house, where the husband lived for over a year until March 24, 1922. During this time another child was born. Friction, however, again arose in connection with the question of the wife's dowry. The husband appears to have been still anxious that his wife should go and live at Mirissa. On March 22 he left the house, and brought an action demanding the return of his furniture. On September 27 that action was settled; the father-in-law agreed to hand over the furniture, and the wife incidentally agreed to go with her husband, and to live on his leased land at Mirissa.

An attempt was made to carry out this settlement, and this is the crucial period of the story. The wife went off straight from Court with her husband and the two children, without taking any of her things. The next day, September 28, they went to Kataluwa

in order to enable the wife to get them, and stayed with the husband's aunt. On September 30 the wife left her husband saying she had been threatened and ill-treated. Both parties made a complaint to the headman, but the wife was persuaded to return to her husband. The couple then lived together from October 1 to October 19, but obviously under very unhapppy circumstances. Up to October 11, they were in the husband's aunt's house at Kataluwa, and after that they stayed at another house belonging to a man called Prema Chandra. The Mirissa house was, apparently, not ready for occupation. On October 4 the husband addressed a very extraordinary petition to the District Judge. He recited the story of their disagreements in some detail declaring that his wife was of a "head strong quarrelsome character, and a wicked demon," and that he himself was a "helpless orphan." He observed that he "had made a terrible blunder in having his wife returned back to him who is a quarrelsome and incorrigible wicked woman to deal with, and it would appear from her behaviour within the last couple of days, began with bickerings and unrest to the petitioner as he is absolutely destitute of relations and friends." He begged the District Judge to "release him as he anticipates danger to his life and is at stake if remains with his wife." The state of friction indicated by this letter continued. The wife says that a promise was made to her that they should be taken to her husband's *mulgedera* at Kataluwa. On October 19 the wife ran away from her husband early in the morning before he awoke, and returned to her father's house. She alleges that her husband threatened to kill her if she did not go. The husband took the headman to his wife, and she then said that she could not go to Mirissa and reside there, but that she was willing to go to her parents' house. A further reconciliation proved impossible, and in January, 1923, the wife instituted maintenance proceedings. In Court, on February 17, the husband declared that the wife would not live with him. Nothing on this point was said by the wife. It was intimated that the husband intended to institute divorce proceedings. An interim order was made, and the divorce proceedings instituted, the grounds of these proceedings being malicious desertion. The learned Judge observes in his judgment: "I think she would not object to a continuance of the marriage, provided the plaintiff lived with her in her father's house, or even at Kataluwa in plaintiff's *mulgedera*, about a mile away from her father's house, but she knows that the plaintiff will not consent to either of these proposals, as that would mean living too close to her parents."

These being the facts, let us now consider the law. The Roman-Dutch law, apart from causes which are considered to render marriage a nullity, recognizes two grounds for divorce: (1) adultery and (2) malicious desertion. This is now embodied in section 20 of our own Marriage Registration Ordinance, No. 19 of 1907. The

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Dutch jurists asserted that these two causes for divorce were recognized by the "divine law." See, for example, *Huber Prælectiones, vol. III., p. 1203.*

> "*Moribus hodiernis sequimur ius divinum novi fœderis, quo duæ tantum causæ cognoscuntur, adulterium, item malitiosa desertio.*"

See also *Bœkelmann, part II., p. 146* "*duas causas, iure divino probatas, I. . . . . 2. ob malitiosam desertionem.*

When we inquire from what source the Dutch jurists conceived the idea that divorce for malicious desertion was sanctioned by divine law, we learn, not perhaps without some surprise, that this source is to be found in the 15th verse of St. Paul's First Epistle to the Corinthians, 7th chapter. There St. Paul is dealing with the case of an "unbelieving husband" married to a "believing wife" and *vice versa*, and he observes: "Yet if the unbelieving departeth, let him depart: the brother or the sister is not under bondage in such cases: but God hath called us in peace." The Greek word for "depart" is also used to denote matrimonial separation. This text, it is true, only relates to separation between believers and unbelievers, but Huber observes that the principle applies to all cases:—

> "*Loquitur de infideli coniuge fidelem deserente sed ratio ad omnes pertinet.*"

and he adds that this extension of the text was everywhere received in the Protestant churches—

> "*Atque hæc extensio ab infidelibus ad quoslibet, suos coniuges malitiose, id est cum animo nunquam redeundi, vel se coniugendi, deserentes, ubique in Protestantium Ecclesiis recepta est.*"

Dutch jurists and theologians appear not to have been embarrassed by another text in the same context referring to "believers," verse xi.: "But if she depart let her remain unmarried, or else be reconciled to her husband." See *Wesenbecius, XXIV., 2, 16.*

It will be observed that in all cases the desertion thus recognized as a cause for divorce is referred to as "malicious desertion." I have not been able to find the origin of this word, but it clearly implies something in the nature of a wicked mind. It means a deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state. As some of the passages I have quoted indicate, it must be *sine animo revertendi.* Van Leeuwen's account of it is as follows:—

> "*Quod omnino intelligendum de affectata et malitiosa absentia, qua quis a coniuge discedit nulla iusta aut necessaria causa coactus; sed levitate et malitiosa quadam aliisque non necessariis, neque probabilibus causis impulsus, absque animo redeundi ad coniugem, oberrat;*"

See also the passage from Brouwer *de iure connub.* cited in *2 Brown on page 142.*

> "*Malitiosus desertor est, qui justa aut necessaria causa coactus, ex animi quadam levitate et malitia, vel impatientia freni coniugalis uxoris et liberorum curam abjicit, eos deserit, et oberrat, sine animo redeundi 2, 18, 12, p. 518.*

Malicious desertion is thus regarded by the Dutch jurists as a very definite and unmistakable thing, but, what is more, they recognized that the principle above explained was to be applied with very great caution and deliberation. *See Voet XXIV., 2, 9.* It was only to be applied if it were clear on formal proceedings having been instituted that the offending spouse had been cited to appear, and that the desertion complained of was a repeated desertion, and that the offending spouse had contumaciously refused to return to married life. Voet further observes in paragraph XI. that even after judgment for desertion and separation, attempts should be made to bring about concord to the full extent to which this is possible. The same principle has been adopted in South Africa. See *Gibbon v. Gibbon* [1] per Shippard J., cited in *Nathan, 2nd ed., vol. 1., on page 306.* "The theory of the Roman-Dutch law appears to have been that divorce should never be granted while there remained a hope of reconciliation. In cases of alleged malicious desertion the Courts required proof that no such hope remained, and therefore would not dissolve a marriage on such ground till after proof of contumacious disobedience of a decree of restitution of conjugal rights." Our own procedure gives an apportunity for the application of the same principle through the fact that every decree for divorce is, in the first instance, a decree *nisi*. The period of three months before it is made absolute is only a minimum period, and in cases of alleged malicious desertion this preliminary period should, in my opinion, be substantially longer, and we should give effect to the principles of the Roman-Dutch law by holding that in cases of malicious desertion the object of this interval is to allow an opportunity for reconciliation, and that the decree should not be made absolute, unless it appeared that the complaining spouse had, in the interval, provided a reasonable opportunity for a resumption of married life, and that this had been contumaciously and unreasonably refused by the other party.

If one now refers to the facts in the light of these principles, it is clear that no case of malicious desertion has been made out. There may have been desertion, but it was certainly not malicious, and, in particular, it is certainly not established that it took place *sine animo redeundi*. The institution of marriage would be in a perilous position if, when husband and wife quarrelled about the place where they should reside, and the wife, during a state of friction took refuge

[1] *2 E. D. C. 284.*

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with her parents, it was held that these facts of themselves entitled the husband to a decree for divorce. I am not able to see in this case that during the material period the husband ever definitely put at the disposal of his wife a home where she could go and live with him. She left him at a period of mutual exasperation, when he himself was anxious to get rid of his wife, and it seems to me quite impossible that her conduct should be regarded as malicious. Even in this very action he himself declared in his evidence. "If I take my wife with me there is no doubt that she would kill me. I am not willing now to take her to a house at Kataluwa. She would poison me. I am not now willing to live with her in any house." These are clearly not circumstances in which the remedy of the Roman-Dutch law would be granted.

I recognize that the situation of the parties to this marriage is now a very unfortunate one. It is now nearly two years since they have lived together, and it may very well be that the wife would now under any circumstances refuse to return to her husband. The question naturally presents itself, whether it might not be convenient to retain the decree *nisi*, and to allow a year's interval in which the husband should be called upon to offer reasonable facilities to his wife for the resumption of married life, the decree being made absolute, if the wife contumaciously and unreasonably refused to take advantage of the opportunity so afforded to her. There is a case, D. C. Colombo, 55,353, reported in *Vanderstraaten (1860-71), p. 237*, which seems at first sight to be a precedent for such a course, but on careful consideration I do not think that it is so. The Court in that case made the decree absolute because no appeal had been taken against the decree *nisi*, and the parties had not come together in the interval. I think that it would be dangerous to allow a decree *nisi* to be granted, unless there were definite grounds to justify the Court in finding malicious desertion.

I would therefore allow the appeal, with costs in both Courts, but I trust the learned District Judge, who will have to communicate this judgment to the parties, will explain to them (and, if I may so suggest, in Chambers) that it is their duty, for the sake of both themselves and their children, to effect a reconciliation; that the wife ought to live in a residence reasonably chosen for her by her husband, if such a residence is put at her disposal, and if she is treated by her husband with due conjugal affection; and that she ought not to insist on living, either with her parents, or in their immediate neighbourhood; and that, if the husband does in fact put such home at her disposal, and after this warning she unreasonably refuses it, it will be competent for the husband to reinstitute fresh proceedings of a similar nature.

SCHNEIDER J.—Agreed.

Appeal allowed.