1905.
July 18.

SILVA *v.* SILVA *et al.*

D. C., Colombo, C 20,884.

Decree for judicial separation in suit for divorce—Necessity of framing issues as to minor remedy—Husband's liability for costs in any event.

There is no objection to a decree of judicial separation being entered in a suit brought by a person claiming a divorce *a vinculo matrimonii*, provided proper issues are framed, and decided, as to the grounds on which the minor remedy may be decreed.

In an action for divorce *a vinculo matrimonii* or *a mensa et thoro* the husband, besides being generally liable to pay his own costs, is also, as a general rule, whether the wife be successful or not, liable to pay his wife's costs, unless she has separate property of her own of sufficient value to enable her to pay the expenses of the proceeding.

THE facts sufficiently appear in the judgment.

H. J. C. Pereira, for first defendant, appellant.

E. W. Jayewardene, for plaintiff, respondent.

Cur. adv. vult.

18th July, 1905. PEREIRA, J.—

In this case the plaintiff, who is the wife of the first defendant, charges him with adultery with the second defendant and with cruelty, and claims, as against him, a divorce *a vinculo matrimonii*. Two issues were framed: (1) Between the 25th September and 3rd October, 1904, did the first defendant commit adultery with the second defendant? And (2) What alimony, if any, is the plaintiff entitled to claim? After evidence had been led by both parties the District Judge held that the first defendant had not committed adultery with the second defendant, but that the

1905.
July 18.
PEREIRA, J.

first defendant was guilty of cruelty towards the plaintiff, and allowed the plaintiff to make an application for a judicial separation. That was done, and the first defendant's counsel appeared to show cause. The plaintiff's counsel cited a case from *Vanderstraaten's Reports (p. 180)* in support of his appplication, and the District Judge, having heard the first defendant's counsel, eventually allowed the application and ordered a judicial separation. The case cited from *Vanderstraaten's Reports*, assuming that it is applicable to matrimonial actions under the Civil Procedure Code, does not support the plaintiff's contention. In that case all proceedings were held to be erroneous, and the judgment was set aside and the case remitted for a new trial. At the argument in appeal the appellant's counsel cited section 601 of the Civil Procedure Code, and submitted that it showed that in an action for dissolution of marriage, when the Court was not satisfied that the plaintiff's case was proved the order to be made by the Court was one dismissing the plaint. That section has been borrowed, as indeed many other sections of chapter 42 of our Code have been, almost *verbatim* from the English Act 20 and 21 Vic., ch. 85. It is nearly in the same terms as section 29 of that Act; and, therefore, in considering the point raised, English authorities might well be consulted. The latest case that may be cited as throwing light on the subject is that of *Otway v. Otway (L. R., 3. and D. 141)*. There, both husband and wife had presented cross petitions for dissolution of the marriage. Both were found guilty of adultery, and the husband was found guilty of cruelty also of an aggravated character. The Judge refused to decree a dissolution of marriage, but granted to the wife a decree for judicial separation. In appeal the order for judicial separation was dealt with on its own merits and discharged, the reason being that the fact that the wife was guilty of adultery disentitled her to relief in the shape of judicial separation. There was no disapproval, however, of the procedure adopted of converting a proceeding for dissolution of marriage into one for judicial separation. I think, therefore, that the course adopted by the District Judge is permissible in a case like this; but an issue should be framed and the defendant should be given every opportunity of further examining the plaintiff's witnesses in view of such issue, and calling further evidence himself. In the present case the District Judge having held that the evidence was insufficient to support a decree for dissolution of marriage, adjourned the entering up of final judgment in order to enable the plaintiff to make application for a judicial separation, if so advised. Thereupon

1905.
July 18.

PEREIRA, J.

the plaintiff moved for a notice on the first defendant to show cause why a decree granting a judicial separation should not be entered. The first defendant showed cause—that is, I take it—against a decree for judicial separation being entered in the case as it then stood. His counsel submitted that his client had not treated the case so far as one for a separation, and he, in fact, called no further evidence in the case. There is nothing to show that the Court was prepared to enter upon a regular trial of an issue to be framed as to cruelty. Anyway, it is possible that there was some misapprehension, and I think that the case should go back for the framing and trial of such an issue as that indicated above. The plaintiff will, subject to the observations I shall make presently, be entitled to her costs of all proceedings in both Courts, whatever may be the result of the action, unless it is shown that she has separate property of her own and can afford to meet the costs of this litigation out of that property. The appellant's counsel questioned this right of the plaintiff to costs. I think the English rule should be followed, and I shall lay it down as briefly as possible. The rule is that the husband, besides being generally liable to pay his own costs, is also, as a general rule, whether the wife be successful or not, and whether she be petitioner or respondent, liable to pay his wife's costs taxed as between party and party, incurred by her up to the time of the case being set down for trial, and to pay them when it is so set down; and he is also liable to pay into Court, or give security for, an amount fixed by the Registrar as sufficient in his judgment to cover the wife's costs in connection with the hearing of the case. The reason for this liability, it may be observed, is that under the old law "the marriage gave all the property to the husband, and the wife had no other means of obtaining justice" (see *Beevor v. Beevor, 3 Philim. 261*; see also *Miller v. Miller, 2 P. and D. 13*).

The order appealed from must, I think, be set aside and the case sent back for the framing and trial of an issue on the question of the plaintiff's right to a judicial separation on the ground of cruelty. The District Judge will make order for costs in accordance with the rule laid down above. The order in favour of the second defendant will stand.

LAYARD, C.J.—I agree.