

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Count Gio. Francesco Sant, Baron Cassia, v. the Countess Generosa, the wife of Count Sant, from the Appellate Court of the Island of Malta; delivered 16th May, 1874.

Present :

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.
SIR JAMES HANNEN.

THIS is an Appeal from a Judgment of the Appellate Court at Malta, confirming in substance the decision of the First Hall of the Civil Court, in a suit instituted by the Respondent the Countess Sant against her husband Count Sant, praying for a personal separation on the ground of ill-treatment. The First Hall gave judgment in favour of the Countess.

The proceedings are founded on the 46th Article of Ordinance No. 5 of 1867, "to amend the laws relative to the Rights and Duties emanating from Marriage and to Separation of Married Persons."

That Article is in these terms :—

"Art. 46. Ciascuno dei conjugi può domandare la separazione per eccessi, sevizie, minacce, o ingiurie gravi dell' altro contro l'attore medesimo o contro qualunque dei suoi figli."

The corresponding Article of the Italian "Codice Civile," which became law on the 1st of January, 1866, is as follows :—

Art. 150. "La separazione può essere domandata per causa di eccessi, sevizie, minacce e ingiurie gravi."

This provision is derived from the French Code Civil :—

Art. 231. "Les époux pourront réciproquement demander le divorce pour excès, sevices, ou injures graves de l'un d'eux envers l'autre."

For divorce in this Article must now be substituted "séparation de corps."

It is to be observed that an important addition has been made in the Maltese Ordinance to the provisions of the Italian and French laws, by placing wrongs done to the children of the Plaintiff on the same footing as those inflicted on the Plaintiff.

This addition was probably suggested by those cases in which, under the English law, cruelty to the children in the presence of the wife has been held to be cruelty to her;* but the law of Malta cannot be interpreted by that of England, for they differ in this important respect, that by the latter the ill-treatment which can give cause for judicial separation must amount to cruelty ("scævitia"), while by the former, separation is accorded not only for conduct which would fall within the definition of cruelty, but also for "ingiurie gravi" (grievous wrongs) done to the complaining consort. It is true that by judicial interpretation an extension has been given in England to the meaning of the word "cruelty," which would possibly include some of those cases which would, under the Maltese law, fall within the description of "ingiurie gravi;" for instance, it has been said by more than one Judge, that spitting on the wife amounts to cruelty (*D'Aguilar v. D'Aguilar*, 1 Hag. 776; *Saunders v. Saunders*, 1 Robertson, 562); and it has been held, where a husband by his filthy language and conduct led a passer-by to take the wife for a common prostitute and insult her, that this amounted to cruelty (*Milner v. Milner*, 4 Sw. and Tr., 240). But the meaning of the words used in the Maltese Ordinance cannot be limited by reference to the English decisions, and we are called upon in this instance, by the language of the Ordinance, to distinguish between acts of violence which are included in the expressions "eccessi" and "sevizie," and those moral wrongs which are pointed at by the words "ingiurie gravi."

To assist in this investigation reference was properly made, in the argument of this case, to Italian

* *Bramwell v. Bramwell*, 3 Hag., 637. *Suggate v. Suggate*, 1 Sw. and Tr., 491. *Wallscourt v. Wallscourt*, 5 N. of C. 132.

and French commentators on their respective codes. To these may be added Dalloz, "Répertoire de Jurisprudence," tit. "Séparation de Corps et Biens," § 28 :—

"L'injure, pour devenir cause de séparation, doit être grave; elle doit porter atteinte à l'honneur de l'époux contre lequel elle est dirigée. Ici, comme pour le cas de sévices, il est difficile d'en déterminer les caractères particuliers; tout dépend de la condition, de la manière de vivre des parties intéressées. Telle parole est une injure grave pour la femme qui appartient à une classe où l'éducation aiguise la sensibilité, qui ne serait qu'un mot sans importance dans une classe où les expressions ont en général beaucoup moins de convenance et de mesure.

"Des paroles amères, des expressions de mépris ou de dégoût constituent un outrage susceptible de fonder une demande en séparation.

"Au reste, cette identité des outrages de fait aux outrages de vive voix, des peines aux injures, n'a jamais semblé à personne la matière d'une incertitude."

In proof of which he cites various authors, and proceeds :—

"La seule difficulté est de bien distinguer les faits qui doivent être considérés comme injurieux, et l'on peut, ce nous semble, la résoudre à l'aide d'une théorie assez simple. L'injure procède nécessairement du mépris ou de l'intention de manifester ce sentiment: les faits qui n'en sont pas empreints peuvent bien révéler l'oubli d'un devoir, mais à notre sens ce ne sont pas des injures. Toutefois, il ne faut pas, à l'égard des époux, entendre le mot mépris dans le sens restreint du langage ordinaire. Placés par la loi et par la religion dans des rapports d'affection profonde et de confiance intime qui doivent vivement exciter leur sensibilité, ils ne sauraient sans injustice subir, sous ce rapport l'application banale d'une vocabulaire qui n'est pas celui de la société conjugale. Il y a mépris, et par suite injure, de la part d'un des époux envers l'autre, lorsqu'il y a manifestation affectée, persévérante, d'un sentiment contraire à celui qu'il devrait éprouver pour son conjoint."

Their Lordships consider that, under the words "ingiurie gravi," it was intended to leave a large discretion to the Tribunal having to judge of the facts; that not only acts but words designed to wound the feelings of the wife—where, as in this case, she is the complaining party—may amount to "ingiurie gravi;" that, in considering this question, the position of the parties, the habits and usages of the society in which they live, must be regarded; that insults offered to the wife, which manifest contempt of her in that character, are of special gravity, and that that gravity is increased if the

insults be offered in the presence of others; that wrongs of this description are not to be estimated separately, but in combination one with another.

Having considered the principles applicable to the case, the facts may be briefly stated as follows:—

The parties were married on the 31st August, 1830, and have had five children. They were both of high rank, the Appellant being noble, and the lady of equal birth. They appear to have been in somewhat straitened circumstances for their position in society.

There is nothing in the evidence to show that their early married life was not happy; and all the witnesses who were called to establish the charge of cruelty against the Count speak chiefly as to events of the four or five years preceding the separation.

One witness* called by the Count gave evidence from which it would appear that, as long ago as 1849, the Appellant used threatening and insulting language towards his wife: "One day the Count, taking a plate in his hand, said to the Countess, threatening her, 'If you speak, I will break your head with this plate. Your income is not enough for your slippers.'" But, whether this be regarded as an isolated outburst of temper or as indicative of his habitual behaviour, it appears, from the general tenour of the evidence of the witnesses called on behalf of the Countess, that the conduct of her husband towards her, and one at least of her children, had assumed a more serious character about the year 1866: "Once, four or five years ago," says the witness Elena Bonatto, in her examination taken in May 1870, "I approached Miss Angelica, and, finding her crying, she told me that she had got a slap in the face."

Lorenzo Vella, coachman to the Count's father, speaking of the general behaviour of the Count when he came with his family to visit his father during the nine years which preceded 1864, says, "When the Count came, he got angry with every one, also with his father. The Count Francesco used to threaten every one. There was no reason for it. He used to call the wife and children 'carrion,' but not his father. He spoke so whilst irritated, because everything irritated him."

Maria Bonello, also in the service of the Count's

* Nicola Ferrugia (p. 164).

father, says, "When he came he scolded the lady. Once, five years ago, the Count came about 10 P.M. I heard him cry out. I heard from his lady, who was crying, that he was scolding her because she had gone out to church. He continued scolding till about midnight, and returned to town at night-time."

The principal evidence offered on behalf of the Countess is that of servants living in the house.

Lorenzo Camilleri, who lived eleven years in the family, says, "The lady was treated badly; he swore at the lady, and at the children also, in a passion. There was no cause for the anger. I sought to get away, not to hear the bad words. The last quarrel took place about two years or twenty months ago (*i.e.*, in 1868). The Count had said, 'It will end badly, we shall finish badly;' and sometimes he said, 'On account of yourselves I shall go to the gallows.'"

He also states that the Count, in the presence of his family, used profane language in depreciation of matrimony, and continued, "Some months before I left the Count's house I heard him say, 'I raised you from the mud, your income does not serve me for tooth-picks.' Oftentimes I have seen the wife in tears, also the children. When the Count knocked at the door the family got timid. The Count at times used the word 'carrion' ('carogna'), to his wife."

He also states that the Count used to apply a grossly obscene term of abuse to his wife.

Elena Bonatto, more than nine years a servant of the parties, states that the Count used towards the lady the expression "carrion," that he threatened in gross terms to kick her, that he threatened to turn her out of the house, that sometimes the reason was some mistake of the witness herself in serving the dinner, that the Countess was often weeping, that the Count cursed and swore and used improper words before the children, as well as before their mother, and particularly that he used with reference to his wife, and in her presence, language of the most disgusting indecency, too gross to be here repeated.

Margarita Farrugia, a servant in the house for two years and a half before the Countess left, deposed that the Count threatened to kick his wife, and to

throw her out of the window ; that on one occasion, when the lady was in bed, he threatened to throw her out with her chemise on, and to kill her ; that after this, from 3 o'clock in the morning till 6, he took to walking about, swearing, cursing, and grumbling, from the lady's room to his own. "At last he remained in his room." "During my stay," the witness continues, "their house was a hell. He used to say to the lady she was good for nothing ; that he had raised her from the dirt. He swore by the Virgin Mary. A day did not pass without some quarrel. He used to say that he would be sent to the gallows on her account."

This witness also corroborated the last as to the use by the Count of the obscene and insulting language to the Countess, already referred to. "He did not call her by her name, but would say, 'I say, come here,' and called her a sow and brood-hen. These words he used openly at dinner before the children and servants."

No suggestion of a reason was offered why these witnesses should not be believed, except the antecedent improbability that a gentleman should be guilty of such conduct to his wife ; but the length of time they were in the service of the Count is a testimony to the general goodness of their character, and no questions were put to them in cross-examination with a view of shaking their credibility.

On the other hand, their statements were corroborated in some important particulars by the evidence of Dr. Mifsud, the medical attendant of the family. He says, "I observed that he, the Count, is of a hard disposition. The father is of an irascible character, in consequence whereof, when he is under some impulse, he does not pay any respect to the state of illness of the wife and of the family. If at any time some family dispute arises with the servants, or something similar, he gets into a passion and utters some injurious word even in the sick-room ; words addressed to the servants and sometimes to the wife momentarily aggravating the state of the sick person. For example, the words used were that the position of the wife depended on her title as Countess, and speaking with contempt of her family. I also heard him swearing as if using familiar expressions. The words were uttered in a loud voice audible to the family. I also attended the

Count sometimes, but his irascibility surmounted his indisposition," probably meaning that his illness did not prevent his outbursts of temper. "I do not remember injurious words in the presence of the lady, but there were such words said to me in regard to her. I always observed the exasperated state of the Count. I told the Count to repress his irritation; he used to say, 'I cannot.'"

Their Lordships are of opinion that the evidence of these witnesses outweighs the testimony of those persons who were called on behalf of the Count.

Some of these, indeed, gave evidence rather tending to support the charges made against the Count. The evidence of Niccola Ferrugia has already been referred to. Another, Camilleri, had only been in the Count's service a month when the Countess left; but he, while stating that he saw no blows and heard no bad language, says that when the lady and family used to retire, the Count remained to grumble, and swore against those who had caused him to marry.

The other witnesses called by the Count were either men servants (such as the gamekeeper and coachman), not having the same opportunities of observing his behaviour as those called by the Countess, or acquaintances, before whom, on the rare occasions on which they saw him, it may well be that he restrained his passion, while in the privacy of his home he may have permitted it to carry him to the excesses deposed to by the domestic servants and Dr. Mifsud. Even if the weight of evidence on the one side and the other were more equally balanced than it is, their Lordships would not lightly set aside, on a question of fact, the finding of the tribunal which had an opportunity of hearing the witnesses and observing their demeanour; but without these advantages their Lordships think that the testimony of the witnesses deposing to what they saw and heard is of more value than that of persons who, from the necessity of the case, are only able to state that they did not see or hear similar conduct and words.

The result is that their Lordships come to the conclusion that the Count, for some years before his wife left her home, had been accustomed to treat her with harshness and unkindness, and that he frequently insulted her in the grossest manner before

her servants and children, and intentionally wounded her feelings as a mother and a woman by applying to her terms of the foulest vituperation, and that he thereby kept her in a constant state of excitement and fear, which could not but be prejudicial to her health.

This being the general condition of the household, it was proved, and not denied, that in November 1868 the Count gave his daughter Angelica, a woman of thirty, some slaps in the face, he alleging that the only provocation she had given was that she contradicted him.

It was also proved by Dr. Mifsud that the effect of these blows, acting on the already delicate health of the daughter, was to throw her into convulsions, which continued to return during several months, and that the lady and all the family from the time of this occurrence were in fear of the Count.

Their Lordships are of opinion that this violence offered to the daughter must be taken in conjunction with the previous treatment of the mother, and that together they constitute "*ingiurie gravi*" within the meaning of the 46th Article.

It was, however, argued that the Countess, by not leaving her husband before February 1869, condoned his matrimonial offences. Their Lordships are of opinion, however, that this defence is not established. It appears that Angelica remained ill from the consequences of her father's violence for several months, during which she required the attention of her mother, and it further appears that on the first occasion of the Count leaving home the lady took advantage of the opportunity to escape from the house.

Their Lordships will, therefore, humbly recommend to Her Majesty that the Judgment of the Court of Appeal of Malta of the 22nd April, 1872, be affirmed, and that this Appeal be dismissed with costs.