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DROIT CIVIL. — Divorce — Causes — Cruauté physique et mentale — Preuve — *G.M.S.* c. *G.V.B.*, Cour supérieure, division des divorces, Hull, 7 octobre 1971, n° 14,583, Bernard de L. Bourgeois, J. — *J.F.H.* c. *E.W.B.*, Cour supérieure, division des divorces, Hull, 14 octobre 1971, n° 12,202, Jacques Boucher, J.

1re espèce. — *L'abus de boissons alcooliques, des brutalités répétées et la tenue de propos obscènes en présence de jeunes enfants autorisent le prononcé du divorce du chef de cruauté physique et mentale.*

2e espèce. — *Un acte de brutalité isolé et sans gravité n'est pas constitutif de cruauté physique. Même joint au précédent, des incidents banals, qui ne font que révéler une incompatibilité de caractère entre les époux, ne sont pas constitutifs de cruauté mentale.*

A supposer qu'il puisse y avoir cruauté mentale en l'absence de conséquences dommageables pour la santé, la preuve des faits reprochés doit au moins satisfaire aux mêmes exigences que dans une action civile ordinaire. En l'absence de corroboration, les tribunaux ne peuvent qu'hésiter à prononcer le divorce pour cruauté mentale, si la preuve est contradictoire ou peu satisfaisante.

1re espèce

(*G.M.S.* c. *G.V.B.*)

THE COURT, on the petition for divorce submitted by Petitioner, having examined the pleadings and the exhibits and heard the evidence, adduced by the parties, renders the following judgment;

The principal grounds upon which the Petitioner seeks to obtain from this Court a conditional decree of divorce are the Respondent's excessive drinking habits, which have resulted, on occasion, by Respondent striking Petitioner with the result that she has had to be treated medically at the hospital, and also because of alledged vile and gross language used by Respondent towards Petitioner in the presence of the children.

There can be little, if any doubt, that Petitioner has proven that on a number of occasions, particularly on May 1, 1971, when Respondent, who had been drinking excessively, has caused Petitioner to be seriously bruised to the point that the latter had to be removed to the hospital for medical treatment.

As a matter of fact, Dr. Norman Stewart Geggie, confirmed in his evidence that he was called upon to treat Petitioner at his hospital in

Wakefield, as a result of bruises which he attributed to certain blows received by Petitioner.

At this point, the Court should like to observe that Respondent, who also was heard as a witness, was very honest in his deposition and, while not admitting directly that he struck Petitioner on May 1, 1971, nevertheless acknowledged that she may had suffered bruises as a result of physical "pushing that he resorted to" on that particular occasion.

Petitioner has also stated under oath that her husband not only had been drinking excessively for a period of over 6 years, but also that he had been using frequently obscene language directed not only at her, but also at her two young boys.

After hearing all the evidence adduced by Petitioner herself and other witnesses heard on her behalf, the Court is satisfied the Petitioner has proven the main allegations of her petition for divorce and is entitled to a conditional decree accordingly.

It must be observed here, that Respondent did not contest seriously on the merits, the grounds for divorce; the Respondent did, however, oppose strenuously the right of Petitioner to obtain legal custody of the two young boys aged respectively 15 years and 10 years.

After hearing all the evidence, both on behalf of Petitioner and on behalf of Respondent, the Court is satisfied that the father and mother love very dearly their sons, R... and L..., and both would be capable of looking after them.

There is, however, some danger in leaving the two young boys in the permanent custody of their father, not only because he continues to drink heavily on week-ends, but also because he has a tendency to leave them, on occasions, unattended, and also because he seems to spoil them to the point, particularly the older boy, R..., aged 15, who does not seem to wish to see his mother.

After weighing all the evidence, the Court is of the opinion that it would be in the best interest of the children if legal custody were granted in favour of the Petitioner provided, however, that broad visitation rights be given to the Respondent and, in view of all the circumstances of this case, the Court will so rule; in order not to disrupt unnecessarily the schooling of the two boys, the Court feels that Petitioner should be allowed to live in the common domicile to the construction of which Petitioner has contributed a total sum approximating $12,000.00; and, as a result of this ruling, the Respondent will have to find living quarters somewhere else; in order to help Petitioner to look after her two sons, Respondent will have to pay an alimentary allowance of $100.00 a month.

Although the Court does grant legal custody of the children to the Petitioner, the Court is also mindful of the fact that Respondent has always been a good father to his sons and, for that reason, will allow Respondent to have the boys, R... and L..., on three week-ends each month, starting on Friday afternoon after classes until Sunday evening.

Considering that Petitioner has proven the main allegations for divorce, and is entitled to judgment accordingly;

Considering, however, that although Respondent has not contested too seriously the merit of Petitioner's proceedings in divorce, he has asked for legal custody of his two boys;

Considering that both Petitioner and Respondent are equally capable and fit to look after the two boys, R . . . and L . . . ;

For these reasons, the Court

a) doth grant a conditional decree of divorce in favour of Petitioner;

b) doth grant legal custody of the minor children, R . . . and L . . . , to Petitioner;

c) doth allow Petitioner to live with her two sons in the common domicile;

d) doth order Respondent to pay to Petitioner for the upkeep of the two sons, R . . . and L . . . , the sum of $100.00 per month;

e) doth allow Respondent to have his two sons with him on three week-ends each month, starting on Friday afternoon after classes until Sunday evening;

Each party will pay her or his own costs.

2• espèce

(*J.F.H.* c. *E.W.B.*)

THE COURT, having heard the parties by their attorneys on the merits of the present case and the evidence, seen the exhibits, proof of record and deliberated:

Petition for divorce

The parties were married in Montreal on May 11, 1938. The Petitioner, a minor of 19 years old, went through the celebration without her parents' consent. Her, then 23 years old husband, was temporary out of work. He left his wife in Shawinigan, Quebec, to seek employment in Northern Ontario as a commercial pilot; an occupation which he was qualified to fulfill since the age of 18.

His wife joined him shortly afterwards when suitable accommodation was found to receive her.

They took residence, from the beginning of the marriage until a few years ago, at the different places in the provinces of Ontario, Quebec, Manitoba and British Columbia. To secure employment, the respondent had to move where his services as a pilot were needed. He worked for different employers. During the war, he was attached to the Ferry Command. After, to Trans-Canada Air Line, now Air Canada. Actually, he is a federal civil servant with the Air Services Headquarters, in Ottawa.

The children born of the marriage were five. The oldests are in or about their thirties and lived independently of their parents.

The younger children, J... 16 and D... 12, are dependants living at the common domicile at Aylmer, Quebec.

Since their marriage, the parties have lived under the same roof. They never were separated. There is no suggestion that the marriage was ever in danger of breaking down until the last few years preceding the service of the petition for divorce on December third, 1970, following which the respondent was ordered, in January 1971, to occupy a separate and provisional residence pending the disposition of the case.

The petitioner is 52 years old. She has artistic talent. She is a part-time teacher in a school for retarded children, where she earns a yearly emolument of $1,000.00. She is healthy. Besides her functions outside the home, she kept house for her husband and two children.

The respondent is 55 years old. He has an enviable record in his profession. He could ill afford more than a $5.00 wedding 33 years ago, which should not be a cause of reproach by his wife. He now earns a basic pay of $18,260.00 a year plus a flying pay allowance of $1,399.88 at the Air Service Headquarters.

The petitioner relies on section 3 (d) of the Divorce Act that is physical and mental cruelty to secure a divorce.

Physical cruelty

This ground has not been established. The respondent is not a wife beater. An incident which occurred on the morning of November 18, 1970, admitted by the respondent, is an isolated act which does not substantiate the contention that the respondent resorted to violence to settle his marital conflict with his wife.

That day, at breakfast time, the respondent turned off the kitchen light, as he felt that natural light was sufficiently abundant to dispense with electricity. The petitioner entertained a different opinion. She turned on the switch. He turned it off again. This game went on repeatedly until the moment when the spouses, trying to reach the switch at the same time, the extended arm of the respondent grazed the jaw of the petitioner who fell down.

This event which the petitioner noted carefully in her note book, in contemplation of her recourse for divorce, had no serious consequence. Pride more than limb had been bruised. No medical treatment was required to cure a blueish spot, half an inch in diameter, on the skin in the area of the jaw and the elbow.

Though there is no serious evidence of physical cruelty, this event could only be taken in consideration in the determination of the other ground alleged in the petition; that is mental cruelty.

Mental cruelty

The petitioner's contention that marriage life has become intolerable is based on the following reasons: excessive drinking, grievous insults, refusal to consummate the marriage and differences on the upbringing of their son J . . .

When heard as a witness, the respondent has admitted that he does indulge in drinking after his working hours and during his leisure time, but he denies committing any excess.

His wife is the only witness to pretend otherwise. She has admitted that she had never seen her husband staggering. Coupled with this admission is the fact that the respondent qualifies for a flying pay allowance. To earn this allowance, certain conditions of eligibility are strict. Proof must be adduced of medical fitness and professional capacity in flight instructions conditions.

I fail to see, having regard to this particular circumstance and the whole of the evidence, that the petitioner has established a case based on mental cruelty deriving from excessive alcohol consumption.

The other reasons alleged in support of the petition have to be considered together. These reasons or their accumulation do not tend to prove mental cruelty, but rather incompatibility of character. Both parties are strong-will persons. Because of this trait of their respective character, they have been unable to use self-restraint in their conduct as matrimonial partners.

The light switch incident above related affords an illustration of their particular temperament. The enumeration of other trivial incidents can serve no useful purpose.

However, it can be said that the spouses are seriously afflicted by their son's conduct who is becoming a problem child. There is no satisfactory evidence that the respondent is the cause of this important problem, nor for that matter, the petitioner herself.

The determination of this case involves a question of evidence and substantial law.

It has been argued that there is now no need to consider whether conduct complained of has caused "danger to life, limb or health bodily or mentally, or a reasonable apprehension of it". [1]

Even if I agreed with the current jurisprudence that mental cruelty can exist in the absence of consequences, it remains that misconduct in this respect is a question of fact which must be established by the quantum of evidence needed to sustain an ordinary civil action.

The onus is on the petitioner to prove her case. She is at a disadvantage. She is the sole witness to the facts in support of the petition. Those facts are either denied or explained by the respondent. There is no corroboration.

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[1] *Dame L.* c. *L.*, 1970 C.S. 222; *Zalesky* c. *Zalesky*, 1969, 1 *D.L.R.* 471; *Knoll* c. *Knoll*, 1970, 10 *D.L.R.* 199.

Notes consigned by the petitioner in a notebook do not constitute corroboration of her testimony. They might be useful to refresh one's memory.

It is true that corroboration is not required. But in absence of corroboration, courts are reluctant to grant a divorce on the grounds of mental cruelty, where the evidence is contradictory or unsatisfactory.

The interested parties, from my observation of their conduct as witnesses, as well as the whole of the evidence, have a problem of incompatibility of character. Incompatibility is not a ground for divorce. [2]

No court can order the spouses to live together. If they do not resume conjugal life, it might be that, which I do not have to decide, a recourse for divorce might be justified on section 4 of the Act.

Seeing my conclusion, there is no necessity to determine whether the matrimonial status of the interested parties falls under the community or separation of property.

For the foregoing reasons:

The Court dismisses the petition; with costs against the petitioner.

NOTE. — Dans les deux espèces ci-dessus, les requêtes en divorce pour cruauté physique et mentale étaient fondées sur des allégations sensiblement similaires: abus de boisson, brutalités, propos injurieux, etc. Les jugements rendus montrent pourtant toute la distance qui sépare une preuve solide, justifiant le prononcé du divorce, d'une preuve légère qui n'emporte pas la conviction du tribunal: ici gravité et répétition des faits reprochés, abondance de témoignages; là incidents isolés ou banals, témoignage contredit et non corroboré.

On notera d'autre part que le premier jugement ne se prononce pas sur la définition de la cruauté, alors que le second n'est pas sans manifester une certaine méfiance à l'égard de la définition libérale, voisine de celle de l'injure grave, donnée par la majorité de la jurisprudence canadienne postérieure à 1968. Cette méfiance et, corrélativement, la difficulté à se départir de l'esprit étroit du très peu psychologue arrêt Russell, semblent encore dominer la jurisprudence québécoise. Nous avons déjà eu l'occasion d'indiquer que cette attitude est aussi étrange que regrettable (1971 *R. du B.* 99; sur la notion de cruauté en général, v. F. HELEINE, *Chronique de droit familial,* II, n°s 10 et 14, cette *Revue,* 1970, p. 116 et 129).

Alain-François BISSON.

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[2] *Dame B.* c. *R.*, 1970 C.S. 212.