3 Phil. 34

[G. R. No. 1056. December 08, 1903]

AGUEDA BENEDICTO, PLAINTIFF AND APPELLEES. ESTEBAN DE LA RAMA, DEFENDANT AND APPELLANT.

D E C I S I O N

WILLARD, J.:

This is an action for divorce. The complaint, which was filed on October 29, 1901, alleged as the grounds therefor. abandonment and adultery. The answer charged the plaintiff with adultery, denied the adultery imputed to the defendant, and asked for a divorce. Judgment was rendered on July 5,1902, in favor of the plaintiff, granting her a divorce and 81,042.76 pesos as her share of the conjugal property. The defendant excepted to the judgment and moved for a new trial on the ground that the facts found were not justified by the evidence. This motion was denied, and the defendant excepted. The record before us contains all the evidence received at the trial.

(1) The first question which we find it necessary to decide is whether or not the Courts of First Instance now have jurisdiction of divorce cases, and if they have, on what law it is based.

The court below assumed that the provisions of the Civil Code relating to divorce, contained in title 4 of book 1, are still in force. In this we think there was error.

By the royal decree of July 31, 1889, the Civil Code as it existed in the Peninsula was extended to the Philippines. The *"cumplase"* of the governor-general was affixed to this decree on September 12,1889. The Code was published in the *Gaceta de Manila* on November 17,1889, and took effect as a law on December 8, 1889. On December 31, 1889, the following order was published in the *Gaceta de Manila*:

"GENERAL GOVERNMENT OF THE PHILIPPINES,
"SECRETARY'S OFFICE, Bureau No. 2,

"*Manila, December 29,1889*.

> "By direction of Her Majesty's Government, until further order, titles 4 and 12 of the Civil Code, extended to these Islands by royal decree of July 31 last, published in the Gazette of this city of the 17th of November last, are suspended in this Archipelago.
>
> "The proper authorities will issue the necessary orders to the end that in lieu of the two titles so suspended the former law may continue in force.
>
> "This order will be communicated and published.
>
> "WEYLER."

This order purports to have been issued by the governor-general by order of the Government at Madrid, and although it is stated in the *Compilacion Legislativa de Ultramar* (vol. 14, p. 2740) that no decree of this kind Avas ever published in the *Gaceta de Madrid* and that a copy thereof could not be obtained in any governmental office, yet we can not assume that none was ever issued.

Sanchez Roman says: "By reason of the lack of that preparation which was proper in a matter of such great importance, it seems, according to reports which merit a certain amount of credit (for no order has ever been published which reveals it), that the Government of the Philippines, after taking the opinion of the audiencia of Manila, consulted the colonial office concerning the suspension of titles 4 and 12 of book 1. This opinion was asked in respect to title 4 on account of certain class influences which were strongly opposed to the application of the formula of marriage which gave some slight intervention to the authorities of the State through the municipal judge or his substitute in the celebration of the canonical marriage. As to title 12, the opinion was asked by reason of the fact that there was no such officer as municipal judge who could take charge of the civil registry." (2 Derecho Civil, p. 64.)

Moreover, the power of the governor-general, without such order to suspend the operation of the Code, was well settled. A royal order so stating was issued at Madrid on September 19, 1876, and with the *cumplase* of the governor-general published in the *Gaceta de Manila* on November 15, 1876.

It was suggested at the argument that this order of suspension was inoperative because it did not mention the book of the Code in which the suspended titles 4 and 12 were to be found. The Civil Code contains four books. All of them except the third contain a title numbered 4, and the first and fourth contain a title numbered 12. Title 4 of book 2 deals with rights of property in water and mines and with intellectual property. Title 4 of book 4 relates to the contract of purchase and sale, and title 12 to insurance and other contracts of that class. There is no such intimate relation between these two titles of this book as between titles 4 and 12 of book 1, the one relating as it does to marriage and divorce and the other to the civil registry. The history of the Law of Civil Marriage of 1870 is well known. As a consequence of the religious liberty proclaimed in the constitution of 1869 the whole of the law was in force in the Peninsula. But that basis was wanting in these Islands, and prior to the promulgation of the Civil Code in 1889 no part of the law was in force here, except articles 44 to 78, which were promulgated in 1883. Of these articles those numbered 44 to 55 are found in title 4, but they relate merely to the rights and obligations of husband and wife and do not touch the forms of marriage nor the subject of divorce. If these provisions of the Civil Code on these subjects could be suspended by the certain class influences mentioned by Sanchez Roman, the only marriages in the Islands would be canonical and the only courts competent to declare a divorce would be ecclesiastical. There can be no doubt but that the order of suspension refers to titles 4 and 12 of book 1, and it has always been so understood. It follows that articles 42 to 107 of the Civil Code were not in force here as law on August 13, 1898, and therefore are not now.

While General Orders, No. 68, promulgated by the Military Government on December 18,1899, treats of marriage and nullity of marriage, it says nothing about divorce. To find the law applicable to this subject resort must be had to the legislation relating thereto in force in the Islands prior to 1889. It seems necessary to ascertain in the first place what laws on the subject were in force in the Peninsula and afterwards if any ‘of them had been extended to the Philippines.

The canon law, which the ecclesiastical courts administered both in Spain and here, had not as such any binding force outside of the church. However, any part of the canon law which by proper action of the civil authorities had become a civil law stood upon the same footing as any other law of Spain. This happened in the case of the decree of the council of Trent. That those decrees have in Spain the force of a civil laAv is well settled. “Tho decrees of the council of Trent have in Spain force of law” (1 Practica General Forense, Zuniga, 260). In the preface to the Law of Civil Marriage of 1870, its author, Montero Rios, says: “Philip II accepting as law of the State by royal cedula dated in Madrid the 12th of July, 1554, the

decrees of the council of Trent," etc. This royal cedula of Philip II was brought forward into the *Novisima Recopilacion* and is now Law 13, title 1, book 1, thereof. The same thing is declared in article 75 of the present Civil Code, which is as follows: "The requisites, form, and solemnities for the celebration of canonical marriages shall be governed by the provisions of the Catholic Church and of the holy council of Trent, accepted as laws of the Kingdom." It may be doubted, notwithstanding, if these decrees, even if considered as extended to the Philippines and in force here, furnish any aid in the solution of the question. The canonists hold that they do declare adultery to be a ground for divorce (2 Procedimientos Eclesiasticos, Cadena, p. 211). This is, however, more by deduction than otherwise. The causes for divorce are nowhere distinctly stated therein. The seventh canon of the twenty-fourth session (November 11,1563), relied upon by the ecclesiastical writers, does not say that adultery is a ground for a separation; it simply says that it is not a ground for a divorce from the bond of matrimony. The eighth canon of the same session, while it declares that the church may direct the separation of the spouses for many causes, does not state what those causes are. The laws of the church which do state what these causes are have not the force of civil laws.

The Decretal Law of December 6, 1868, abolishing in the Peninsula the special jurisdictions, was extended to the Philippines by a royal order of February 19, 1869, which was published in the *Gaceta de Manila* on June 2, 1869. That Decretal Law contained the following provision:

"The ecclesiastical courts shall continue to take cognizance of matrimonial and eleemosynary causes and of ecclesiastical offenses in accordance with the provisions of the canon laws. They shall also have jurisdiction over causes of divorce and annulment of marriage as provided by the holy council of Trent; but incidents with respect to the deposit of a married woman, alimony, suit money, and other temporal affairs shall pertain to the ordinary courts."

This did not have the effect of making the canons mentioned therein civil laws. It simply declared that the church might try the cases referred to according to its own laws in its own courts and that the State would enforce the decrees of the latter.

It is not necessary, however, to decide this question as to the decrees of the council of Trent, for the *partidas* do contain provisions relating to the subject of divorce. Law 1, title 10, of the fourth *partida,* defines divorce as follows:

"*Divortium,* in Latin, means, in common speech, separation (*departimiento*), and is the means by Avhich the wife is separated from the husband, and the husband from the wife, on account of some impediment existing between them, when it is properly proved in court. And whoever separates the parties in any other way, doing it by force, or contrary to law, will go against that which is said by Jesus Christ, in the Gospel: 'those whom God hath joined together, let no man put asunder.' But when the spouses are separated by law, it is not then considered that man separates them, but the written law, and the impediment existing between them. And *divortio t*akes its name from the separation of the wills of man and woman, which are in a contrary state when separated, to what they were when the parties were united."

Law 2 of the same title is as follows:

> "Properly speaking there are two forms of separation to which the name of divorce may be given and two reasons therefor; there are many reasons which bring about the separation of those who appear to be married but are not so by reason of some impediment between them. Of these two reasons, one is religion and the other the sin of fornication. Religion authorizes divorce on this ground: That if any persons there be lawfully married, there not existing between them any of the impediments upon which the marriage might be dissolved, if either of them after they have been carnally joined should desire to take holy orders and the other should grant permission, the one desiring to remain in the world promising to live a life of chastity and being so aged that none can suspect that such spouse will be guilty of the crime of fornication and the other enter into the order in this manner, a separation results which may properly be called divorce, but it must be made by order of the bishop or some other of the prelates of holy church who have authority therefor. Furthermore, if the wife offends her husband by the crime of fornication or adultery, this is another reason which we say may properly be a ground for divorce. The accusation is to be brought before the judge of the holy church and proof made of the fornication or adultery, as set forth in the preceding title. The same would result should one of the spouses commit spiritual fornication by becoming a heretic or a Moor or a Jew, if he or she should refuse to eschew this evil. And the reason why this separation which is authorized by reason of these two things, either religion or fornication, is properly called divorce, in distinction from separation which results from other impediments, is that, although it separates

> those who were married as stated in this law and the preceding one, the marriage nevertheless subsisjs, and thus it is that neither one of them can contract a second marriage at any time excepting in the case of a separation granted by reason of adultery, in which case the surviving spouse1 may remarry after the death of the other."

It will be seen from these laws that the onlv ground for divorce now of importance here is adultery.

Law 2, title 9, of the fourth partida, provides in part as follows:

> "Husband and wife may accuse each other, in another way than those mentioned in the preceding law; and that is for adultery. And if the accusation be made with a view to separating the parties from living together, or from having any commerce with each other, no other person but the spouses themselves can make an accusation for such a cause, and it ought to be made before the bishop or the ecclesiastical judge (official) either by the parties themselves or their attorneys. * * * And in all the various ways in which the husband can accuse the wife, mentioned in these two laws, the wife may in like manner, according to holy church, accuse him, if she choose; and she ought to be heard, as he is himself." While Law 2 of title 10 seems to speak only of the adultery of the wife, this clearly gives the wife the right to accuse the husband of adultery for the purpose of securing a separation. So does Law 13, title 9, *partida* 4.

The divorce did not annul the marriage. Law 3, title 2, *partida* 4, says, among other things, the following:

> "Yet, with all this, they may separate, if one of them, commit the sin of adultery, or join any religious order, with the consent of the other, after they have known each other carnally. And notwithstanding they separate for one of these causes, no longer to live together, yet the marriage is not dissolved on that account." Law 4, title 10, *partida* 4, is to the same effect. Law 7, title 2, partida 4, is in part as follows:
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> "So great is the tie and force of marriage that when legally contracted it can not

> be dissolved, nothwithstanding one of the parties should turn heretic or Jew or Moor or should commit adultery. Nevertheless, for any of these causes they may be separated by a judgment of the church, so as to live no longer together, nor to have any carnal connection with one another, according to what is said in the title on the clergy, in the law which begins with the words 'otorgandose algunos.'"

The *partidas* contain other provisions in regard to the form of the libel (Law 12, title 9, partida 4), and Law 7, title 10, *partida* 4, confers jurisdiction upon the church in cases of divorce.

That either spouse has been guilty of adultery is a defense to his or her suit (Law 8, title 2, *partida* 4), so is the fact that he has pardoned her (Law 6, title 9, *partida* 4). And if, after a divorce has been granted to the husband, he commit adultery, there is a waiver of the judgment (Law 6, title 10, *partida* 4).

Were these provisions of the *partidas* in force in the Islands prior to 1889? The general rule was that laws of the Peninsula did not rule in the colonies unless they were expressly extended to them. As to certain laws, this result was, however, accomplished in another way. An examination of the Laws of the Indies will show that they are almost without exception of an administrative character. They deal with the relations of the citizen to the church and to the Government and some of them to matters of procedure. The laws which treat of the rights of citizens between themselves are few This fact leads to the promulgation of the law which appears as Law 2, title 1, book 2, of the *Recopilacion de las Leyes de Indias.* The last part of Law 1 of that title and said Law 2 are as follows:

> "And as to all matters not provided for by the laws of this compilation, the laws of the compilations and the *partidas* of these Kingdoms of Castile shall be followed in the decision of causes in accordance with the following law." (Law 1.)
>
> "We order and command that in all causes, suits, and litigations in which the laws of this compilation do not provide for the manner of their decision, and no such provision is found in special enactments passed for the Indies and still unrepealed, or those which may hereafter be so enacted, that then the laws of this our Kingdom of Castile shall be followed, in conformity with the law of Toro,

> both with respect to the procedure to be followed in such cases, suits, and litigations, and with respect to the decision of the same on the merits." (Law 2.)

This law of Toro; designating the order in which the different bodies of law should be applied, is now found in book 3, title 2, Law 4 of the *Novisima Recopilacion.*

In the royal cedula of Carlos, dated May 18, 1680, declaring the force of this compilation, the commands of this Law 2 are practically repeated. By the operation of this law, first enacted in 1530, those laws of the *partidas* hereinbefore referred to relating to divorce, upon the discovery and settlement of the Philippines became at once effective therein. They have remained in force since as civil laws of the state as distinguished from the laws of the church. It may be added also that upon them the ecclesiastical courts apparently in part relied in determining cases for divorce pending before them. They are cited as authorities by the writers upon ecclesiastical law. (3 Procedimientos Eclesiasticos, Salazar and La Fuente, p. 9; Practica Forense, Rodriguez, pp. 410, 413; 2 Practica General Forense, Zuiiiga, p. 90; 2 Procedimientos Eclesiasticos, Cadena, p. 210.)

Being in force on August 13, 1898, they continued in force with other laws of a similar nature. (Am. Ins. Co. *vs.* Canter, 1 Pet., 511; proclamation of General Merritt, August 14, 1898). There is nothing in the case of Hallett vs. Collins (10 How., 175) which is inconsistent with this result. In fact that case assumes that the law of the partidas regarding matrimony was in force in Louisiana, this conclusion being reached, however, without taking into consideration the above-mentioned Law of the Indies and without making the proper exceptions. (Law 2, title 1, book 2.)

The **partidas** recognized adultery as a ground for divorce. Therefore, according to the civil as well as the canonical law in force here on August 13, 1898, the commission of that offense gave the injured party the right to a divorce. That provision of the substantive civil law was not repealed by the change of sovereignty. The complete separation under the American Government of church and state, while it changed the tribunal in which this right should be enforced, could not affect the right itself. The fact that the ecclesiastical courts no longer exercise such power is not important. The jurisdiction formerly possessed by them is now vested in Courts of First Instance, by virtue of Act No. 136. Section 56, first and fifth paragraphs of that act, provides that "Courts of First Instance shall have original jurisdiction, first, in all civil actions in which the subject of litigation is not capable of pecuniary estimation; fifth, * * * and in all such special cases and proceedings as are

not otherwise provided for."

The result is (1) that Courts of First Instance have jurisdiction to entertain a suit for divorce; (2) that the only ground therefor is adultery; (3) that an action on that ground can be maintained by the husband against the wife, or by the wife against the husband; and (4) that the decree does not dissolve the marriage bond. The Court of First Instance of Iloilo, therefore, committed no error in assuming jurisdiction of this case.

(2) A motion for a new trial having been made in the court below on the ground that the findings of fact contained in the decision were not justified by the evidence, it becomes necessary to examine that evidence.

The adultery of the defendant was fully proved.

The finding that the plaintiff had not committed adultery is, however, plainly and manifestly against the weight of the evidence. We arrive at this result from a consideration chiefly of the admitted facts in the case, the most important of which is the letter written by the plaintiff to the defendant on March 6, 1899, and found at pages 168 and 195. This is in itself practically conclusive against her. A portion of that letter is as follows:

> "E., I still feel ashamed for the past, although it is seven years since we separated. For this, then, Esteban, pardon me for pity's sake. Wipe out the past. Remember me for the love of God. Contemplate our unhappy fate. To you I look to assuage my sorrow. E., I have heard that you have had some misfortunes lately. I send my sympathy, although I am unworthy of your presence."

The significant words "I am unworthy of your presence" probably escaped the attention of the judge below, because he has not quoted them. The contention of the appellee is that the wrong for which the plaintiff sought pardon was that of having asked for an allowance. This contention can not for a moment be sustained. A woman does not ask her husband to blot out the past, to have compassion on her, and, most important of all, does not say that she is unworthy of his presence simply because she has asked him for an allowance, something to which, according to her own belief, she had at the time a perfect legal right. The letter is a confession of guilt.

It is admitted that the plaintiff and defendant had lived happily together from the time of their marriage in July, 1891, to August, 1892. It is also admitted that then the defendant suddenly, without any previous warning, took. his wife to the 4ouse of her parents, left her there, and never lived with her afterwards. There must have been some reason for this sudden change. The court below says that it was because the defendant had tired of his wife. There is nothing in the evidence to support this theory. In her complaint the plaintiff charges the defendant with having committed adultery with Gregoria Bermejo in 1892. She produced no evidence to support this allegation as to the time. No one of the six witnesses for the plaintiff upon this charge fix any date prior to 1894. The other two charges relate to 1899 and 1901. There is no evidence in the case from which a judge would be justified in finding that from the separation in 1892 to some time in 1894 the defendant had been unfaithful to his marriage vow. And the judge below made no such finding.

Two witnesses, Epifanio Lacson and Doroteo Garcia, who testified as to the charge in connection with Gregoria, speak of a woman brought by the defendant to Negros in 1892. But an examination of their evidence will show that it is entirely insufficient to prove any illicit relations between this woman and the defendant. In view of the evidence which the plaintiff did present in this case, we think it safe to say that if the conduct of the defendant during the years 1892 and 1893 had furnished any ground for suspicion the plaintiff would have been able to produce evidence thereof at the trial. She did not do so. The lack of this evidence destroys the theory of the court below and of the appellee that the defendant expelled the plaintiff from his house because he was tired of her and desired the company of other women. That theory is entirely inadequate to explain the sudden termination of their marital relations.

The event is, however, to our minds, correctly explained by the testimony of the defendant. The separation and the letter written by the plaintiff from which we have quoted can only be explained on the supposition that this testimony of the defendant is true. He stated that on his return from an inspection of one of his estates his wife's maid gave him a letter in the handwriting of his wife and directed to her lover, a Spanish corporal of the civil guard, named Zabal. She admitted the genuineness of the letter, fell upon her knees, and implored him to pardon her. That same day he took her to the home of her parents, told what had occurred, and left her there.

That the testimony in regard to this letter is not a fabrication of recent date is shown by the evidence of the plaintiff's mother, one of her chief witnesses. The mother testified that

about a year after her daughter was returned to her she heard that the defendant believed that illicit relations existed between Zabal and the plaintiff on account of a certain letter. She heard Zabal's name mentioned by a sergeant of police in 1893 or 1894. This may have been the sergeant of the civil guard who, according to the testimony of Domingo Jardelesa, was the cause why the latter did not deliver to the plaintiff a letter intrusted to him for her by Zabal after her separation from her husband.

The evidence of the servants and others who testified to facts conclusively showing the adultery is severely criticised by the court below and the counsel for the plaintiff. That criticism relates in a large degree to the matter of time and dates. If this direct evidence were the only evidence in the case we should not, perhaps, disturb the finding of the court. But when it is in its essential points corroborated by the admitted facts which we have heretofore recited, there is left, in our opinion, no doubt whatever of the guilt of the plaintiff.

It is said that if the plaintiff is guilty the defendant has condoned the offense. It is not necessary to determine upon this point where the truth lies for two reasons: (1) the court below made no finding of fact on the subject; (2) even if it had found that there was condonation this would not have entitled the plaintiff to a divorce.

By Law 6, title 9, *partida* 4, the wTife can defeat the husband's suit for divorce by proving that he has pardoned her. But we have found no laws in the partidas which say that the effect of that pardon would be so far-reaching as to entitle her to a divorce against him in a case like the present one. On the contrary it is expressly provided in Law 8, title 2, *partida* 4, as follows:

> "For the sin of each one of them is of itself a bar to an accusation against the other."

Our conclusion is that neither one of the parties is entitled to a divorce.

The result makes it unnecessary to consider that part of the judgment which relates to the settlement of the conjugal partnership.

Section 497 [1] authorizes us in cases of this kind "to make such findings upon the facts and render such final judgment as justice and equity require."

The judgment below is reversed, and we find from the evidence the following facts:

(1) The allegations of the complaint as to the marriage of the parties and as to the acts of adultery committed by the defendant are true as therein stated except as to the date of the adultery committed with Gregoria Bermejo.

(2) The plaintiff, in the summer of 1892, at Talisay, in the Province of Occidental Negros, committed adultery with one Zabal, a corporal of the civil guard.

As conclusions of law from the foregoing facts we hold that neither party is entitled to judgment of divorce against the other; that judgment be entered that the plaintiff take nothing by her action or the defendant by his cross demand, and that neither party recover of the other any costs either in this court or the Court of First Instance.

Judgment will be entered accordingly forty days from the filing of this decision, and the case remanded to the court below for execution. So ordered.

Arellano, C. J., Torres, and *Mapa, JJ.*, concur.
McDonough, J., dissents.
Johnson, J., did not sit in this case.

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[1] Code of Civil Procedure.

DISSENTING

COOPER, J.,

It is immaterial whether a divorce *a mensa et thoro* is governed by the provisions contained in Title IV of book 1 of the Civil Code, by the canonical law, or by the laws of the *Partidas.* Under each the causes for divorce are substantially the same, one of which is for adultery.

The conclusion reached by the majority of the court is that both plaintiff and defendant

have been guilty of adultery, and that therefore neither is entitled to relief.

In entering upon a review of the evidence and a discussion of this question it is proper to refer to our statute upon the subject of a review by this court, of evidence, and to determine in what cases it is allowed and the rules which govern where such review is permitted.

It is provided in section 497 of the Code of Civil Procedure that the Supreme Court shall not review the evidence taken in the court below nor retry the questions of fact except "* * * 3. If the excepting party filed a motion in the Court of First Instance for a new trial upon the ground that the findings of fact were plainly and manifestly against the weight of evidence, and the court overruled said motion and due exception was taken to his overruling the same, the Supreme Court may review the evidence."

The motion for a new trial filed in the court below was based upon the ground that the "findings of fact were contrary to the proofs presented on the trial."

Is this a sufficient compliance with the provisions above cited, it not being stated in the motion "that the findings of fact were plainly and manifestly against the weight of evidence?"

If this provision of the code stood alone, the failure to comply with this requirement might be regarded as simply a defect in the motion, but construed in connection with the other provisions the question becomes a different one. Under the provisions of section 145 of the Code of Civil Procedure the Court of First Instance may, at any time during the term at which an action has been tried, set aside the judgment and grant a new trial on the ground that the evidence was insufficient to justify the decision, or that it is against law; but it is expressly provided in this connection by section 146 that the overruling or granting of a motion for a new trial shall not be a ground of exception, "but shall be deemed to have been an act of discretion on the part of the judge."

But even if the conclusion should be reached that the motion is sufficient to authorize a review of the evidence, still this court must be restricted in reviewing the evidence and in retrying the facts by the provisions contained in clause 3, section 499, and the judgment of the lower court should not be reversed unless the findings of the court were plainly and manifestly against the weight of evidence.

It is very clear from these provisions it was the intention of the legislative department that the findings of fact made by a judge of the Court of First Instance should be entitled to all

the weight that a verdict of a jury has in those jurisdictions where jury trials prevail, and that the findings of fact, like the verdict of the jury, should not be disturbed where the evidence is merely conflicting. The reason for this is that the trial court, having tlie witnesses before it, is most competent to judge of the weight to be attached to their testimony, and that it is not sufficient that the appellate court, looking at their testimony as it is written down, would have come to a different conclusion.

Where there is a direct and substantial conflict, and the determination of a question depends on the credibility and weight, to be given to the testimony of witnesses, the rule is the court will not set aside the findings even where they might have found the other way. That the question of credibility of witnesses is for the court below, and not for the appellate court, to determine is supported by decisions of many courts of the United States.

It is on account of the superior means that a trial judge has by reason of the presence of the witnesses, and the observance of their demeanor while testifying, that such a rule exists.

It appears from the decision of the trial judge that he placed no little stress upon the appearance and demeanor of the witnesses. With reference to the testimony of the woman Apolonia Aurelio, upon the credibility of whose testimony the case as to the adultery of the plaintiff largely rests, he says:

> "That the testimony of this woman Apolonia is too uncertain and too suspicious to justify any court in declaring the plaintiff guilty of adultery, especially when the worthlessness and the dubious character of the testimony of the other witnesses for the defendant on this subject increases the probability of the existence of something in the nature of a conspiracy to destroy the case of the plaintiff and support that of the defendant in the present case.
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> "There are other considerations in the evidence, as well as in the atmosphere of the court room and *the demeanor of the parties during the trial, which inclined the court to believe at that time that the true facts of this case were icith the plaintiff*"

Again, he says:

> "This court does not hesitate to say that the attitude of the plaintiff was such as to impress the court very favorably in her behalf. Not a particle of vindictiveness toward the man who, as she believes, has so unjustly treated her, was exhibited by her; her entire bearing was that of a modest, retiring, self-respecting, and conscientious woman."

Again, speaking of the testimony of the woman Apolonia, he says:

> "The plaintiff and the plaintiff's mother both swore that this woman, Apolonia, never commenced to work for the plaintiff until after the year 1893, after the couple had separated, and that she was then sent by the husband to the wife as a servant. The wife also says that trouble arose between her and this woman, Apolonia, subsequent to 1893, by reason of the fact that Apolonia was about to marry a man whom the wife disliked. This statement is not denied by any of the defendant's witnesses. It therefore shows that a motive exists on the part of this woman, Apolonia, to injure the wife. There is also evidence in the ease tending to show that this woman, Apolonia, received a large sum of money shortly before the trial of this case, which money came from the defendant or some of his agents. The court, however, does not regard this testimony as of great importance, because it is too vague, hut the other testimony is very important. The attitude of thv. woman,. Apolonia, *on the witness stand was apparently hostile to the plaintiff."*

An examination of the evidence of the case not only shows that the findings of fact by the Court of First Instance are not plainly and manifestly against the weight of evidence, but the preponderance of evidence seems in favor of the plaintiff, especially upon the question of condonation.

I shall not attempt to review the mass of testimony found in the record. In view of the many conflicts occurring in the statements of the witnesses, the many inconsistencies in the testimony of material witnesses, the suspicion cast upon some of the witnesses it is clear that this is a case in which the trial judge possessed advantages far superior to those of this court in passing upon the credibility of the witnesses who testified in the case, and gave due weight to such as were entitled to belief, and tUe rule applies with peculiar force that an appellate court will not disturb the finding of a trial court when these findings depend

upon the credibility of witnesses.

It is stated in the majority opinion that the conclusion that the plaintiff was guilty of adultery was arrived at from a consideration chiefly of the admitted facts in the case, the most important of which is a letter written by the plaintiff to defendant on March 6, 1899; that this letter is considered as practically conclusive against her. The entire letter, extracts of which are given in the majority opinion, is as follows:

> "MY RESPECTED AND UNFORGETTABLE ESTEBAN : Pardon that I disturb your tranquillity, E., that in the midst of a profound sentiment that afflicts me I find consolation for my profound grief in addressing the man who loved me in the time of my good fortune, and who led me to the altar before the eyes of the Being whom we most love, God. Remember me; let fall down a drop of compassion from your soul; look at me back again with your cheerful eyes at the woman who is watching for you. I know well that you are very disgusted with me, and for just reason for having claimed my pension. Be calm; quiet yourself; reflect for a moment my situation, which I will explain to you.
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> "When you went to Europe mother went to see you to explain our situation to you, and you answered that it had nothing to do with you. She insulted you, Esteban; you had reason to be offended.
>
> "Now, regarding my having demanded my pension, you are also in the right, but pardon my impudence in stating what I have to say:
>
> "I swear to you, E., and call God to witness, that when you went to Spain my pain was unbearable, thinking of my misfortune. I had become completely desperate, and Orozco wrote and advised me to demand my pension in view of the fact that you were going to reside permanently in Spain; then I finally did commence proceedings in view of my desperate situation, and nothing further came of the matter during your absence.
>
> "If the Lacsons, who wish me ill, have told you more they have.made a mistake, for the truth about my comportment is that it can not be complained of. You can secure information regarding my conduct during our separation here in Valladolid.

"I keep yet on my face the shame of what has happened, notwithstanding that it has been already many years since we parted. Therefore, my husband, forgive me; erase what has happened; remember me for God's love; behold our dark fate; in you I trust my future.

"E., I have heard that you have had some misfortunes. I. send my sympathy, although I am unworthy of your presence. I also learned from Modesto that you do not wish to have my pension sent. Do as you wish. Good bye, E.; take good care of yourself, and command,

"Your faithful servant, Q, B. S. P.,

"AGUEDA BENEDICTO.

"March 6, 1899.

"P.S. – On the lltli of February papa died, and delivered his soul to God after a painful illness."

This letter, upon which so much stress has been placed in the opinion of the majority, as showing the guilt of the plaintiff, rather indicates that the writer was in a morbid state of mind, in great distress and dejection of spirit, and, in her own language, "completely desperate." It shows a willingness to prostrate herself before her husband, to subject herself to his will, to confess any manner of misdoings which will appease his wrath, and regain his favor without regard to innocence or guilt. This is evident when she says: "I know that you are disgusted with me for having claimed my pension" when it is remembered that the wife is entitled to one-half of all property acquired as gains during the marriage, as community property; that at the time this letter was written, the husband was not only in the enjoyment of a large estate in his separate right but was in the exclusive possession and enjoyment of all of the community property accumulated during eight years of marriage, one-half of which belonged to her, yet we find her confessing herself as guilty for claiming a small pittance of what belonged to her, and apologizing for having taken at some previous time steps to compel him to do that which good conscience should have dictated to him as just and right.

It is hard to conceive that the letter was the result of remorse of conscience for sins

committed against the husband when it appears from the record that the husband, after their .separation, during the space of ten years, maintained illicit relations with no less than four mistresses. three of whom bore him offspring; and that there had been a betrayal of the confidence of the wife, a near relative, when a girl less than 14 years of age, which fact a sense of shame did not restrain the defendant from disclosing in his testimony on the trial of the case.

With reference to the question of condonation, it will be seen from the citation contained in the majority opinion that this doctrine is recognized by Law 6, title 9, partida 4. It exists in the ecclesiastical law. and is recognized in the United States and England and in all countries where laws of divorce exist.

But it is stated in the majority opinion that there is no law to be found in the partidas which says that the effect of pardon would be so far-reaching as to make it applicable to this case.

By condonation the offending party is restored to the same position he or she occupied before the offense was committed, the only condition being that the offense must not be repeated. To say that the effect of pardon would not be so far-reaching as to entitle the plaintiff to divorce, in a case like the present one, is equivalent to saying that because the plaintiff has been once guilty she would forever lose her right to a divorce for offenses of a like character thereafter committed by the husband. This makes condonation conditioned, not only that the parties receiving it will not again commit the same offense, but it adds the further condition that the party granting it shall forever have the right to commit the same offense himself with impunity.

This question has often been before the courts. The American authorities are uniform that a condoned offense, not being sufficient as a cause for divorce, is not a bar to divorce in favor of the plaintiff. (9 Am. and Eng Enc. of Law, 821.)

In Masten *vs.* Masten (15 N. H.) it is said: "Where the statutes are silent upon this question the courts hold that as a condoned offense can not be a cause for divorce, therefore it can not be set up as a bar in recrimination."

In Jones *vs.* Jones (18 N. J. Eq., 33) it is said: "It is better to hold that when the erring party is received back and forgiven the marriage contract is renewed and begins as *res integer*, and that it is for the party and not for the courts to forgive new offenses."

In the case of Gumming *vs.* Cumming (135 Mass., 390) the court says:

> "To hold otherwise would operate to some extent as an encouragement or license to the condoning party to commit offenses against the marriage relation; and would also tend to give a constant sense of inequality between the parties with respect to their legal rights. All condonation is in a sense conditional – that is, there is an implied condition that the same offense shall not be repeated. It is not, however, attended with the further condition that the offender shall be disqualified from thereafter alleging any ground of complaint for subsequent misconduct against the condoning party. No such inequality should be established by an arbitrary rule of law applicable to all cases. Condonation restores equality before the law. If the injured party is willing to forgive the offense the law may well give full effect to that forgiveness and not extend to such party the temptation, the encouragement, the license to run through the whole calendar of matrimonial offenses, without redress at the hands of the other party. We have not overlooked the consideration that an original adultery by a libellant may have had the effect to weaken the sense of the obligation of the marriage contract on the part of the libelee, and that for this reason a divorce under such circumstances ought to be refused. This consideration is of weight, and would deserve especial attention if judicial discretion were to be exercised in determining a case, but it is not sufficient to overcome the controlling reasons in favor of the establishment of a general rule to the contrary."

A finding of the lower court against condonation would have been plainly and manifestly against the weight of evidence.

It is shown by the evidence that the next day after the supposed adultery of the wife the defendant took his wife to the house of her parents, Andrea de la Rama, the mother of the plaintiff, testifies that when the defendant brought the plaintiff to her house she supposed it was on a visit; that they remained at her house about a week; that during their stay the plaintiff and defendant slept in the same room, and that there was only one bed in the room that they occupied.

The plaintiff testified that on this occasion she and her husband remained together at the house of her parents from four to six days; that during this time they slept in the same bed and had matrimonial intercourse.

The defendant de la Kama testified that he remained at the house of the plaintiff's parents

one day and two nights; that he occupied the same room and slept in a different bed. On being asked by the court as to the length of time he remained with his wife, he stated that he remained there one day and two nights, more or less, and when asked if he slept in the same room but in a different bed he answered that he was not sure that there were two beds in the room.

This court has not only reversed the judgment of the trial court but has entered a judgment against the plaintiff.

It is true that the court may, in the exercise of its appellate jurisdiction, affirm, reverse, or modify any final judgment and may direct the proper judgment to be entered, but where there has been failure of the lower court to make a sufficient finding of fact, or where there are defects or omissions in the pleadings which may be remedied by amendment, or where there is a possibility of supplying defects in the proof, such practice should not be followed.

It is stated in the opinion that it is unnecessary to pass upon the question of condonation for two reasons: (1) The court below made no findings of fact on the subject. (2) Even if the court had found that there was condonation, this would not have entitled the plaintiff to a divorce.

I have before attempted to answer the last objection. As to the first objection that is, that the lower court made no findings on the subject if this be true the case should be reversed in order that a finding be made.

To deprive the plaintiff of the judgment which she has obtained and make a final determination of the case here without giving her an opportunity of correcting this error, if such exists, is inequitable and unjust.

Date created: April 16, 2014