IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN DIVORCE

SUIT NO. D.S. 078 of 1977

BETWEEN	SYBIL MAE SIMMS	-	PETITIONER
AND	DENHAM VON HINDENBERG SIMMS	-	RESPONDENT

Mr. D. Scharschmidt for Petitioner
Mr. Norman Wright for Respondent

26.5.80, 27.5.80, 9.11.81, 10.11.81
8.11.82, 9.11.82, 14.3.86

WRIGHT, J.

When marriage was solemnized on the 3rd December, 1958, between the petitioner, a 29 year old mid-wife and the respondent, a civil servant, the latter was her junior by 5 years. Short of being clairvoyant no one who witnessed that marriage would have been able to predict that not only in age would he remain junior to her but in the role he would play in this marriage. Nineteen years less five weeks later she was to petition for dissolution of their marriage alleging cruelty and desertion as the grounds. But interspersed among the events to found the charge of cruelty are the births of the three (3) children of the marriage on the following dates:

3rd November, 1959.
3rd December, 1964
2nd July, 1966.

The issue of condonation is therefore a live one.

The acts of cruelty and desertion are set out at paragraph 7 of the petition thus:-

> "(a) That at Lawrence Tavern just two months after our marriage in the month of February, 1959 after your Petitioner and the Respondent had an argument about the quarters in which they were living the Respondent got into a rage and locked your Petitioner outside barefooted and in her night dress; your Petitioner was forced to seek help from her father-in-law who accompanied her home and spoke to the Respondent who eventually let your Petitioner inside.

(b) That at Lawrence Tavern in September, 1962 your Petitioner saw the Respondent with some photographs of a girl and your Petitioner asked the Respondent about this, the Respondent threatened your Petitioner with a bottle forcing your Petitioner to run in fear of her safety. That the Respondent threatened to kill your Petitioner.

(c) That the Respondent has on many occasions refused to have sexual intercourse with your Petitioner and one night in August, 1963 when your Petitioner tried to make advances to the Respondent he pushed your Petitioner roughly away and told her if she wanted a man she should go outside and look for a donkey, your Petitioner was very hurt and disturbed by this and went to sleep on a mattress on the floor in a spare room. Shortly after this incident the Respondent came into the room one night and took the baby Everett from his crib and placed him on the mattress on the floor beside your Petitioner. When your Petitioner asked the Respondent why he did this the Respondent struck your Petitioner who screamed whereupon the Respondent's brother who also lived on the premises came to see what was wrong and the respondent then attacked his brother. Then seeing the mood of the Respondent your Petitioner and her brother-in-law were afraid of the Respondent and your Petitioner left the premises and spent the night at a girlfriend's house and return to the matrimonial home the following morning.

(d) That your Petitioner and the Respondent has frequent quarrels and the Respondent continued to make threats on your Petitioner's life and eventually in September 1963 the Respondent ordered your Petitioner to leave the matrimonial home and kept abusing your Petitioner until your Petitioner in fear of her life went to live with her parents at 30 East Avenue, Kingston where your Petitioner stayed for one year. That while your Petitioner stayed with her parents the Respondent visited her there and cohabited with her and your Petitioner became pregnant and eventually returned to live with the Respondent on the 3rd day of November, 1964. That due to severe mental stress occasioned by the Respondent your Petitioner developed fits during her pregnancy and eventually delivered a premature child.

(e) That the Respondent who works in Montego Bay comes home every other weekend. That one weekend towards the end of January 1974 at 7 Cadet Close the Respondent who seldom spoke to your Petitioner when he did in fact come to the matrimonial home moved his personal belongings into another bedroom where he sleeps. That your Petitioner however continued to do the Respondent's laundry but was prevented from doing so by the Respondent who left insulting notes interfere with his belongings. That the Respondent does not eat meal prepared by your Petioner neither speaks to your Petitioner. That from and since the 17th day of June, 1974, the Petitioner and the Respondent have not lived together as man and wife."

The respondent entered Appearance on 13.4.78 and on 25.4.78 filed Answer and Cross-Petition. He denied the allegations of cruelty and desertion and set up grounds of cruelty and desertion on the basis of which he seeks a dissolution of the marriage. Paragraph 3 of the Answer and Cross-Petition contains his charges:

"(a) That in July of 1963, your Respondent had a major operation at the Kingston Public Hospital which necessitated that he be hospitalised for one month and the Petitioner seldom visited the Respondent during this time. This greatly upset the Respondent and seriously aggravated his mental strain being experienced by virtue of the nature of his operation. After the Respondent was discharged from hospital the Petitioner showed reluctance to be intimate with him and put the baby Everett to sleep between herself and your Respondent. During his recovery from the operation the Respondent had to prepare his own meals as the Petitioner refused to do same and this significantly affected the recovery of the Respondent to normal health.

(b) In or around April of 1970, the Respondent became suspicious of the relationship between the Petitioner and one of her co-workers, one Alvin Rainford, but when questioned about it the Petitioner replied that they were just good friends. However, the said Alvin Rainford left Jamaica in May of 1970, and on the 9th of May, 1970, the Petitioner also left Jamaica, having informed the Respondent of her intention to do so only one week before. The Petitioner had made no arrangements for the care of the children in her absence the Respondent had to care for the three children. The Petitioner did not return to Jamaica until October of 1970.

(c) On the 15th day of October, 1971 after the Petitioner and your Respondent had had a quarrel, the Petitioner threw a kettle of boiling water on the Respondent, which badly burnt the Respondent on his right side above the Pelvis as a result of which the Respondent had to seek medical attention.

(d) In October of 1971, the Petitioner told the Respondent that she was going to the United States of America the following day and left the home without making any arrangements for the running of the household or for meeting those domestic expenses for which she was responsible. During her absence the Respondent ran into considerable financial difficulties as he received no financial assistance and there was very little correspondence between the Petitioner and your Respondent. As a result of this the mortgage on the matrimonial home fell in arrears and the Respondent had to struggle to make ends meet. With a view to discussing the Petitioner's intention towards the marriage the Respondent went to New York. On his arrival there he contacted the Petitioner by telephone and agreed to meet her at an address to have a

discussion, however when the Respondent arrived at this address at the appointed time, he was informed that the Petitioner had suddenly removed that morning, taking her belongings with her. As a result of this experience your Respondent was very upset and returned to Jamaica in a much worse financial position than before and suffered great embarrassment as a result to not being able to meet the various financial commitments of the household.

(c) In or about December of 1973, the Respondent among the Petitioner's belongings a number of letters from the said Alvin Rainford referred to in paragraph 3 (3) above to the Petitioner, as well as one unposted letter from the Petitioner to the said Alvin Rainford, all of which confirmed the Respondent's suspicions that there had been illicit relationship between the parties for some time.

All efforts on the part of the Respondent to discuss the matter were unsuccessful as the Petitioner refused to discuss same declaring that she was a big woman. This refusal was the cause of severe mental strain and unhappiness to the Respondent whose performance at work as well as his health suffered in consequence."

The reply dated 25.5.78 denies the charges and admits that on 15.10.71 the respondent did sustain a burn in the following circumstances:

"2. That the Petitioner admits that on the 15th day of October, 1971 the Respondent and herself had an argument and that the Respondent was burnt with boiling water but the Petitioner says that the Respondent was standing near the stove when she was about to remove a kettle with boiling water therefrom and in the act of lifting the kettle some of the water spilled from the sprout of the kettle on to the Respondent but this was in no way intentional and was purely accidental. The Petitioner denies that the Respondent had to obtain medical attention as a result of this accident."

The parties are the only witnesses. But therein lies a difficulty. These are persons who obviously wish to be rid of each other, and, with the evidence being so circumscribed, the search for the truth assumes a greater urgency. It is well recognised that in such an investigation the character of the parties calls for very careful scrutiny.

There is no doubt that the petitioner is the more dominant partner - a dominance which degenerates into her becoming domineering. Significant as that undoubtedly is it is by no means her most outstanding characteristic. What I find to be her distressingly outstanding feature is her unabashed disregard for the truth at times accompanied by contempt

which the evidence demonstrates to have been so practiced in her relationship with the respondent that in Court she was either unable or did not care to conceal it. The need for great caution in acting upon her unsupported testimony is clearly indicated.

By contrast the respondent borders on the supine and this, it seems would, by default, tend to nurture the more aggressive propensities of the petitioner. And yet he conceded that the petitioner -

> "was a mild-mannered person but on occasions she displayed a violent nature."

One does not have to be credulous to accept his evidence even though it stands alone. But that is not to say that everything he says will be accepted because factors which militate against the acceptance of evidence generally, e.g. accuracy of recollection and self-interest, call for consideration.

The difference between them, is I think, best exemplified by their assessment of their relationship. From the lips of the petitioner:-

> "We were never on good terms at any time." -

a view she expressed more than once.

And in relation to trips she made to the U.S.A. she said -

> "We did not discuss the matter of my going abroad on any of my trips."

While confirming that theirs was not a happy marriage the respondent conceded:

> "On occasions when I came home relationship improved for a period of time . . . . . things improved became normal - peaks at times. It continued like that for some time - a couple of months . . . . . There wasn't any continuity in happiness."

If the respondent's assessment seems more likely to be the truth, and I am so inclined to believe, then at the least the petitioner is exaggerating and at the worst she is lying.

Left alone with their character deficits the parties could not have avoided trouble in their marriage which may well be said to have a built-in self-destruct mechanism. The fabric of such a marriage was incapable of tolerating the burden imposed by the intermeddling of a

third person, the moreso when it was cherished by one of the parties. But more of this anon.

Let me now advert to the principles which guide a Court in deciding whether a charge of cruelty has been made out. The question of cruelty is one of fact to be decided as between the actual parties before the Court and not on a hypothetical basis with reference to decided cases. The truth of the charge must first be determined and then the truth ascascertained examined in the light of settled principles.

In the Eleventh Edition of Rayden on Divorce at page 1104 it is stated under the heading "The test of and approach to cruelty" thus:-

> "It has been said that to test cruelty by asking whether it is cruelty "in the ordinary sense of that term" is a dangerous test. It is submitted that the proper approach still is: was the conduct of such a grave and weighty nature as to make co-habitation virtually impossible. The conduct complained of must be serious. It must be much higher than the ordinary wear and tear of normal life. It is the effect rather than its nature which is of paramount importance in assessing a charge of cruelty. To obtain a matrimonial order on the ground of cruelty it must be proved that one partner in the marriage, however mindless of the consequences, has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that that misconduct had caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in a case of cruelty: from the complainant's side ought this complainant to be called on to endure the conduct: from the defendant's side was this conduct excusable?
>
> The Court deals with the husband and the wife before it not with hypothetical parties. Assuming that injury or apprehended injury to health is found the Court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that, from a reasonable person's point of view, after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the complainant ought not to be called upon to endure it."
>
> Saunders v. Saunders (1965) P.46
>
> Williams v. Williams (1964) A.C. 698

The petitioner relies, in part, on incidents of threats but in order that they may amount to cruelty threats must give rise to injury to

health or a reasonable apprehension of such injury. The evidence must be examined with this in mind.

The first incident complained of is alleged to have taken place in February, 1959, some two months after the marriage. Her evidence is to the effect that at about 10.30 p.m. while they were in bed, she spoke about the acquisition of furniture for the house. It was apparently the same apartment they had occupied before marriage. No furniture had been acquired since marriage and she seemed keen on having this attended to. She says she also raised the question of other domestic matters. She did not say for how long she had been talking but the respondent was obviously not enjoying the presentation and told her that if she continued he would put her off the bed. This seemed to be a dare she could not pass up so she continued talking and he kept his word. He opened the door lifted her off the bed and put her outside in her nightie and then he locked the door. She appealed to the respondent's father who was the headmaster at the Lawrence Tavern Primary School and who lived in the cottage just across the road. Upon the latter's intervention the respondent let her in but promptly upon the father's departure he put her out again to go and sleep at the father's house. Back came the father who must have been more persuasive then because the respondent allowed her to stay.

The respondent denies this incident stating that they then occupied one room which was so crammed that it could not take a message. Says he, they even had to pack some things in a barrel. Accordingly, the occasion for such talking could not arise. However, despite this denial I am persuaded by the very nature of the subject-matter and the circumstances to accept that there was such an event.

The problem seems to lay in their differing priorities. The respondent might have yielded to the factual situation that there was no room and that since the things were in a barrel there was no need to rush. On the other hand as a wife almost fresh from the altar the petitioner would wish to have the trappings of her new status made more obvious and may

she did not in fact see the respondent with any such photograph. Rather, goaded by suspicions that he had formed a relationship with a certain girl she searched the book-case at the teacher's cottage occupied by the respondent's father and found photographs and, apparently, letters. She confronted him with a view to ascertaining what was the relationship between him and the girl. He became angry and passed unkind remarks about her person. There was a fuss, she says, but she cannot recall the details. She says she recalls him saying if she wanted a man she should go outside to a donkey. If true, that would constitute a grave insult and for that very reason needs to be proved and not merely thrown in for good measure.

What does the respondent say in answer to this charge? He recalls some discussion about pictures found by the petitioner in his father's book-case. They were mostly group pictures in one of which he stood beside a girl but he denies any relationship with her. He so informed the respondent. He denies referring her to a donkey if she wanted a man.

I am satisfied, that, from the nature of this confrontation one of "the quarrels which they had from time to time" did result. But the petitioner was non-specific about the unkind remarks. The evidence does not support the finding of any such remarks even though the confrontation was not a pleasant one. The allegation that the respondent attempted personal violence against her has not been made out. But even if an act of cruelty had been made out then the fact that they continued living together thereafter and that two children were born to them subsequently could not be ignored.

Paragraph 7(c) of the Petition may be regarded as containing the more serious allegations aginst the respondent and from their very nature they depend upon the petitioner's credit-worthiness for acceptance seeing they are denied by the respondent.

In the light of the petitioner's oft repeated evidence that they were never on good terms at any time I find it not a little strange that she can contend that she made advances to her husband with a view to

having sexual intercourse but that he rebuffed her. And even though I do not accept her grim picture of the relationship I cannot accept her evidence on this charge. It is observed that the invitation to associate with a donkey makes its re-appearance here. Nor do I accept her charge of assault upon her.

It is convenient to deal with paragraph 7(c) of the Petition and paragraph 3 (a) of the Answer and Cross-Petition together since they deal with the same period. Her evidence-in-chief in support of the charge here preferred is as follows:

> "I think it was in 1963 he told me if I wanted a man I should go outside to a donkey. I was very annoyed and moved out of the bed-room took a mattress and put it on the floor of another room and slept there. At that time had Everett only. He was in the bed-room in his crib. He did nothing for the first 2 - 3 nights but the fourth night when I retired to bed he took the baby from his crib and brought him into room where I was and placed him on mattress beside me. I asked why he had removed the child from his crib. He did not reply. I told him to take the baby back. He got mad with me and was about to hit me and his brother Windsor who was in the house came out his room and said "Denham what are you trying to do?" Time about 9.30 p.m. Up to then it was a noisy affair. I had kept saying "Denham, why you trying to hit me?" He took up vase from book case as if to hit his brother and both brother and I left the house that night. I spent the night at friend's house - nearby - his brother took me there. Next morning I went back to house and continued to live there."

In cross-examination she admitted that in July 1963 - the respondent underwent major surgery - thyroidectomy - involving extensive removal of muscles of the neck and shoulder - and had to be hospitalized for some time. She denies it was for one month as the respondent maintains - may be two weeks, she thinks - during which time she claims she visited him every day. He admits she did visit him in hospital but not very often. The surgery left him with three rather unsightly scars including a deep depression in the top of the left shoulder (still evident at time of trial). A suspected malignancy was thus removed but trouble of a different sort was to follow. As a result of the loss of much muscle from the shoulder and neck the respondent's head leaned over to one side and as a result he claims the petitioner called him "lean neck", became cold towards him and rebuffed his advances at intimacy with her.

Respondent says he felt really despondent because she was making games at him. To emphasize her point she put the baby Everett between them on the bed. Be it noted that this is the time when, according to her, she was sleeping on a mattress on the floor and when the respondent took baby Everett from his crib and placed him on the mattress beside her. But on the contrary he contends that during this time the petitioner, in order to frustrate any attempt at advances by him, put the baby Everett between them on the bed. This was during the four or five months which the respondent spent at home convalescing and it is not difficult to accept that for two people who were not oozing love for each other life in such circumstances could well be less than desirable, if not painful.

If either version is accepted it must have been painful. On the one hand either a normal or a love-starved wife seeking the warm embrace and marital love and affection of her husband who not only proves to be reluctant to gratify her desires but in cruel fashion repulses her. On the other, according to the respondent, here is a husband who after discharge from hospital had his neck leaning to one side, with him being unable to move his neck for sometime having to prepare his own meals because his wife had stopped doing so and attempts at intimacy with his wife were repulsed with taunts of "lean neck". And then to crown it all she put the baby between them to put an end to any further advances by him. Obviously, both versions cannot be true but before coming to a conclusion it is necessary to examine more evidence.

The petitioner testified that during this period of convalescence the respondent repeatedly referred to her as a parasite and told her to leave the home. This she refused to do. She testified that she became so distressed that she was almost demented. After one of their several quarrels she did remove to her father's home at 30 East Avenue, Greenwich Town where she remained for a year. Following upon visits by and co-habitation with her husband their relationship obviously improved to the extent that she became pregnant, as a result, and subsequently returned home to her husband. It is worthy of note that as a nurse she obviously intended to impress with the serious effect his conduct had on her when she testified that she was

so distressed that she was almost demented. Yet there is no evidence she even sought medical attention.

The second child was the result of the rapprochement. However, they seemed to have lived together unhappily thereafter.

In order to resolve this charge as well as the charge of desertion at paragraph 7 (e) it will be convenient at this point to have a critical look at how well the petitioner's credit fared under the pressure to which she was submitted in cross-examination. To say that this cross-examination was unrelenting borders on the euphemistic. Fierce may be the more correct word. But even so it was not unfair having regard to the issues at stake and the conduct of the petitioner.

The most fruitful area of the cross-examination had to do with her relationship with Alvin Rainford. Fruitful not only for the respondent's case but for the Court as well because it provided a window through which a good look could be had of the Petitioner. In order, therefore, to put this aspect of the case in proper perspective it is considered useful to set out first her evidence-in-chief relative thereto:

> "Know Alvin Rainford - a co-worker of mine. Husband knew him and once he voiced suspicion of relation between me and Rainford.
>
> (Para. 3(b) of Answer put to petitioner).
>
> No, he did not question me as such. He made remarks or accusations I should say. I did reply. "We were just good friends."
>
> Yes, Rainford did leave Jamaica May, 1970 - I think February 1970. Yes, I did leave 9th May, 1970. Not true I told husband only one week before leaving of my plans to go. I can't say just how long before but would say about 3 - 4 weeks before. I went to U.S.A. to Queens, New York, to my uncle, Cyril Edwards. Rainford left for Canada. Not true I made no arrangements for home or children."

If the respondent did not have material with which to confront the petitioner the extensive cross-examination regarding this third party might have qualified as gilding the lily because this evidence was already tottering under its own weight. The retraction of her admission that Rainford left in May which then became "I think February" was for obvious reasons, the most important of which was to deny the fact that she left

hot on his heels. Then, too room was being created for the indefinite notice which she gave her husband of her intention to go which could not be accommodated between two departures within the first nine days in May. But that was not enough for Mr. Wright who began his cross-examination on the afternoon of the first day's hearing and did not relax the pressure until two more days had been spent.

Not unpredictably the cross-examination began with Rainford as the topic. She repeated he was a co-worker and denied he ever referred to her as "Darling love". Such a term had never been used between them. She admitted writing to him once in 1972 but this was the only occasion, she said. In order to write him she had obtained his address from another co-worker and a cousin of his. Yes, she knew Rainford's handwriting. Shown an envelope addressed to her at her uncle's New York address she said she recognised the handwriting:

> - "It could be Rainford's. It looks like Rainford's. I recognised it as Rainford's handwriting."

She said also that the return address on the back of the envelope was in Rainford's handwriting and was the address to which she had written him. The envelope (in evidence as Exhibit 5A) was date-marked August, 1970 Toronto - a time when she was in the U.S.A. though she maintains she was not living at the address on the envelope. She also identified two other envelopes similarly endorsed - one date-marked September 29, 1970 (Ex. 5(b)) and the other September 21, 1970 (Ex. 3(c)). Following this she identified a letter in her handwriting (Ex. 6a) dated 2.10.70 addressed to Alvin which was not mailed. She denied any kind of intimate relationship with Rainford, but, if that is true, then the letter is misleading. It reads -

> "Same Address.
>
> 2/10/70.
>
> Alvin,
>
> I got your note today, and to say I was disappointed would be putting it mildy. There are certain things you make mention of (1) i.e. my visa I quote "Its a pity you have that kind of visa, and does not want to stay away from your h . . . . . ". (you know whom). To say I am mad about those remarks would be an understatement. It's the 2nd time you have mentioned about my visa and you know damn well that I got my visa from 1968 and at the time I was

greatful for a 2 yr. visa - if I didn't get that kind of visa then I wouldn't be here now - secondly I can stay away from my h . . . . . I have been away from him since May 10th - but I can't stay away from trouble with the Immigration Authorities when my visa expires. You have your wife and kids here with you - you can have them at your beckon call. I have not seen my children (at least 2 smaller ones) since May - hence I MUST GO HOME.

Don't use my visa and my going home as an excuse for not trying to come to see me - maybe thats too much of a sacrifice to make eh?

You mentioned in your letter of 21/9/70 that you have driven from Toronto to U.S. on two occasions already but its strenous to do.

With whom or where did you stay on those two occasions? Not on the street? Or may be there is no place at all in New York where you could stay. - Yet I could come up how funny? All that you have said Alvin doesn't spell sense. It must have been something or some one more important then than Sybil that dare you to drive over the border twice without even thinking where you would stay for a night. Listen Alvin if you wanted to come to see me nothing would stop you. Its about time I stop fooling around, and start packing my eggs in more than one basket. Don't answer this letter, because I am leaving my job tomorrow and if you reply to the former address then I wont get it. I can only say as you have said. "Thank you". I leave N.Y. on Sat. 10th Oct.

Hence goodbye for ever.

Sybil

Sorry I got so involved with you in the beginning."

She insisted that the respondent never confronted her with this letter.

Questioned as to the meaning of the post script she said:

> "My involvemert was never intimate. I took my little problems to him at times. I could be emotionally involved with him but not physically. I could have been emotionally involved with Rainford. No, I was not but would have been on the brink - not sure I was."

Pressed for a positive answer she did not oblige but said it could be that she was regretting the near emotional involvement.

A letter dated 24.8.70 (Ex. 6(b)) addressed to her was admitted to be in Rainford's handwriting. It reads in part -

> "My Dear Sybil,
>
> You think you were trying like mad to contact me but you should see me. You think you are homesick, you should see me. I thought I was lonely back home but that I can tell you was good compared to here.

My love I had to buy a car and I practically live in it. We are two KING-SIZED fools but . . . . . .
I came up on May 1st as you know . . . . . Honey I would have to see you to tell you the conspiracy going on but it wont work. Just wait till I gather up some finance. My love I am over-joyed to hear from you and am so sorry we can't see each other. If this letter confuses you (which it should not) just imagine the depressed state I'm in. Before I forget do you have to go home in October? and why.

By love.

(Then follows a drawing of lips)

AL

Answer soon."

The only comment I need to make - the language speaks volumes - is that this letter gives the lie to her substitution of February, 1970 for May 1970 as the date Alvin Rainford left Jamaica.

But more was yet to come. Letter dated 21/9/70 (Ex. 6(c)) was admitted to be in Alvin Rainford's handwriting. It occupies three pages but the lower one-third of page one is missing. Here is the remainder of page 1 -

"1. Same Address

Hi Sybil,

I got your letter okay but for the life of me I couldn't answer right away. I didn't know what to say. When you said in your last letter "love as ever" I interpreted it to mean "Love as never". My God our chances weren't many but we had a few and I keep wondering what a strange sort of love for two people. Sybil I wont say it but you damn well know what you mean to me. It took years to see it and further to admit it but I suppose I could not hide it any more and to see I come out a much sadder man. To me you were <u>all woman</u> and I dont know a damn soul who wouldn't go chasing after you even at the risk of his neck as in my case and to see I never . . . . . ."

The missing portion conceals a portion of this lover's lament.

The letter concludes thus:-

"Its a pity you will be going home so soon but I suppose whatever will be will be (Que sera que sera). Anyway I got your picture to keep me company you . . . . . !!!
Bye now darling and stay sweet.
Now truthfully and meaningfully <u>I</u> say

Love as EVER

AL"

The admission of these letters by her certainly posed some king-sized questions which like hungry rodents knawed at the entrails of her credit. Firstly, the aura of endearment and the rejection of a purely platonic relationship by the tone and contents of the letters would seem to be unjustified because, said she, she addressed him as "Mr. Rainford" or "Alvin". Then she proceeded -

> "When I said he never wrote me but I wrote him once I meant that he did not but having seen this letter (referring to letter dated 24.8.70) Ex. 6(b) I'd change that evidence."

Still referring to Ex. 6(b) she said -

> "I would not say this is the only time he wrote me, I now recall that he wrote more than once. I'll change my evidence that I wrote him only once in 1972 - having seen the letter."

In the light of her evidence touching the nature of the relationship she was referred to the closing of Ex. 6(c).

> "Bye now Darling and stay sweet. Now truthfully and meaningfully I say Love as EVER AL."

She responded -

> "I did say the relationship did not involve "love" and "darling". These words figured only in letters but not when we spoke".

Apparently they were two shy and tongue-tied youngsters who could speak warmly only from a distance. The time was now 3.55 p.m. and the adjournment was taken with no indication as to what the next day would bring.

The effect of the cross-examination was not lost on the petitioner nor on her attorney as the events of the following day were to show. It is to be noted that to her attorney she had said when he put to her the allegation at paragraph 3(e) of the Answer and Cross-Petition "No relationship betweeh me and Rainford at any time. No, Alvin Rainford never wrote me after he left Jamaica. I wrote to him". At the resumption Mr. Scharschmidt presented an application to amend the Petition and add as paragraph 7(f).

> "The Petitioner alleges that during the course of the marriage the Respondent is guilty of having an illicit relationship with one (name withheld)."

He pleaded that he came into the case only at the trial stage and it was only that morning he received something which enabled him to make the application. Upon enquiry by the Court it was disclosed that the Petitioner had had such information from 1960, shortly after the Respondent had returned from the course in England. Had such information been worth the while and went beyond mere scandal I would expect that the instructing attorney would have been made aware of it but apparently this was not the case, for neither in the Petition which was filed 10.11.77 was it reflected nor in the Reply dated 25.5.78. The application drew very strong objection from Mr. Wright who castigated it as being among other things, a show of vindictiveness. With this view it was not difficult to sympathize.

It is a great pity that counsel gave the appearance of having abdicated his office and was allowing himself to be used as a vehicle for such vindictiveness. If cause for complaint there was the petitioner had bosomed it for 20 years during the course of which she had borne the respondent three children. Accordingly, any matrimonial offence which might have been committed had been condoned beyond any possibility of revival. The application was refused and the cross-examination based on the letters was resumed with predictable intensity and frightening revelations as the following shows:

> "I did not know Respondent had the envelopes and letters in his possession. Had I known I don't know if I would deny that Alvin Rainford had written to me.
>
> Had I known they were in existence I would not have denied they were letters written to me.
>
> Ques: Are you saying that unless I could have proved that Alvin Rainford had written to you you would have continued to deny it?
>
> Ans: I don't know.
>
> I would not tell a lie. I don't know if it was a lie when I said Alvin Rainford had not written to me. I don't know if it was a lie when I said I had written Alvin Rainford only once.
>
> To Court:
>
> I am not saying I don't know what a lie is.
>
> I can't tell the difference between a lie and the truth."

Thereafter she was forced to admit -

> "Yes my saying I don't know is a convenient way of getting out of telling the truth."

She made abundant use of this artifice especially when she was questioned concerning the endearment and intimacy evidenced in the letters. An angry outburst accompanied the denial of intimacy. In connection with letter dated 21.9.70 Exhibit 6 (c) she was asked and replied as follows:

> "Ques: What do you understand Rainford to be saying by "To me you are all woman"?
>
> Ans: I don't know. He wrote it."

Further questioned she replied -

> "I am still using "I don't know" as I have been using it. I can't think what he meant. He wrote it. I did not understand it."

Also this - "I don't know why he'd go chasing after me even at the risk of his neck. He was a married man and had children. I knew this."

Further cross-examination revealed that she knew Rainford from school days - 1957 - 58. She persisted in her "I don't know" when asked whether the respondent confronted her about Rainford in 1971 and 1973.

In responding to the allegation at paragraph 3(c) of the Answer and Cross-Petition the Petitioner testified, in keeping with the Reply, that the respondent had been accidentally burnt adding that this incident was preceded by a box in her face by the respondent. She did observe the burn, did not think he had been badly burnt and was not aware of his seeking medical attention.

The box had not been pleaded and when she was challenged about it she replied that prior to the previous day when she testified about it she had not told her attorney about the burn; but under further pressure she said she had never told her attorney about the box though she insisted the respondent did box her.

Regarding paragraph 3 (d) of the Answer and Cross-Petition the Petitioner testified in her evidence-in-chief that she did go to the U.S.A. in 1971 but denied that she gave the Respondent only one day's notice. She denied, as well, the allegations made against her in the said paragraph.

She thought she had told him the week before then she became more positive and said "He was told one week before". Indeed, contrary to the allegations she had made arrangements for the children to stay with her mother, the cleaners to pick up the laundry and she had as well made arrangements to meet those bills for which she was respondible, e.g. household helper, water and assistance with the mortgage and food bill. In keeping with this she worked as a live-in household helper and sent money to the Respondent, e.g. $30, $60, $50. In addition she would on occasions send pocket-money for the children ($20 or $10). On her return from each trip abroad she would immediately hand over to the respondent such savings as she had effected.

Apparently in an effort to show that they kept in touch while she was abroad on her trips she tendered three letters written by the respondent. They are dated 27.5.70, 10.9.70 and 15.9.70. The contents are not in anyway remarkable. None admits receipt of any money. Two refer to certain financial proposals regarding the acquisition of a car by the respondent from funds in hand and money to pay workmen in respect of work to be done on the house was also mentioned. They certainly do not prove her point. She returned from her 1971 trip on 20.7.72 and in connection with that trip she tendered as Exhibit 4 a letter dated 20.6.72 written by the respondent. For the greater part of the letter he complains about the loss of promotion which would have brought him an increase in salary of approximately $1,100 plus perquisites and this he blamed on her failure to respond to a cable sent her to return home. And then he writes -

> "All I can say is thanks but I just will not allow others to make me forsake my children and my responsibility to them.
>
> You have not sent any money here since January or February and I sent and told you what the position with the house was - plus the taxes, etc. By not sending anything for the children or towards expenses here is clearly indicative of your intention and sense of responsibility. The result - I AM NOW PAYIN RENT repeat RENT for 7 Cadot Close."

It may be inferred that she had sent some money prior to January - February but no specific amount or purpose can be assigned. But the real burden of the complaint is that for some six months or so she had sent none.

Cross-examined she at first denied receipt of the cable but retracted the denial when confronted with the cable. But even then she denied having denied receiving the cable. The notes had to be read back to her before she would admit the denial. Her disregard for the truth was again evidenced by her evasiveness about her address - the same as that on the cable. Not even the plight of the children which would attend his transfer as mentioned in the cable prompted her to reply. It is indeed painful to document the heartlessness which she demonstrates regarding not only the respondent but the children as well. Indeed her attitude regarding the welfare of the children can properly be labelled as reckless. In this regard it is a matter of great relief that the question of the custody of the children is no longer in issue as I would not want to be the one to inflict her children with her in circumstances where the evidence shows the father's claim for custody to be not free from difficulty.

I am certainly not prepared to take the risk involved in accepting the petitioner's testimony regarding paragraph 7(c) of her petition nor paragraphs 3(c) and 3(d) of the Answer and Cross-Petition. Certainly, not after her credit has been so savaged in cross-examination. It follows therefore, that the charges of cruelty have all failed. The issue of desertion as set out in paragraphs 7(e) of the Petition and 3(e) of the Answer and Cross-Petition will be dealt with later.

The respondent's testimony was along the lines of his allegations. At the time of the hearing he was Senior Air Traffic Control Officer stationed in Montego Bay since 21.7.72 and lives in Montego Bay but returns home every other week-end and sometimes more often. But even then he is denied the companionship of his wife because from sometime in 1973 - without any consultation with him - she has been working at nights and when she comes home in the morning she goes to sleep. Later in the day she would attend to domestic chores and so they had no time together. When he pointed out to her the fact that this was hurting their relationship she responded that the night work suited her. Her's was the last word on that matter. Indeed, her evidence in cross-examination bore this out:

"Q: Do you agree that to be working nights certainly from 1973, could not be in the best interest of relationship with husband and children?

A: It suited the family. I agree it was a more suitable arrangement for me.

To the Court

I say it was more suitable for the family because that was the only shift that allowed me to be home when the children came from school. I had no household helper.

It was my decision. Mr. Simms can't decide my work shift."

The petitioner had returned from abroad just the day before the respondent's transfer to Montego Bay. Accordingly, the deleterious effect of this work arrangement about which he said the petitioner remained adamant, which is confirmed by her own testimony, is not difficult to assess.

The charges of cruelty against him are all denied and he agrees that she did leave the matrimonial home in November 1962 - but not by agreement - to live at her parents home for a year during which time he visited her and a pregnancy resulted. The decision to move to her father's house seems very much in keeping with the several decisions she is shown to have made on her own accord, and I find that that was so and not, as she charged, flight due to fear engendered by threats from the respondent. I also accept his evidence that because of the pressures occasioned by the petitioner's absence aborad he travelled to New York made contact with her and arranged a meeting to discuss affairs but that she did not keep the appointment. Her excuse that she had gone on a hurried trip to do shopping for the children seems fanciful and I have no difficulty in rejecting her account.

Among the acts of cruelty complained of by the respondent the admitted burning with boiling water stands out prominently. As must be expected the accounts are conflicing. Whereas the petitioner accounts for it as an accident the respondent insists it was a deliberate act.

In her evidence-in-chief she testified that there had been a fuss after which the respondent went and showered in preparation for leaving for work. While he was showering she tried without success to speak to him and

when he came out she accosted him about it but he still would not oblige. Whereupon she accused him of having no manners and he responded by boxing her and going off to the stove on which were the kettle with boiling water which she needed to washher hair and the pot with his dinner. He was helping himself to some dinner when she lifted the kettle and water from the spout accidentally spilt on to his abdomen and burnt him. She said she observed the burn but did not think it was a bad burn nor was she aware of his seeking medical attention because of the burn. However, under cross-examination she disclosed that up to the day before she gave the evidence she had not told her attorneys of the incident in which she alleges she was boxed. Further pressed she said -

> "Yes, in relation to this (i.e. the burning) I did tell my attorneys that husband had boxed me. Can't recall when I told them.
>
> - - - - - I am not telling a lie about informing them. Not so that I don't care whether I tell the Court a lie. I can't explain the inconsistency in my evidence on this point. It was just a few minutes after he boxed me there was the accident with the kettle - 5 - 10 minutes after. I was hurt when he boxed me. I was angry. I still say the burning was an accident. I did not ask to see the spot burnt. Did not as a nurse try to relieve any pain he might have been having."

Further queried she said the injury was just above the pelvis but she could not give the exact spot as she did not examine the injury and that she was sorry about the accident. Asked how she showed her sorrow she replied that she did not show any sorrow. In fact immediately following the burn she ran across the road to a neighbour's house. She insisted that she did not think he was badly burnt but that he still has the scar. She explained that he became violent after he was burnt and threatened to kill her and that that accounts for her flight.

Not surprisingly the respondent's account is substantially different. Not only did he deny boxing her but he painted a different scenario to the burning. It was the petitioner who had bought the stove he said, and she objected to him using it. On the day in question he, it was who was using the kettle in preparing to leave for work. She approached him and voiced her objection to his use of the stove. He explained what

he was doing and also the fact that the stove had been provided for their common use. She pushed him away and an argument developed. It was then that she took up the kettle and deliberately threw the water on him and then ran through the door.

The petitioner admits that she knows he bears a scar resulting from that burn. At the time of hearing, eleven years after the incident there was still visible a scar measuring about 4 inches by 4 inches, which must be eloquent testimony of the severity of the burn. Indeed the respondent testified that he had sought aid at a Pharmacy on the Red Hills Road where the burn was dressed with gauze but it became worse and was very painful and unconfortable and affected his efficiency at work.

I have no difficulty in concluding that the petitioner deliberately poured the hot water on the respondent and that that was an act of cruelty which was not conduced to by any conduct of the respondent. It is worthy of note that shortly after the burning incident she left to the U.S.A. advising the respondent only the night before she left and absented herself for ten months.

It is conceded by Mr. Scharschmidt that if cruelty is found against either party prior to 17.6.74 (the date of the alleged desertion by both parties) then by reason of continued cohabitation such cruelty would have been condoned but that there would be a revival of the condoned offence in respect of that party who was found to be guilty of desertion. But he maintained that if on the basis of the relationship with Rainford, adultery were found then that would be incapable of revival. On the premise therefore, that the Petitioner's charge of cruelty were established and he submits they have been then, the Petitioner should be granted the decree sought. But while a relationship with Rainford has been proved I cannot say that adultery has been proved. Furthermore, no charge of adultery was prefered against her and even if such a charge had been made the co-habitation with knowledge of the offence would have produced condonation which would render such offence incapbale of being revived. Let me therefore repeat for emphasis that no acts of cruelty have been

proved by the Petitioner whereas the Respondent has succeeded in proving acts of cruelty. The competing allegations of desertion must now be examined.

The Petitioner admits that she ceased preparing meals for the Respondent since about June, 1974 and that she also ceased laundering for him. In addition she alleges that since June 1974 he removed from the matrimonial bedroom and occupied another room with his daughter (then 10 years of age). She also charges that he became withdrawn and did not communicate with her on serious things. On these matters she relies for proof of desertion - constructive desertion.

The particulars of the desertion alleged by Respondent include the cessation of the laundering and the preparation of meals and more importantly the occupation of a separate bed-room by the Petitioner. But any apparent resemblance in the charges is deceptive as will appear from the defending accounts.

On the part of the Petitioner the evidence is that the Respondent brought home his soiled clothes in an Airline bag from Montego Bay and it was known that she would be the one to do the laundering because there was no helper. But on one occasion when she opened the bag she saw a note in the Respondents handwriting on top of the clothes, with some very dirty remarks which she felt were intended for her. The note was not produced and, accordingly, the evidence of its contents could not be adduced. The reasons she gave for not preparing meals for the respondent were that she would prepare and serve meals but he would just ignore them. Regarding the occupation of the matrimonial bedroom her evidence-in-chief is that since June 1974 the respondent has been occupying another bed-room. In cross-examination she said she had bought the bed to replace the one in the matrimonial bed-room and then placed the old bed in the Respondent's son's bed-room. In re-examination she said she had replaced the bed to facilitate the respondent's return to the matrimonial bed-room because he had been complaining of back-ache caused by the mattress. Accordingly, she said she did not tell him to sleep on the old bed. If accepted this is evidence capable of being interpreted as showing such kindness and

consideration as are alien to the case. But what is the respondent's account? He states that he had no back complaint; hence the bed could not have been bought with a view to correcting such a problem. But what is even more significant his evidence is that he has never slept in that bed. The bed was purchased while he was in Montego Bay and when he came home he observed that this new bed had been installed in place of the matrimonial bed which had been shifted to another room. In addition there was this unmistaken indicator of the Petitioner's intention in making the change - his clothes had been put outside to serve as bedding for cats!

The petitioner had strongly denied dealing with his clothes in this manner, stating that with the exception of a coat hanging in the cupboard he had no clothes in the matrimonial bed-room and that he had removed the coat himself. Further she could not recall the respondent ever speaking to her about removing his clothes and consigning them to the cats. However, under pressure of cross-examination she capitulated and admitted what she had denied but sought to excuse herself on the ground that she did not at the time of denial remember.

Regarding the period immediately after the acquisition of the new bed the petitioner testified that -

> "he did not return to the matrimonial bed-room after I had purchased the new bed. He continued to sleep with his daughter. He had been doing so from early 1974."

The respondent's answer is that he has never slept on the new bed because from the very day he arrived from Montego Bay and saw the new bed in the matrimonial bed-room she locked the room door when she was leaving for work and took the key with her and that she continued to do so thereafter. He felt the implication was clear and saw such conduct on her part as being of a piece with her refraining from preparing meals for him and attending to his laundry.

The impact of the discovery in 1973 of the letters relating to the Rainford affair and the petitioner's response when accosted must not be under-estimated because it obviously exacerbated an already unhappy relationship. The petitioner's response as related by the

respondent was that "she is a big woman, she hasn't got to tell me anything". This he said "really got to me", and as a result he became reserved but did not withdraw his communication from her. The consequence of all this is that 1974 would have been a year of miracles for this unfortunate couple if it had turned out to be a year of happiness. It is my opinion that the matters complained of as occurring in 1974 are to be viewed against this background of heightening tension and growing resentment and that the locking of the bed-room, which I find did take place, as well as the cessation of domestic duties by the petitioner are the natural result.

The petitioner had sought assistance from certain writings in the respondent's handwriting which she saw on a 1977 calander none of which bore any reference to her. I regard such effort as unavailing.

I find therefore, that the Petitioner has failed to prove any act of cruelty but that even had she done so such acts would have been condoned. On the part of the respondent the acts of cruelty alleged at paragraphs (a), (c), (d) and (e) of his Answer and Cross-Petition have been proved. On the question of desertion I find that it was the conduct of the Petitioner when she finally locked him out of the matrimonial bed-room that brought the relationship to an end. The petitioner has, accordingly, failed to prove the charge of desertion. The acts of cruelty proved against the petitioner would have been condoned by the continued cohabitation up to June 1974 but would be revived by the desertion of which she has been proved guilty.

Accordingly, the Petition is dismissed. On the Cross-Petition, Decree Nisi is granted to the Respondent on the grounds of Cruelty and Desertion.

The parties will bear their own cost.

even have wished to acquire furniture and this would demonstrate quite clearly the need for better accommodation. But such cramped quarters were certainly not well suited to conversation which was not congenial, the moreso with a wife who was beginning to be assertive. And yet, it is to the respondent's credit that he is not charged with striking her a single blow.

The writer of the book of Proverbs who was well versed in the ways of women, may well have contemplated situations like this when he wrote:-

> "The contentions of a wife are a continual dropping."
>
> Prov. 19.13
>
> and
>
> "It is better to dwell in the wilderness, than with a contentious and angry woman." Prov. 21.19.

However, the respondent sought to escape the "continual dropping" and the contentions not by fleeing to the wilderness but by shutting himself in. But there are still two questions to be considered -

1. Would such act on the part of the respondent be an act of cruelty? and
2. If yes, what would be its status as a matrimonial offence at this point in time.

They can be dealt with together. Quite apart from the fact that I do not believe there was any intent to injure the petitioner, more importantly, there was no injury. It was not, in my opinion, a serious matter and does not qualify as an act of cruelty. But even had it so qualified it would undoubtedly after about 19 years and three children have lost all force and effect being obviously condoned and would after so long a period of cohabitation be regarded as incapable of being revived. I regard such an event unpleasant, regrettable though it was, as subsumed under wear and tear of marriage.

In 1960 the respondent went to England on an Air Traffic Control Course. The complaint at paragraph 7(b) of the Petition is related to this trip. But, contrary to what is pleaded, her own evidence shows that