IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN DIVORCE

SUIT NO. D. 1977/T033

BETWEEN	YVONNE TREASURE	PETITIONER
AND	RANSFORD TREASURE	RESPONDENT

THE 28TH DAY OF JUNE, 1978

Nelton Forsythe, Esq., for petitioner.

Carey, J. :

This is a wife's petition for nullity on the ground, counsel tells me, of non-consummation, and indeed counsel asks for a decree on that ground. The material paragraphs in the petition are in the following form:

> " 6. That your petitioner was at the time of the said ceremony of marriage incapable of consummating the said marriage owing to certain female menstrual disorder. "
>
> " 7. That the respondent returned to America on Monday, 22nd April, 1974, two days after the marriage at which time your petitioner was still experiencing the said female menstrual disorder. "

So that there seems to be some inconsistency or confusion of thought. It is not clear whether the ground is wilful refusal to consummate the marriage or whether the ground is incapacity, that is, the wife's incapacity.

What is the evidence adduced in this case? The wife tells me that the marriage ceremony took place on the 20th April, 1974, that the husband left for the United States, where apparently he resided at the time, two days later and she had not seen him since. On the night of the marriage, intercourse did not take place, because she was "seeing her period". She did remark that she was suffering. I would have thought that periods are normal where women are concerned and there is no question of any suffering or illness.

Assuming for the moment that the ground is incapacity, what does incapacity mean ? It means in law that one of the parties is at the time and continues to be incapable of effecting or permitting the consummation of the marriage, for example, by reason of some structural defect of the organs of generation, especially if this is incurable, which makes complete sexual intercourse impracticable. There were only two days in which intercourse could have occurred and in fact, there is no evidence that any attempt was made. All the evidence was that intercourse had not taken place at a time when she was menstruating.

Well, even if the ground was wilful refusal to consummate, there is no wilful refusal, because she has to show that she had made efforts to have intercourse which have been declined. There is no evidence to that effect here. Where a woman is menstruating at the time of her marriage, that does not constitute such evidence as amounts in law to a ground for nullity. There really is, as I say, no evidence either to establish wilful refusal to consummate, or any incapacity, Indeed there is some evidence of desertion, and the legal advisers of the petitioner would have been better advised to have relied on that ground instead of this wholly misconceived situation they have futilely put forward.

If that is not enough, there is another factor which I must mention. It relates to an order which was made in this case for substituted service. The order was based on an affidavit, which is most laconic in style and exiguous in content. Paragraph 8 of that affidavit says, "I have made numerous enquiries of his (meaning the husband's) whereabouts from friends which is of no avail." Who those friends are, or where they live, have not been stated. There is no evidence to show who this man is, that is, his background; all that is known is that he returned to America after the marriage and it is clear on that affidavit that he was here in Jamaica on holiday. On those bare allegations an order was made for the proceedings to be advertised in the Overseas Gleaner and Daily Gleaner.

The only comment I can make, and I do so with respect, is that there was really little evidence on which such an order might have been made. The law requires personal service of the divorce proceedings for the very good reason that status of part is involved. Where personal service cannot be effected and an order is made for substituted service, the intention is that notice of those proceedings is likely to come to the attention of the respondent spouse. But in order to make such an order, it seems unnecessary to add that the court must be afforded enough information to show that that likelihood exists. The affidavit as submitted in this particular case certainly falls short in that respect. I would have perhaps been constrained to dismiss the proceedings even if there was evidence to support whatever was the choosen ground because the service would have been held invalid. Alternatively, the court could order that the proceedings be re-served, or that a proper application be re-submitted.

This result is most distressing for the petitioner, having to appear to see her petition dismissed, for dismissed it must be. But I think I cannot leave this case without pointing out that practice in the Supreme Court is a matter of importance and must be so regarded. Great care must be taken in handling such matters. I already have, in another matter (McKenzie v. McKenzie - D 1977/ M074 - unreported 28th June, 1978) made certain comments about skill and competence. I don't propose to repeat those observations. But I think that it is essential that a degree of consultation be had, when an attorney is embarking into areas in which, perhaps, because of lack of experience, he is unfamiliar. For it means hardship to the litigant who has to find funds to pay for these proceedings and thereafter to bring other proceedings in the event of their being dismissed.

The only proper thing in this case is that counsel should advise himself whether proceedings for desertion might not have been better founded. Then I think he should pay the costs. Petition dismissed.