CASES ADJUDGED

IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA

AT

MARCH TERM, 1947.

BENJAMIN J. K. ANDERSON, Appellant, *v.* MARY E. ANDERSON, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued March 24, 25, 1947. Decided May 9, 1947.

1. Where one admits the truth of the facts stated in a complaint but sets up justification or excuse, the burden of proof shifts to him.
2. A wife abandoning her husband shall not be entitled to alimony except for good cause as set out in the statute.
3. Our statute does not make either the pendency or the termination of a matrimonial suit a necessary requirement for the institution of a suit for alimony.

On appeal from judgment in alimony suit awarding alimony to appellee, *judgment affirmed.*

B. G. Freeman for appellant. *T. Gyibli Collins* for appellee.

MR. JUSTICE SHANNON delivered the opinion of the Court.

Up to the year 1928 there was no statute of the Republic regulating alimony, so that our courts had to resort to common law principles in the hearing and determination of suits for alimony. However, the legislators deter-

mined that following the common law procedure was detrimental to, and against, the interests of the male citizens of the Republic, so in 1928 an alimony statute was passed, the preamble of which reads as follows:

> "Whereas there is no statute referring to Alimony, but that Courts of this Republic has [*sic*] heretofore acted upon the Common Law Procedure; and
>
> "Whereas the Common Law Procedure has been in many instances detrimental to the interest of the male citizens of the Republic, when they are compelled to institute Actions of Divorce against their wives for the breach of their matrimonial covenants and vows; and
>
> "Whereas, various decisions rendered against those husbands in such cases are not just [and] equitable when the surrounding circumstances are taken into consideration, Therefore. . . ." L. 1928, ch. XIV.

The enactment follows, the first section of which reads as follows:

> "That any married woman who for any just causes hereinafter stated in the Third Section of this Act be compelled to leave her husband's home and live apart from him, shall be entitled to receive a portion of his earnings for her maintenance which shall hereinafter be styled an 'Alimony.' "

After stating in section two of said act that the award shall be limited to not more than one-third of the husband's income and that said award shall be discontinued after a divorce has been granted or the husband shall have removed "the difficulty for which his wife abandoned his home," or shall have, in good faith, made "reconciliations with his wife and ask[ed] her to return home" which the wife refuses to accept, section three thereof makes provisions as follows for cases wherein a wife would not be entitled to alimony:

> "In no case shall the wife abandoning her husband's home be entitled to an Alimony except for the reasons

which shall be considered good causes:– habitual and continuous drunkeness [*sic*] which results into perpetual annoyance and an unhappy home; incompatability of temper creating a regular nuisance to the community and endangering the life of the wife; open and outrageous immorality against the good morals of the community and for which the wife would be entitled to a divorce. . . ."

It is readily seen that the intention of the legislators was to have suits for alimony adjudicated strictly upon equity principles and in conformity with the said act just quoted, with a view to narrowing or restricting what to them appeared a situation detrimental to the interests of the male citizens of the Republic.

By force of the provisions of the act just cited, Mary E. Anderson, appellee, commenced a suit for alimony against her husband, Benjamin J. K. Anderson, appellant, before the Civil Law Court of the Sixth Judicial Circuit, Montserrado County, at its June term, 1946, and in her complaint she substantially alleged that she was lawfully married to the said appellant on a day named in said complaint and that thereafter they lived in tolerable peace and happiness, but that subsequently appellant, becoming unmindful of his marital covenant and obligations, began to abandon himself to habitual drunkenness, which has resulted in perpetual annoyance and an unhappy home, and to open and outrageous immorality with one Lucinda Thomas of the city of Monrovia, against the good morals of the community, thereby neglecting her, the said appellee, his wife, and rendering living between them unhappy. In addition, "as the result of the practices above complained of on the part of the defendant [appellant], defendant did, without any justifiable cause, on the 25th day of April, A.D. 1946, evict plaintiff [appellee], from his bed and board and has neglected and refused from that time up to the instituting of this suit, to provide food, shelter and maintenance for plaintiff." This complaint,

after showing to the court the average income of the defendant, prayed for an award of fifty dollars per month alimony and fifty dollars counsel fees.

The answer of the appellant, in addition to raising certain legal issues regarding the sufficiency of appellee's complaint, admitted that appellee was his wife and that he evicted her from his home. But appellant denied those points in the complaint which charged him with habitual drunkenness resulting in perpetual annoyance and an unhappy home and with living an open and outrageous immoral life with one Lucinda Thomas of this city, and also denied that part of the said complaint alleging the average income or monthly earnings of said appellant.

The appellant charged his wife with being the person addicted to drinking and justified the eviction of his wife by him from his home upon the ground that he found certain concoctions in the home which appeared to have been medicines which the wife had obtained to use on him and herself with a view of better ensuring their living together as husband and wife, a concoction which, however, has the tendency of rendering a husband peculiarly insensible to his own interest and subservient to the will, whims, and notions of the wife and which is commonly known as "yarntonnoh," an expression of the Kpellehs, we understand, which means "me alone" or "my one." The appellee in her reply categorically denied these imputations made against her by her husband, and the pleadings in the case having rested with the rejoinder of the defendant, now appellant, same came up for hearing before His Honor Monroe Phelps, circuit judge assigned to that circuit.

There were only two issues raised against the legal sufficiency of the complaint, and since the first, an alleged misstatement of the time of marriage, is one not sufficiently material to merit an opinion by this Court, which has been conceded by the defendant, now appellant, since

he did not raise it and press it either in his bill of exceptions or in his brief, we pass on to the other which is submitted in count one of the brief in the following manner:

> "The complaint was bad for duplicity in that it charged appellant with having committed two separate and distinct wrongs constituting each a cause of action. His Honour the trial judge erred in overruling appellant's demurrer on said point and the law issues raised in his answer."

Referring to count two of appellant's answer wherein the issue was raised, we find it was submitted that the complaint of appellee should be dismissed for duplicity "in that plaintiff declares that defendant began to abandon himself to habitual drunkenness which resulted into perpetual annoyance and an unhappy home," and in the same count she contends that the unhappiness of the home was due to "open and outrageous immorality with one Lucinda Thomas of the City of Monrovia." Appellant contended in his said answer that since each of these is a separate and distinct cause of action each should have been pleaded in separate and distinct counts and each count commenced in the manner provided, required, and directed by the statutes. We are so much in agreement with the position of the trial judge in overruling this count of the appellant and in sustaining count two of the appellee's reply that we hesitate to disturb it. The notion of the appellant that these were two separate and distinct causes of action and hence should not have been joined is erroneous. The alleged habitual drunkenness and open outrageous immorality with the lady named were not pleaded as causes of action but rather as incidental facts to the act of eviction of appellee and the refusal and neglect of the appellant to provide her with food, shelter, and maintenance, the actual cause of the action.

Said answer having been taken to admit his marriage to appellee and his eviction of her as his wife, it is our

opinion that the burden of proof shifted to him to substantiate the imputations made against his wife, since it appears that his answer in this respect was intended to place him within section four of the said act regulating alimony, *supra,* which reads thus:

> "That where an action of divorce is instituted by the husband against the wife, and where the presumption of guilt on part of the wife is great, *she shall not be entitled to receive an Alimony upon a suit brought by her.*" (Emphasis added.)

Appellant did not avail himself of the opportunity of instituting an action against his wife. Questions were directed to his counsel, whilst arguing before this Court, as to whether or not appellant already had entered an action of divorce against his wife, the plaintiff below, upon the strength of the allegations which he pleaded in justification of his eviction of her from his home. Counsel was compelled to admit that no such action was filed.

It is our opinion that the imputations made against the appellee to the effect that she was addicted to heavy drinking have hopelessly failed in proof since appellant did not bring anyone to support this charge, whilst on the other hand those whom he brought testified against the correctness of the allegation. We will now consider the imputation that appellee had undertaken to engage in witchcraft and had secured from Freetown a witch doctor and also one witch doctor by the name of Friday; and that appellant discovered concoctions which she had obtained to place in his food and some to use in her body with the view of hypnotizing him and having him accede to and obey her every whim and notion, the use of such concoctions from witch doctors usually leading one to insanity or to death. We are of the opinion that this was a subtle effort to becloud the truthfulness and effect of appellee's claim. But these charges have fallen short of creating a great presumption of guilt against the appellee so as to affect her claim for alimony; for whilst it is true

that appellant did discover these concoctions in the home where he had placed appellee nevertheless, upon inquiring from her as to their true and correct purport, she informed him, according to her evidence which was denied by appellant, that they were obtained by her whilst at Freetown to which her husband had sent her for medical treatment, and that they were for the purpose of safeguarding herself against ills and outward conditions of life. What is strikingly peculiar is the neglect on appellant's part to have produced the Doctor Decker whom appellant, together with his sister Mary Anderson and his alleged paramour Lucinda Thomas, claims told them that he made medicine for appellee as against appellant, which medicine was bad. There is no evidence given to show appellee had obtained some of the concoctions from a Doctor Friday. Furthermore, there is no record to show why the testimony of these two persons was not required.

In addition, there is the boy Dennis, a ward of appellant, who, appellant said, told him of his having seen appellee one night putting certain powdered concoctions in the food that had been cooked for dinner and who, it is further said, told appellant and his sister Mary Anderson about it. Despite the fact that appellant bases his claim to justification for the eviction of his wife upon an alleged use of certain concoctions on him which were harmful and deleterious and which he discovered, the record discloses no testimony of Dennis to show that he did see appellee do the act imputed to her. Needless to say, under the circumstances the testimony is hearsay and has no probative value. There is no evidence even that appellee was ever confronted by the said Dennis regarding this incident. This accounts for our opinion that the whole thing was a subtle fabrication designed to becloud the truthfulness and effect of appellee's claim against the appellant for alimony.

Prince Nelson, a willing witness for the appellant,

testified that he was or is a steward of his church, that he advised appellant to call in a witch doctor to analyze the concoctions which were found in the home, and that when the doctor came in he analyzed same and found them to be bad medicines, a fact considered of great importance to the appellant's plea of justification for eviction of his wife but overlooked by himself in his own testimony whilst on the stand. From the said Prince Nelson's statement it is gathered that appellee was in the home when the alleged analysis of the medicines was done and was called to witness it and hear what the doctor had to say.

From the evidence of the appellant himself the said Dr. Decker is said to have also told Mr. and Mrs. Joseph T. Dayrell, Jr., the latter being the youngest sister of the appellant, of his having made medicine for appellee. Nevertheless, neither of these two persons was brought to testify, appellant electing to rest his proof of this fact on the evidence of his sister Mary and of his alleged paramour Lucinda Thomas, both of whom, the record discloses, had had a quarrel with appellee because appellee charged her husband with an illicit and outrageous immoral relationship with the said Lucinda Thomas, a relationship which the record suggests was encouraged and condoned by appellant's sister Mary.

Whilst it is true that our statute, *supra,* seeks to discourage the common law procedure in the hearing and determination of suits for alimony, yet we find ourselves compelled to resort to the common law for the definition of alimony:

> "'Alimony' . . . [is] the allowance required by law to be made to a wife out of her husband's estate for her support or maintenance, either during a matrimonial suit or at its termination, where the fact of marriage is established and she proves herself entitled to a separate maintenance. . . ." 27A C.J.S. *Divorce* § 202, at 868.

It appears from the rules of the common law that alimony was available during the pendency of a suit or after its termination. In the former case it is called temporary alimony and in the latter permanent alimony. Our statute does not seem to make either the pendency or the termination of a matrimonial suit a necessary requirement for the institution of a suit for alimony, so that a suit for alimony can be maintained in the absence of a pending action for divorce. However, it appears that it is necessary that the appellant, to be able to relieve himself of the responsibility of paying his wife alimony, first institute an action of divorce against his wife wherefrom the greatness of the presumption of guilt against her can be determined. It does not appear to us from the statute that appellant can make her a public charge and then sit complacently and wait until she sues for alimony before he for the first time takes a position to justify his eviction of his wife so as to relieve him of the responsibility for support, upkeep, and maintenance. To take it otherwise would be creating a source of injustice both to the wife and to the public who may not have been apprised of any unbecoming acts on the part of the wife which would leave her husband not responsible for her support, upkeep, and maintenance.

In view of the above, we are of the opinion that the decree of the lower court in this matter should be affirmed to all intents and purposes and in every respect with costs against the appellant. And it is hereby so ordered.

Affirmed.