ROBERT H. DENNIS, Appellant, *v.* EMMA DENNIS, Appellee.

APPEAL IN ACTION OF DIVORCE.

Argued December 2, 3, 1941. Decided December 30, 1941.

Where the pleadings are not properly drawn, the case will be remanded with instructions permitting the parties to replead.

On appeal in a divorce action, *judgment reversed and case remanded with permission to replead.*

C. T. O. King for appellant. *S. David Coleman* for appellee.

MR. JUSTICE TUBMAN delivered the opinion of the Court.

This cause came on before us for hearing, and when the pleadings consisting of a complaint, an answer, and a reply were read, we thought it necessary to hear arguments on these before going into the merits in the cause, the ruling made on these by the trial judge having been submitted to us for review by the appellant in the first count of his bill of exceptions.

Consequent upon this ruling of the trial judge, exhaustive arguments were made by counsel representing the parties and, after probing said counsel as they addressed the Court in defense of their respective positions, we have reached the following conclusion in connection therewith.

The answer filed by defendant, now appellant, attacks the complaint as being unintelligent, indistinct, and wanting in the statement of the time and place where the alleged incompatibility of temper occurred. Inspecting the complaint of plaintiff, we find that the allegations of

defendant made in his answer in this respect are correct and true, for indeed no place whatever is mentioned and the time is very indistinctly and vaguely stated. For instance, in the first paragraph of the complaint the time of occurrence is stated thus: "sometime between the first day of January and the second day of June of said year." The second count of the complaint charges the acts to have been committed "sometime about the 24th day of December A.D. 1937."

Nowhere in the complaint is the place where the acts of alleged incompatibility occurred stated at all, although the law requires this to be done.

As to time, the following authorities are pertinent:

> "In personal actions, the pleadings must allege the time—that is, the day, month, and year—when each traversable fact occurred; and, when a continuing act is mentioned, its duration should be shown." Shipman, Common-Law Pleading § 281, at 389 (2d ed. 1895).
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> "Both at common law and under the various codes and practice acts, it is generally held necessary to state in the declaration, complaint, or petition a time when every material traversable fact happened, and where the time of a certain occurrence is an essential element of liability of defendant, such time must be stated." 49 Corpus Juris *Pleading* § 154, at 144 (1930).
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> "*In personal actions,* all traversable affirmative facts should be laid as occurring on some day; but no day need be alleged for the occurrence of negative matter; . . ." 3 Bouvier, Law Dictionary *Time* 3279 (Rawle's 3d rev. 1914).
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> " 'Between' when properly predicable of time is intermediate. 'Between two days' was held exclusive of both. . . ." 1 *Id. Between* 340.

As to place, *Corpus Juris* states the following:

> "A statement of a traversable fact should include an allegation as to the place where such fact occurred,

but where the place of occurrence complained of is clearly stated, it need not be repeated in connection with every occurrence, a reference being sufficient." 49 Corpus Juris *Pleading* § 155, at 145 (1930).

But what is more, under the Matrimonial Causes Act an action of divorce must be brought in the county where both or either of the parties reside. "Actions of divorce shall be brought only in the judicial circuit where either the plaintiff or the defendant resides at the time of the commencement of action." L. 1935–36, 29, § 38. This in our opinion requires the pleader to include in every complaint for divorce the place of residence of the parties so that it will appear from the records that the court in which the action is brought has jurisdiction to try same. The complaint in this cause is wanting in this respect for it does not show upon its face or by any other means the residence of the parties at the time the action was brought.

Although not raised in the answer, we find the complaint materially defective in other material respects. It contains five counts, each of which should constitute a separate and distinct cause of action capable of standing alone as a complaint if the other counts were dismissed. But in none of these counts was the statutory definition of incompatibility pleaded, to wit, that the defendant "is so extremely quarrelsome and intolerably pugnacious to the [plaintiff] . . . that life together between them becomes notoriously dangerous." L. 1935–36, 28, § 33. The single exception is the last count, which pleads nothing but a quotation of the statute in this respect and which pleads this portion of the statute as a separate and distinct cause of action. The statutory definition should have been pleaded in each count after setting forth the acts of defendant which show the incompatibility. These could not constitute a separate and distinct cause of action.

The matrimonial causes statute further requires that it must be alleged and proved in a complaint praying for a divorce for incompatibility of temper that such traits

were not discovered by plaintiff to have existed prior to and at the time of marriage. *Ibid.* This averment is not contained in any of the counts of the complaint, although required by the statute under which the action is brought. The plaintiff, however, makes it a separate and distinct count, thereby constituting it a cause of action. However, he merely recites the statute.

We are, therefore, of the opinion that the complaint is materially defective and unscientifically drawn.

The answer of the defendant, now appellant, is equally defective and unscientifically framed. In counts one and two thereof defendant pleads over to facts and subsequently raises demurrers, which is not permissible under the rules of pleading. Further, the answer of defendant does not offer plaintiff a better plea.

On the whole, the pleadings filed by both parties in this action are so unscientifically framed that we are of the opinion that no proper case is made out by the complaint and no legal issue is joined by the answer and that, in view of these gross irregularities, the facts in the case cannot be entered into by us for judicial consideration. Therefore the judgment of the trial court should be reversed and the case should be remanded, with instructions that the parties be allowed to file new pleadings should they desire to do so.

The case having been commenced before the repeal of the statute making incompatibility of temper a ground for divorce, said new pleadings shall not be affected by such repeal; and each party should bear his own costs up to this stage; and it is so ordered.

His Honor the Chief Justice, although generally in accord with the principles of law herein enunciated and the conclusions reached, disagrees with the majority on one point which he desires to have mentioned as a matter of record. In his opinion, since the demurrers in the answer were not pleaded with sufficient accuracy to war-

rant the dismissal of he complaint and hence could not be sustained, the complaint with all of its admitted defects was thereby left unaffected by the unsuccessful attacks made upon it and should therefore have been allowed to stand and the case submitted to the jury for a trial of the facts. His view is that the common law rule for disposing of demurrers has been materially modified by our statute which provides that:

> "1. The defendant may either deny the truth of the facts stated in the complaint [traverse], or he may deny that they are sufficient in law to maintain an action [demur], or he may do both [demur and traverse]. . . .
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> "2. If the defendant deny both the facts and the law, the question of law shall first be disposed of." Stat. of Liberia (Old Blue Book) ch. V, §§ 1, 2.

Hence, in his opinion the question of law having been decided adversely to defendant, the issues of fact should have been proceeded with and the case not remanded for new pleadings to be filed. But as the majority held differently, the Chief Justice, while as aforesaid agreeing with his colleagues on the other points, is withholding his signature from our judgment.

Reversed.