J. EDMUND JONES, Appellant, *v.* DIANAH L. JONES, Appellee.

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

Argued May 3, 4, 1937. Decided May 14, 1937.

1. In order for one spouse to obtain a divorce against the other on account of incompatibility of temper it must be shown that defendant was so extremely quarrelsome and intolerably pugnacious that their living together has become notoriously dangerous.
2. If from a complaint for divorce on this head there have been omitted any of the essential elements necessary to be proved, such facts cannot legally be put in evidence, and hence it is proper to dismiss such a complaint upon demurrer taken to such defect.
3. If in any pleading subsequent to the answer a party should depart from the ground taken in his previous pleading, an imperfect judgment shall be given for his adversary.

In action for divorce in the Circuit Court, judgment was rendered for defendant. On appeal to this Court on a bill of exceptions, *affirmed.*

A. B. Ricks and *P. Gbe Wolo* for appellant. *L. Garwo Freeman* for appellee.

MR. JUSTIC DOSSEN delivered the opinion of the Court.

This is an action of divorce instituted by appellant, plaintiff below, in the Circuit Court of the First Judicial Circuit, Montserrado County, at its August term, 1936, Law Division, against his wife, appellee, defendant below, for incompatibility of temper.

From the records sent up to this Court, we find that the pleadings filed are very voluminous and interesting and went as far as the sur-rejoinder which was filed by appellant, plaintiff below. They contain some interesting issues which this Court would like to pass upon in this opinion, but as the case was dismissed upon issues of

law only, and the bill of exceptions filed only deals with two of such issues, we are unable to travel outside of the said bill of exceptions, and shall therefore have to confine ourselves to the issues thus submitted. For in *Phillips* v. *Republic,* decided at our January term, 1934, this Court said *inter alia:* " 'An exception . . . is an objection taken to the decision of the trial court upon a matter of law, and is a notice that the party taking it preserves for the consideration of the appellate court a ruling deemed erroneous.' " 4 L.L.R. 11, 1 New Ann. Ser. 12 (1934).

The pleadings in this case having been rested, the case came on for hearing before His Honor Nete-Sie Brownell, Resident Judge presiding, who after going through the issues therein raised and the law controlling same and hearing arguments *pro et con,* sustained the answer and subsequent pleadings of appellee, defendant below, dismissed the action, and ruled the plaintiff, now appellant, to pay all legal costs. Said appellant, not being satisfied with ruling of the trial judge, excepted, and appealed to this Court for review upon a bill of exceptions, the most pertinent portion of which reads as follows, to wit:

> "1. Because on said date Your Honour did rule in the first count of said ruling and judgment, as follows: That according to the statute providing for divorce for incompatibility of temper, it is stated that the complaint in such actions must further allege and it must be proven that such traits were not discovered by plaintiff to have existed prior to and at the time of marriage.
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> "The wording of the statute in this respect appeared to our mind to be mandatory, and the complaint may be dismissed because of omission of such averments. It is known that there are ante as well as post nuptial causes for divorce and the Legislature declared that the discovery of temper must be post nuptial.
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> "Further, every complaint must contain a distinct

and intelligible statement in writing of a sufficient cause of action within the scope of the form of action chosen, otherwise the action may be dismissed. The complaint in this case fails to aver the requirement of this statute above set forth. To which ruling the plaintiff excepts.

"And also because on said date Your Honour did rule on the second count of said ruling and final judgment as follows, to wit: The court further says that from the wording of the statute under construction, it is the intendment of the Legislature that before a divorce for incompatibility of temper can be granted it is necessary to set forth that incompatibility exists to the degree that the other spouse against whom the complaint is made so extremely quarrelsome and intolerably pugnacious to the other that life between them becomes notoriously dangerous. To which ruling the plaintiff excepts."

We shall now inspect the pleadings and compare the law controlling them, and see if the trial judge was correct in his ruling. This suit grows out of an Act relating to Matrimonial Causes passed and approved by the Legislature of Liberia, February 24th, 1936, and section 33 of said Act, upon which this action is predicated, reads as follows, to wit:

"Incompatibility of Temper shall be regarded to exist where either the husband or wife is so extremely quarrelsome and intolerably pugnacious to the other that life together between them becomes notoriously dangerous." Acts of the Legislature of Liberia, approved February 24, 1936, p. 20, § 33.

Comparing the complaint with the Act above mentioned, we find that said complaint is seriously defective and bad, as it does not include the words of the statute defining incompatibility of temper. In our opinion before a divorce can be obtained on said ground it is necessary to prove as an integral part of said complaint that

the defendant was in fact extremely quarrelsome, and so inclined towards pugnacity that the life of one or both spouses was by said pugnacious tendency endangered. That being so, it becomes necessary, in our opinion, that the allegation should be made in the complaint; otherwise any attempt to prove such tendencies which the enactment makes an important part of plaintiff's case would be irrelevant, and the object of the enactment thereby defeated.

After carefully scrutinizing the complaint filed in this case and comparing the statute out of which it grows, we have no hesitancy in saying that said complaint is not framed in the exact language of the statute from which it was drawn.

By a further inspection of the pleadings filed by appellant, plaintiff below, and in count eight of his reply, appellant makes a departure from the grounds set forth and contained in his said complaint, in that he raises and pleads a separate and distinct cause of action, that is to say, that he accuses appellee of "Unfaithfulness to him as plaintiff," which is tantamount to a distinct cause of action for a divorce according to the above cited Act, which thereby renders said reply void and of no legal effect. For this departure in the reply, even had there not been the other errors before discussed, defendant was entitled to a judgment in her favor; for our statute provides, "Every Answer and Reply must contain a distinct, intelligible, and sufficient Answer or Reply in writing to the complaint, or Reply to which it purports to be a Reply or to such parts thereof as it professes to reply, and it must not *depart* from the ground taken by the former Answer or Reply or judgment shall be given for the other party." Liberian Statute (Old Blue Book) ch. VI, p. 46, § 5; 1 B.L.D., "Departure"; 1 Chitty, Pleading 674; 1 Tidd's Practice 688.

The records show that the trial of this cause was regularly conducted, and that the ruling of the trial

judge on the issues of law as presented in the pleadings is correct, and in perfect harmony with the statute out of which this action grows. This Court is therefore of the opinion that the judgment of the trial court should be affirmed, and appellant ruled to pay all cost; and it is hereby so ordered.

Affirmed.

MR. JUSTICE RUSSELL, dissenting.

On the 15th day of July, 1936, J. Edmund Jones, appellant, and plaintiff in the court below in this case, filed a complaint in an action of divorce against Dianah L. Jones, his wife, defendant in the court below, now appellee, for incompatibility of temper, in which he says that he was lawfully married to his said wife on the 7th day of December in the year of our Lord Nineteen Hundred Twenty-Seven; that from the time of their aforesaid marriage they lived together in tolerable peace and happiness for eight years consecutively; but that within the last six months of their said marriage, that is to say, prior to the institution of this action, his said wife became extremely disagreeable, harsh and further assumed a loud, enraged and angry attitude,—which actions on her part the appellant regards as incompatibility.

In setting out the particular acts of incompatibility of temper as required by the statute upon which this action is predicated, the appellant set forth the following as the basis of his complaint or action: (1) That during the early part of May, 1936, in a conversation between appellant and appellee in the presence of the latter's mother, Mrs. Nellie Woods, and other persons at the table in their home, the appellee made use of the following expression to the appellant: "If Marion Grimes came back to visit this house again, I will order her out and thereby show her that I am the mistress of this house"; (2) that on the 14th day of May, 1936, the appellee went into the office of the Bank of Liberia where he, appellant, was and is

employed as Secretary, and peremptorily ordered one Nora Dean who had gone to the Bank on some official business; (3) that on the 6th day of June, 1936, the appellee left the appellant's house in Monrovia and betook herself to a place called Sinta in the Liberian Hinterland, without any permission from, or even notification to her husband; (4) that on the 13th day of June, 1936, about 7 o'clock p.m., the appellee left the home of the appellant without his knowledge and remained out until 9 o'clock p.m., and the appellant further cited two other cases as grounds of his action, which were couched in counts 7 and 8 of his aforesaid complaint (q. v.). The foregoing, then, were some of the specific acts alleged to have been done by his wife, the appellee, which the appellant considers to be incompatible and for which he prayed the trial court to grant him a divorce. In keeping with section 7 of the 33rd page of the Old Blue Book (Liberian Statute), the appellee filed her appearance on the 16th day of July, 1936, and filed her answer on the 21st day of July, 1936.

In count one of her said answer the appellee says that the complaint of the date has been defective and bad because it does not contain the statutory words which are as follows: "that the defendant is extremely quarrelsome and intolerably pugnacious to the plaintiff that life together between them has become notoriously dangerous," and therefore prays for the dismissal of the appellant's aforesaid complaint. And further in count two of the aforesaid answer, the appellee sets up that the complaint of plaintiff, now appellant, is further defective and bad, because it also lacks the necessary averment required by the law governing divorce under the particular form of action chosen, that is to say, that all complaints in an action of divorce for incompatibility of temper must allege that, "such traits were not discovered by plaintiff to have existed prior to and at the time of marriage."

These then were the salient points upon which the

complaint and all subsequent pleadings of the appellant, plaintiff in the court below, were dismissed by the trial court. See judge's ruling on law pleadings, especially last paragraph.

Indeed, that there are mandatory, technical words of art to be used in all indictments for felonies and misdemeanors in criminal prosecutions, the omission of which may render an indictment vulnerably defective and bad, invalid and therefore liable to be quashed, cannot be gainsaid; yet still it is my opinion that this rule of criminal law is not strictly applicable to civil cases, particularly so when the statute upon which the plaintiff based his complaint is, as in this case, unequivocal and self-explanatory. For the statute of the case says:

> "Incompatibility of temper shall be regarded to exist where either the husband or wife is so extremely quarrelsome and intolerably pugnacious to the other that life together between them becomes notoriously dangerous.
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> "The complaint in such case must distinctly state particular acts repeatedly done conclusively to show the incompatibility and must be proven at the trial sufficiently to convince the jury that it does exist." Acts of the Legislature, 1935–36, p. 20, § 33.

The complaint of the appellant in this case having very unambiguously enumerated particular acts of incompatibility repeatedly done by his wife the appellee, that is, during the last six months immediately preceding the institution of this action, the onus necessarily devolves upon him to prove such acts conclusively before a jury and his effort to do so should not have been thwarted by dismissal of the case upon sheer immaterial technicalities. For the requirement of the relevant statute of proving at the trial before a jury particular acts alleged to be done, in my opinion, makes the issue involved in every divorce suit for incompatibility of temper an issue both of law

as well as of fact which must be decided by a jury with the assistance and under the direction of the court. Liberian Statute (Old Blue Book), ch. VII, p. 47, § 3.

Thus it is palpable and needs no further excuses to show, that the issue involved in this case is one both of law and of fact, if for no other reason than that the statute requires proof after setting up the particular acts which constitute the offense. Consequently, I cannot, and do not, concur with my colleagues to affirm the judgment or ruling of the trial judge dismissing this case.

As regards count two of the defendant's answer attacking the plaintiff's complaint on the grounds that it is defective and bad because it does not contain the statutory words, "such traits were not discovered by plaintiff to have existed prior to and at the time of marriage," it must be conceded that upon inspection of the complaint we find that it does not contain the identical words of the statute as pointed out in the defendant's aforementioned attack upon the complaint; nevertheless, containing as it does words of similar import, that is, words substantially coextensive with those employed in the statute, said complaint of the plaintiff was not, and is not, in my opinion, legally dismissable; especially so, since the plaintiff in count one of his complaint alleges that he was married to Dianah L. Jones, his wife, on the 7th day of December, 1927, and that after their said marriage they lived together *in tolerable peace and happiness for the period of eight or more years,* which allegations plainly connote that "such traits" as complained of were not discovered to have existed in Dianah L. Jones prior to and at the time of their marriage (or else the union might not have been effected); but that said traits existed, that is to say, became known and intolerable to appellant only during the last six months preceding the institution of this action of divorce.

In view of the foregoing considerations, I cannot and

do not agree with my colleagues to sustain and affirm the ruling of the trial court dismissing this case, when indeed the issues involved in the cause are issues not only of law but also of fact, which our statute says must be decided by a jury with the assistance and under the direction of the court; hence this dissenting opinion.