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Keener v. Keener

Roger J. Traynor

App. 378, 386, 387 [9 Pac. (2d) 225], as follows: "It is a settled rule that when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown (*Balfour* v. *Fresno C. & I. Co.*, 109 Cal. 221 [41 Pac. 876])." **[5]** And in *Scott* v. *Sun-Maid Raisin Growers Assn.*, 13 Cal. App. (2d) 353 [57 Pac. (2d) 148], the court stated at p. 359: "When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact* . . . . (*Thomson* v. *Leak*, 135 Cal. App. 544, 548 [27 Pac. (2d) 795]; *Gallatin* v. *Markowitz*, 139 Cal. App. 10, 13 [33 Pac. (2d) 424]; *Coats* v. *General Motors Corp.*, 3 Cal. App. (2d) 340, 356 [39 Pac. (2d) 838].)" [Italics added.]

[2b] Applying the rules of law above stated, it is clear that the trial court should have denied defendant's motion for a summary judgment so that the issue raised between the parties hereto as to the duration of defendant's undertaking to furnish support and maintenance to the plaintiff might be tried upon its merits. **[6]** The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact. The use made of the statute in this case was a perversion and an abuse of it.

For the reasons indicated the judgment of the superior court is hereby reversed and the cause remanded.

Gibson, C. J., Shenk, J., Edmonds, J., Carter, J., and Traynor, J., concurred.

Respondent's petition for a rehearing was denied September 13, 1941.

[L. A. No. 16881. In Bank.—Aug. 19, 1941.]

A. L. KEENER, Appellant, v. NELLIE D. KEENER, Respondent.

[1] Divorce—Extreme Cruelty—Conduct Causing Mental Suffering.—The inflicting of "grievous mental suffering," within the meaning of Civ. Code, § 94, is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party. A correct decision depends upon the sound sense and judgment of the trial court whose conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion.

[2] Id.—Extreme Cruelty—Conduct Causing Mental Suffering—Conduct Indicating Dissatisfaction.—A course of conduct by which one party to a marriage continually indicates dissatisfaction with the other and makes such dissatisfaction known to friends of the parties may well cause humiliation, embarrassment and mental anguish to a degree constituting extreme cruelty. And so a spouse's loss of temper, his repeated criticism of his wife in the presence of friends, his statements, after years of marriage, that she should support herself are sufficient to constitute extreme cruelty where they are proved to have caused her grievous mental suffering.

[3] Id.—Proceedings—Complaint—Pleading Cruelty.—While Civ. Code, § 94, defining extreme cruelty requires an element of wrongfulness, a pleader suing for divorce on such ground need not use the exact language of the statute. It is sufficient if the rational inference from the allegation is that the infliction of the suffering on the other party was wrongful.

[4] Id.—Extreme Cruelty—Justification—Proof by Complainant. It is not necessary that a cross-complainant seeking a divorce on the ground of extreme cruelty establish as a part of her case her own freedom from fault where the plaintiff in his answer to the cross-complaint did not allege any fault on her part, and there was no evidence at the trial indicating that

2. See 9 Cal. Jur. 650; 17 Am. Jur. 188.

McK. Dig. References: 1, 2. Divorce and Separation, § 13; 3, 5. Divorce and Separation, § 72 (3); 4. Divorce and Separation, § 23; 6. Divorce and Separation, § 25; 7. Divorce and Separation, § 27; 8. Trial, § 285.

the cross-complainant was in any way responsible for the plaintiff's course of conduct.

[5] **Id. — Proceedings — Complaint — Pleading Cruelty—Alleging Time and Place.**—A pleader seeking a divorce on the ground of extreme cruelty need not, in the absence of special demurrer, plead the exact time and place of each of the acts complained of where the conduct was continuous and was not confined to any particular time or locality.

[6] **Id.—Extreme Cruelty—Sufficiency of Evidence—Motive.**—One seeking a divorce on the ground of extreme cruelty need not prove that the course of conduct complained of was inspired by malevolent motives.

[7] **Id.—Extreme Cruelty — Corroboration — Successive Acts.** — Where the cruelty consists of successive acts of ill treatment, it is not necessary that there be direct testimony of other witnesses to every act sworn to by the complaining party. The corroboration is sufficient where the corroborating witness states that he heard the testimony of the party and knows the facts related therein to be true.

[8] **Trial — Findings—Necessity for—Waiver.**—Findings of fact are not required where the parties join in a written stipulation, filed with the clerk, waiving findings.

APPEAL from a judgment of the Superior Court of Los Angeles County. Ben B. Lindsey, Judge. Affirmed.

Action for divorce in which defendant filed a cross-complaint for separate maintenance which was amended at the trial by adding a prayer for divorce. Judgment granting a divorce on the cross-complaint, the complaint having been dismissed, affirmed.

Jerrell Babb for Appellant.

Roy J. Farr for Respondent.

TRAYNOR, J.—Plaintiff filed an action for divorce on the ground of desertion against defendant to whom he had been married for over thirty years. Defendant answered and cross-complained for separate maintenance on the ground of extreme cruelty. Subsequently plaintiff filed an answer to defendant's cross-complaint and an amended complaint adding a second cause of action for divorce on the ground of defendant's alleged extreme cruelty. At the trial defendant amended her cross-complaint by adding a prayer for divorce. Plaintiff

dismissed his complaint and the action was tried on the cross-complaint of defendant as a default.

Defendant alleged in her cross-complaint as amended that during the last three years of her married life plaintiff on numerous occasions lost his temper and found fault with defendant in the presence of friends and acted in a peculiar manner, that he remarked in the presence of friends that defendant was not a good or proper wife, that he told her she should get out and support herself, and that he requested her to apply for work as a kitchen cook or servant. She alleged that these acts caused her grievous mental anguish.

At the trial defendant testified regarding the acts of the plaintiff substantially in accord with the allegations of the amended cross-complaint. She testified that this conduct was continuous, made her nervous and ill and caused her great mental suffering. A corroborating witness testified that she heard the testimony of defendant, knew the facts therein related and corroborated them in their entirety.

The court granted defendant a divorce upon her cross-complaint and plaintiff appealed.

[1] Plaintiff contends that the facts alleged and proved by defendant were insufficient to sustain an action for divorce on the ground of extreme cruelty. Section 94 of the Civil Code defines extreme cruelty as "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." In each case the infliction of "grievous mental suffering" is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party. (*Barnes* v. *Barnes,* 95 Cal. 171 [30 Pac. 298, 16 L. R. A. 660]; *Fleming* v. *Fleming,* 95 Cal. 430 [30 Pac. 566, 29 Am. St. Rep. 124]; *MacDonald* v. *MacDonald,* 155 Cal. 665 [102 Pac. 927, 25 L. R. A. (N. S.) 45]; *Avery* v. *Avery,* 148 Cal. 239 [82 Pac. 967]; *Cline* v. *Cline,* 4 Cal. App. (2d) 626 [41 Pac. (2d) 588]; *Shaw* v. *Shaw,* 122 Cal. App. 172 [9 Pac. (2d) 876]; *Davis* v. *Davis,* 58 Cal. App. 100, 102 [207 Pac. 923]; *Van Camp* v. *Van Camp,* 53 Cal. App. 17, 22 [199 Pac. 885].) A correct decision must depend upon the sound sense and judgment of the trial court. (*Barnes* v. *Barnes, supra; Shaw* v. *Shaw, supra.*) Its conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion. (*MacDonald* v. *MacDonald, supra;*

Davis v. *Davis, supra; Andrews* v. *Andrews,* 120 Cal. 184 [52 Pac. 298].)

[2] A course of conduct by which one party to the marriage continually indicates dissatisfaction with the other and makes such dissatisfaction known to friends of the parties may well cause humiliation, embarrassment and mental anguish to a degree constituting extreme cruelty. In the instant case plaintiff was a teacher in the public schools and his loss of temper and repeated criticisms of defendant in the presence of their friends and his statements, after more than 25 years of marriage, that she should support herself were sufficient to constitute extreme cruelty if they prove to have caused her grievous mental suffering. The trial judge was in a position to observe the intelligence, refinement and delicacy of sentiment of the defendant and to determine whether plaintiff's conduct caused her grievous mental suffering. In the absence of an abuse of discretion, his conclusion cannot be disturbed.

[3] Plaintiff contends that the defendant did not sufficiently allege or prove that his conduct was wrongful. While section 94 by its definition of extreme cruelty requires an element of wrongfulness, the pleader need not use the exact language of the statute. It is sufficient if the rational inference from the allegations of the cross-complaint is that the infliction of the suffering upon the other party was wrongful. (*Nelson* v. *Nelson,* 18 Cal. App. 602 [123 Pac. 1099]; *McCahan* v. *McCahan,* 47 Cal. App. 176, 180 [190 Pac. 460].) **[4]** It was not necessary that defendant establish as part of her case her own freedom from fault where plaintiff in his answer to her cross-complaint did not allege any fault on her part and there was no evidence at the trial indicating that defendant was in any way responsible for plaintiff's course of conduct. Plaintiff did not see fit to cross-examine defendant or to offer any evidence on his own behalf.

[5] It was not necessary that defendant plead the exact time and place of each of plaintiff's acts, for the conduct of which she complained was continuous and not confined to any particular time or locality. (*Zartarian* v. *Zartarian,* 47 Cal. App. 90 [190 Pac. 196].) Moreover, plaintiff did not see fit to demur specially to the amended cross-complaint. **[6]** Nor was it necessary that defendant prove that plaintiff's course of conduct was inspired by malevolent motives. (*Barngrover* v. *Barngrover,* 57 Cal. App. 43 [206 Pac. 451].)

[7] Plaintiff contends that the corroboration offered by defendant was inadequate. Where the cruelty consists of successive acts of ill-treatment, however, it is not necessary that there be direct testimony of other witnesses to every act sworn to by the complaining party. (*Andrews* v. *Andrews, supra.*) Here the corroborating witness stated that she heard the testimony of the defendant and knew the facts related therein to be true. No objection to this testimony was made by the plaintiff. The corroboration was sufficient.

[8] Plaintiff complains of the failure of the trial court to make findings of fact. The parties joined in a written stipulation, filed with the clerk, waiving findings. Under such circumstances findings are not required. (Code Civ. Proc., sec. 632. See *Waldecker* v. *Waldecker,* 178 Cal. 566 [174 Pac. 36].)

The judgment is affirmed.

Gibson, C. J., Shenk, J., Curtis, J., Edmonds, J., and Carter, J., concurred.

[Crim. No. 4343. In Bank.—Aug. 19, 1941.]

THE PEOPLE, Respondent, v. DEWEY CLARK et al., Appellants.

[1] Homicide—Evidence—Evidence of Murder.—In a prosecution for murder the evidence justified a conviction where it showed the finding of the defendants a few hours after the disappearance of the murdered couple in unexplained possession of the automobile in which they were last seen alive, where they were positively identified by a garageman who saw them after the commission of the crime and whose testimony was corroborated by others, where there was testimony of other witnesses to defendants' presence near the scene of the crime on the evening thereof which was not inherently improbable, where there were corroborating circumstances including blood on defendants' clothing, and where contradictions in defendants' testimony justified its rejection by the jury.

McK. Dig. References: 1. Homicide, § 145 (3); 2. Witnesses, § 23.