

(GRIFFITH WILLIAMS AND MELISSAS, JJ.)

(March 11, 1948)

SOPHOCLES POLYCARPOU, *Appellant*,

v.

DESPINA ZENONOS, *Respondent*.*(Civil Appeal No. 3809.)*

Breach of promise of marriage—Oral promises—Written contract of dowry—Simple contracts—Merger—Amount of damages fixed in contract of dowry—Damages for breach of contract to marry—Assessment—Limitation.

The respondent brought an action against the appellant claiming damages for breach of promise of marriage. The trial Court found that the parties promised orally to marry each other, and later on the same day a contract of dowry was drawn up and signed, and that the appellant subsequently broke his promise. It was contended for the appellant that the oral agreement merged into the written agreement, namely the contract of dowry. The trial Court, holding that the stipulation as to damages in the contract of dowry governed the amount of damages which could be recovered under the contract sued upon, limited the amount of damages to the amount fixed in the contract of dowry.

Held : (i) that, as in the present case both agreements, the oral and the written, were simple contracts, merger failed to materialize.

(ii) the two agreements under consideration were vastly different in character : the mutual promises of marriage were the contract to marry ; the dowry document was the contract in consideration of and conditional upon marriage actually taking place. The contract of dowry is analogous to the English marriage articles. Its object is to bind the parents or other relatives to provide the marriage portion for the benefit of the parties to the contemplated marriage. The contract of dowry did not change or affect the position of the parties to this action under the oral contract to marry, and the trial Court was, therefore, wrong in limiting the amount of damages to the amount stipulated in the contract of dowry.

Action remitted to the District Court for re-assessment of damages.

Appeal by defendant and cross-appeal by plaintiff from the judgment of the Full District Court of Limassol (Action No. 47/46) in favour of plaintiff.

A. C. Indianos for the appellant.

J. Potamitis for the respondent.

The facts of the case are fully set out in the judgment of the Court which was delivered by :

GRIFFITH WILLIAMS, J. : This appeal arises out of an action brought by the respondent against the appellant claiming damages for breach by appellant of promise of

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marriage. The contract to marry each other on which respondent sued is stated in her pleadings to have been made orally between them on 28.4.1943.

The appellant put forward three defences to this claim which are also made grounds of appeal :

- (a) that the contract of the parties to marry each other is contained only in the contract of dowry dated 28.4.1943 ;
- (b) that in accordance with the terms of this written contract the appellant terminated the agreement on account of respondent's immoral conduct in allowing her brother-in-law to kiss her, and
- (c) discharge of the contract by mutual agreement.

The District Court rejected all the grounds of defence and found for the respondent, but limited the damages to the amount stipulated in the contract of dowry, holding that the stipulation as to damages in that contract governed the damages resulting to respondent by appellant's breach of his contract to marry her.

The finding of the District Court on the first ground of defence was that a verbal promise by the parties to this action to marry each other preceded the dowry contract. On the evidence given by the parties we agree with this finding. But appellant's counsel argues that the verbal agreement merged in the written agreement—the dowry contract. The rule as to merger is that a lesser security is extinguished into a higher one ; for instance, a simple contract is merged into an identical engagement by deed ; a simple contract is merged into a judgment recovered on the basis of that contract. In the present case both engagements, the verbal and the written, are simple contracts and merger therefore fails to materialize. Furthermore the two agreements under consideration are vastly different in character. The mutual promises of marriage are the contract to marry ; the dowry document is the contract in consideration of and conditional upon marriage actually taking place. The contract of dowry is analogous to the English marriage articles. Its object is to bind the parents or other relatives to provide the marriage portion for the benefit of the parties to the contemplated marriage. It is usual for the fiancés to become parties of the same part as promisees, in order to be able to enforce the dowry contract. Nothing more and nothing less was done in the present case. The dowry contract has not in the least changed or affected the position of the parties to this action under the oral contract to marry, beyond fixing a date, November, 1946, for the celebration of the marriage, which was necessary in order that the stipulation for the transfer of properties one month before marriage

should take effect. We therefore hold that the District Court was wrong in deciding that the amount of agreed damages fixed in the written contract of dower limited the amount of damages claimable under the contract sued upon.

The District Court rejected the imputations made by appellant on respondent's honour, and found that for reasons of his own appellant repudiated his contract with respondent before the time fixed for the celebration of the marriage. We consider that the evidence before the trial Court justified its conclusion on this ground of defence. The appellant retained his determination to break the engagement as from June, 1945, throughout, and as from that time became liable to an action which respondent might institute at her election, and did so after she despaired of appellant ever performing his promise.

The third ground of appeal is rescission by mutual consent. The rescission by waiver or mutual consent was alleged to have been brought about by the mediation of a priest whom appellant called as his witness and whose evidence the trial Court accepted. To dispose of this ground of defence it is sufficient to cite verbatim the appellant's evidence from the record on this subject. He said: "Towards the end of October (1945) we told something to the priest Papa Yianni. He went somewhere and on return he told us something. After the conversation with Papa Yianni I considered the engagement dissolved." There has not been the slightest allegation either by appellant or by Papa Yianni that the latter was authorized to treat on behalf of any party to the contracts in this case or to bind anyone. It is sufficient to say that the proposition that contracts can be rescinded by a stranger intervening to ascertain the intention of the parties is untenable.

The fourth ground of appeal relates to the finding of the trial Court that appellant deflowered respondent. There was sufficient evidence on which the trial Court could come to that conclusion and we do not propose to interfere.

The fifth ground of appeal is that the amount of damages adjudged was excessive. We have already alluded to the limitation imposed by the trial Court on the amount of damages and respondent cross-appeals from that decision. From what we have already said in relation to the first ground of appeal we are of opinion that the trial Court erred in limiting the damages to the figure stipulated in the dowry contract. The action will, therefore, be referred back to the District Court with the direction that the damages to which respondent is entitled be assessed without reference to the limitation in the contract of dowry.

Appeal dismissed with costs, cross-appeal allowed with costs. Action remitted to District Court for re-assessment of damages.

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