[GRIFFITH WILLIAMS, J., AND ZEKIA, J.]

(July 1, 1953)

AHMED MOULLA MOUSTAFA OF FAMAGUSTA, *Appellant,*

v.

EMINE ALI OSMAN OF KOROVIA, *Respondent.*

(T.F.C. Appeal No. 6.)

Divorce on ground of adultery under sec. 26 of the Turkish Family (Marriage and Divorce) Law, 1951—No suit for divorce after the expiration of six months from the occurrence of the event constituting the ground of divorce.

The period for the limitation of actions does not necessarily run from the day the adulterous relations started but from the date or dates on which the act or acts of adultery, on which the petition for divorce is based, have been committed.

Amount of compensation payable to an innocent husband who obtains a decree of divorce on the ground of adultery by his wife is to be assessed by taking into consideration (*a*) the circumstances of the case, (*b*) the pecuniary position or expectations of the wife and (*c*) the injury to the person or reputation of the husband.

The award of £10 as compensation in favour of the husband, in the circumstances of the case, was found unreasonably low and it was increased to £250.

Appeal by plaintiff from the judgment of the Turkish Family Court of Famagusta (Action No. 92/51).

A. Zaim for the appellant.

U. Emin for the respondent.

The facts sufficiently appear in the judgment of this Court which was delivered by:

ZEKIA, J: The appellant and respondent were married in 1936 in accordance with the Sheri Law. The prompt dower fixed for the wife was £40. The couple lived together happily up to the 28th October, 1950, and had four children. On that date the wife without any lawful excuse deserted the husband and the conjugal home and started adulterous association with a certain Ali Vechi of Korovia, her native village, and co-habited with him up to April 1951. For some reason or other the respondent in April left the co-respondent's house and lived with her father at Korovia until the 8.9.1951. On this day she left the father's house and resumed co-habitation with the said Ali Vechi up to the death of the latter, which occurred on the 6.11.1951. The appellant instituted this action against his wife, the respondent, on the 2nd November, 1951, claiming (*a*) a decree of divorce on the ground of adultery and desertion; (*b*) £695 as damages and compensation for the work he had done on the property of the respondent; and (*c*) £1,000 damages as compensation for the breaking of the marriage union. The respondent counterclaimed for (*a*) £788. 15*s*.

representing the value of produce collected by appellant from her property (fields and trees); (*b*) £40 agreed prompt dower payable by plaintiff to the defendant as per marriage contract; (*c*) custody of the two youngest children.

Desertion and adulterous association with the co-respondent on the dates mentioned was not denied by the respondent. Prompt dower also was not disputed but it was alleged that it had been prescribed. The damages claimed in the action and in the counter-claim were disputed. The claim for a decree of divorce was opposed by the respondent on the ground that her husband had condoned or connived at the commission of the adultery. The trial Judge gave judgment on the 10th June, 1952, granting the appellant his divorce on the ground of desertion, but refusing to do so on the ground of adultery. Custody of all the children was given to the father (appellant). The respondent was ordered to contribute £2. 10*s*. monthly towards the cost of the maintenance and education of the children and the judge dismissed the claims by both sides for damages in relation to the cultivation of the property of the respondent. The trial judge also dismissed the counter-claim of £40 of prompt dower, finding that the respondent's claim for dower was prescribed. £10 only was awarded as compensation to the appellant for the breaking of the marriage due to wife's fault, and only part of the costs of the action was allowed him. From this decision of the trial Court the husband has appealed to this Court against (*a*) the refusal of this trial Court to grant him a divorce on the ground of adultery; (*b*) the smallness of the amount awarded him as compensation. Defendant-respondent on the other hand counter-appealed against (*a*) the grant of divorce; (*b*) dismissal of her claim for prompt dower; (*c*) the order giving custody of the children to the plaintiff and the order directing her to contribute £2. 10*s*. a month towards the maintenance of the children.

The learned trial judge refused to grant the divorce on the ground of adultery for reasons which he gives in his judgment (page 10 of the notes) as follows:

> "The adultery of the defendant took place some 7 months prior to the new Turkish Family (Marriage and Divorce) Law enactment. And the plaintiff before this law was enacted had full power to divorce his wife unilaterally at any time he liked at his own free will without any formalities. But plaintiff failed to do so and keeping silent waited until the new law came into force with the hope of getting rid of the burden of paying the dowries of the defendant and on top of it claiming damages from her.
>
> The plaintiff had full knowledge of the adultery of the wife but he waited for about a period of one year to bring his action for divorce on this ground.

Section 26 of Law 4 of 1951 limits the time for suitors who claim a divorce on ground of adultery (*inter alia*) to a period of six months from the occurrence of the event or from the time when such event first comes to the knowledge of the party suing for divorce. On this ground the plaintiff's claim for divorce fails."

Section 26 of the Turkish Family (Marriage and Divorce) Law, 1951, reads :

> " No suit for divorce on the ground set out in paragraphs (*a*), (*b*) or (*c*) of section 25 shall be brought after the expiration of six months from the occurrence of the event constituting the ground of divorce as in the said paragraphs stated or from the time when such event comes to the knowledge of the party suing for divorce."

Surely the phrase " from the occurrence of the event constituting the ground of divorce ", in reference to adultery, should be taken to refer to the act of adultery constituting the ground of divorce. There is nothing in the section to lead us to interpret the phrase in question in the way done by the trial Court. The material date for the limitation of actions is not when the adulterous relations started but it is the date or dates on which the act or acts of adultery that are put forward as a ground of divorce have been committed.

Section 26 corresponds to article 129 of the Turkish Civil Code. Commenting on this article Professor Osman Fasil Berki in his book on divorce and separation at page 52 states :

> " If acts of adultery are many and the adulterous association a continuous one then the date of the last act of adultery is to be the date on which the time for limitation of action begins to run."

Footnote 50 refers to the full Temyis Court decision Civil Section (highest Court of Appeal in Turkey) which reads :

> " If those committing adultery lived together as husband and wife the date for limitation of actions will start to run not from the commission of the first act of adultery but from the last day of co-habitation."

There is nothing in the English Law in conflict with this principle. The husband's right to claim divorce on the ground of adultery could not ordinarily in English Law be defeated by unreasonable delay. This kind of defence has only been applied in exceptional circumstances where the delay was deliberate and culpable and its duration covered a period of several years. In *Rickard* v. *Rickard* there was a deliberate delay of 12 years in the presentation of a husband's petition which was dismissed. On appeal Lord Sterndale, M.R., stated :

> " The word delay must be understood to be culpable delay, something in the nature of connivance or acquiescence" (page 158 Latey on Divorce, 14th edition).

Even if one considered the first period of adulterous association being condoned by the plaintiff-appellant, the second period might be considered as a cause of revival of such condoned adultery because under the English Law, assuming that it could be resorted to in this case, the condoned adultery may be revived by familiarities falling short of actual adultery unless indeed there is a case of connivance. In this case the adulterous relations were resumed and continued up to the filing of the action for divorce, and even for some days later. This clearly constitutes a fresh ground for divorce both under the Turkish Family (Marriage and Divorce) Law, 1951, and the English Law. The Court below was in error therefore in holding that plaintiff's right to claim for a divorce on the ground of adultery was prescribed. Section 25 in dealing with the ground for divorce and stating the commission of adultery as a ground adds the following proviso :

> " Provided that no divorce shall be granted if the Court is satisfied that the party suing for divorce has consented to the adultery or has since condoned it."

Condonation which is called " forgiveness " in the Turkish text has been judicially defined, and a summary of it is given in page 147 of Latey on Divorce :

> " Condonation (which is not defined by statute) is forgiveness and reconciliation with full knowledge of all material circumstances. It is a " blotting out of the offence imputed so as to restore the offending party to the same position he or she occupied before the offence was committed " ; mere forgiveness is not condonation : to be condonation ' it must completely restore the offending party, and must be followed by co-habitation '."

In the present case after respondent's first desertion for apparently establishing adulterous association with the co-respondent they were never reconciled and never again lived together ; so no question of condonation arises. With reference to consent or connivance Latey states :

> " Connivance means that the adultery of one spouse has been caused by or has been knowingly and wilfully or recklessly permitted by the other as an accessory."

Reading from page 136 of the same text-book :

> " It is of the essence of connivance that it precedes the event, and generally speaking the material event is the inception of the adultery and not its repetition, although connivance at the continuance of an adulterous association may show that the party conniving must be taken to have done so at the first. It is of the utmost importance to bear in mind that the issue is whether, on the facts of the particular case, the husband (in that case) was or was not guilty of the corrupt intention of promoting or discouraging either the initiation or the continuance of the wife's adultery."

There is nothing in this case to indicate that the petitioning husband was guilty of connivance, collusion, consent or condonation so that his right to claim divorce on the ground of his wife's undisputed adultery might be lost.

Coming to the second ground of appeal relating to the amount of compensation awarded by the trial Court, section 31 of the Turkish Family Law, 1951, may be relevantly quoted :

> " Upon a decree of divorce, the Court may order the party in fault to pay such compensation to the innocent party as to the Court may seem fit, having regard to all the circumstances of the case including the pecuniary position or expectations of the party in fault and of the injury to the person or reputation of the innocent party."

This section corresponds to article 143 of the Turkish Family Law (Civil Code). There is some difference between the two enactments, namely, the provision in the Turkish Civil Code makes the pecuniary injuries sustained, or anticipated, by the innocent party the basis for assessing damages, whereas in our law the pecuniary position or expectation of the party in fault is a factor to be taken into account in awarding damages in favour of the innocent party. The injury suffered by the person or reputation of the innocent party is by both enactments a fact to be taken into consideration in assessing damages. There is no analogous provision in English Law though some assistance may be derived in comparing it with the principle of assessment. Thus an innocent husband in obtaining a decree of divorce against an adulterous wife is entitled to compensation, the amount of which is to be assessed by the Court taking into consideration (*a*) the circumstances of the case (*b*) the pecuniary position or expectation of the wife and (*c*) the injury to the person or reputation of the husband.

It is in evidence that the respondent owns immovable property to the value of a few thousand pounds and derives a yearly income from it of about £110. On the other hand the appellant is a farmer who, though the owner of some 53 donums of fields at Galatia, has chiefly relied for the support of his family on having at his disposal the lands of his wife. The respondent's services as a wife, especially for looking after the children of the marriage, were also of value to him. After the desertion the respondent took back her property and appellant has been deprived of the benefit of farming her lands. Through the conduct of the respondent the appellant's personal reputation must have suffered injury ; and compensation for his injured feelings is also within the scope of the section. In the circumstances the award of £10 as compensation appears to us to be unreasonably low. We think that respondent should pay a substantial sum as compensation to the appellant and we assess it at £250.

Having dealt with the grounds of appeal we pass to the grounds of the cross-appeal.

As to the 1st ground, namely, the alleged value of produce collected by appellant we see no reason to differ from the trial Court. The appellant cultivated the lands of his wife and expended much money and labour for the improvement of the land. The produce was made use of for the maintenance of the family. The appellant's wife was equally responsible for such maintenance.

The second ground of cross-appeal is the claim for prompt dower by the wife. The couple got married in 1936 and in the contract of marriage " Nikah " the sum of £40 was stipulated as prompt dower. In addition to the prompt dower there was also an amount mentioned as deferred dower but respondent could not have claimed the deferred dower owing to the provisions of the Turkish Family Law, 1951, but she could claim prompt dower within a year after the coming into operation of the said law, if such claim was not already prescribed. The counterclaim of the respondent is dated 16.11.1952 but by section 9 of the Limitation of Actions Law, in an action where a counterclaim is made the latter shall be deemed to have been commenced on the day the action was instituted. The action having been instituted within a year after the enactment of the Turkish Family Law, 1951, the counterclaim for the dower was entertainable, if as we said it has not been already lost by the Limitation of Actions Law, 1945 (Cap. 21). Section 5 of the said Law reads :

> " No action shall be brought upon for or in respect of any cause of action not expressly provided for in this Law or exempted from the operation of this Law after the expiration of six years from the date when such cause of action accrued."

Those who had a right of action not already prescribed under the provisions of Medjellé (Old Law), and in case where six years had already elapsed from the date the cause of action accrued, two years time was given to bring such action. Therefore, respondent's wife was entitled up to September, 1947, to bring an action against her husband claiming her prompt dower, but after this date she was precluded by the provisions of the Limitation of Actions Law to pursue such claim. Counsel for the respondent, however, based his contention in counterclaiming the prompt dower on the ground that the cause of action in case of prompt dower accrues only when there is a clear demand for payment of it by the wife, and in this case there was such a demand only in 1950 by bringing an action to recover prompt dower in the Sheri Court, which action was discontinued in the same year. Now, therefore, if the time runs as from the year 1950, no cause of action having

accrued earlier, the counter-claim for the dower is within time. We have been referred to a decision of the Judicial Committee of the Privy Council: *Khajurunissa* v. *Saifullahkhan.* The rule established by this authority is given in page 454 of Mahommedan Law by Said Emir Ali vol. 2, 5th Edition:

> "The prompt or exigible dower, however, is a debt always due, and demandable during 'the subsistence of the marriage, and certainly payable on demand.' On a clear and unambiguous demand by the wife, for payment of dower and its refusal by the husband, it has been held by the Judicial Committee of the Privy Council that a cause of action accrues, against which limitation would begin to run."

The prompt dower has been generally considered an ordinary debt immediately demandable by the wife and payable forthwith to her, and it has been invariably the practice in the courts applying the Ottoman Law to regard such claims prescribed after the lapse of 15 years from the date of Nikah, the contract of marriage, the date on which the prompt dower has been agreed upon. Unfortunately Indian reports are not available in our library, but from a Digest on Indian cases available in the library it appears that the decision of the Privy Council was based on the Limitation Acts XIV of 1859 and IX of 1871. In Cyprus, however, the basic law governing the Limitation of Actions up to the passing of the Limitation of Actions Law, 1945, (Cap. 21) was the Ottoman Law, that is articles 1660 to 1675 of Medjellé. Article 1667 of Medjellé reads: "Prescription runs from the time the plaintiff is entitled to claim the subject-matter". In the same article an example is given for claims referring to dowers in the following words: "Again in an action to recover deferred dower prescription begins either as from the time of divorce or from the death of either spouse *because a deferred dower becomes prompt either by divorce or by death.*" This article coupled with the example given in the text makes it clear that prescription in respect of a claim for prompt dower starts from the day such dower has been stipulated; because a wife is entitled to claim payment of such dower as soon as a contract of marriage has been concluded. According to the Ottoman Law the material time is the date on which a plaintiff is entitled to make a claim and not the date on which a demand for payment is first made. Moreover under the Indian Limitation of Actions Acts 1853–1875 the lapse of six years is the period fixed for barring claims for dower—whereas under Ottoman Law the prescribed period is 15 years. Article 1667 of Medjellé being in force by virtue of section 49 of the Courts of Justice Law, 1935, until the year 1945, and the marriage contract under consideration having been made in 1936, the cause of action in respect of the prompt dower had accrued since the year

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1936. The period of limitation being reduced to six years by the Limitation of Actions Law, 1945, and by virtue of special proviso in the said Law the respondent wife being enabled within two years from the date of enactment to pursue her claim for dower, her right to institute an action for such dower eventually expired in September, 1947, and it has been lost since that date.

The third ground of the cross-appeal turns on the question of the defendant's claiming the custody of two of the children who are just over 9 years of age. There was evidence before the trial Court that the father was in a position to take care of all the four children and also to arrange for their education. There is nothing to support the contention that the children or two of them will be happier or that it would be conducive to the welfare of the children if they were put under the custody of the mother, a mother who deserted them without reasonable cause.

The judgment of the lower Court therefore is varied in the way indicated above. That is a decree of divorce to be issued on the grounds of adultery and desertion. That the respondent be ordered to pay £250 as compensation to the appellant ; and that the respondent do pay full costs to the appellant here and in the Court below.

1953 October 6

ATHINA TELEVANTOU v. EVRYDIKI HOLMES.

[HALLINAN, C.J., AND GRIFFITH WILLIAMS, J.]

(October 6, 1953)

ATHINA TELEVANTOU OF NICOSIA, *Appellant,*

v.

EVRYDIKI HOLMES OF NICOSIA, *Respondent.*

(*Civil Appeal No.* 4031.)

Pledge—Return of pledge to pledgor—Sale by pledgor to bona fide purchaser—Pledgee cannot recover against purchaser.

The plaintiff lent her husband £300 and took his motor-car as a pledge, but promptly returned it, the husband undertaking " to keep it as a loan for use in my custody and as agent of my creditor ". He later sold it to the defendant a *bona fide* purchaser for value. The trial Court dismissed the plaintiff's claim against the purchaser for damages for detinue, conversion and trespass.

Held: Where a pledgee returns the pledge to the pledgor, the special property of the pledgee cannot prevail over the right of a *bona fide* purchaser for value from the pledgor. *Babcock* v. *Lawson*, 1880, 5 Q.B.D., 284 followed.

Appeal dismissed.