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THE ELECTRICITY AUTHORITY OF CYPRIS
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special agreement between him and the Electricity Authority conferring on him any additional rights over and above those prescribed by the statute, governed by the provisions of the Electricity Law of 1941 and of the Electricity Development Law, 1952; in particular by section 18 of the former and by section 42 of the latter law. *As the cause of action pleaded does not fall within the one or the other of these sections, the appeal ought to be allowed.*

1954
June 30

ZENON DJABRA
v.
THALIA Z. DJABRA.

[HALLINAN, C.J., AND ZEKIA, J.]

(June 30, 1954)

ZENON DJABRA, *Appellant,*

v.

THALIA Z. DJABRA, *Respondent.*

(*Civil Appeal No.* 4092)

Guardianship—Jurisdiction of District Court—Pending proceedings before the Greek Ecclesiastical Tribunal.

The appellant was the husband of the respondent. The Greek Ecclesiastical Tribunal dismissed the respondent's petition for divorce and, while an appeal to a higher Ecclesiastical Tribunal was pending, the respondent applied to the District Court for the custody of the child of their marriage. The Court refused an order for custody but made an order giving the mother access. The husband appealed against the order for access.

Upon appeal,

Held: The question of whether as a matter of comity the District Court should make the order while proceedings between the parents of child are pending before an ecclesiastical tribunal is a matter which should be left to the discretion and good sense of the District Court; the Supreme Court will not lightly interfere with the exercise of that discretion.

Klosser v. *Klosser,* 1945, 2, All E.R. 708 followed.

Several reasons why a Magistrate in England should refuse to exercise jurisdiction pending High Court proceedings are not applicable in Cyprus as between the District Court and the Greek Ecclesiastical Tribunal.

Appeal dismissed.

Appeal by defendant from the judgment of the District Court of Nicosia (Action No. 101/52) in favour of plaintiff.

G. Clerides for appellant.

C. Colocassides for respondent.

Judgment was delivered by:

HALLINAN, C.J.: This appeal arises out of an application

by the mother of an infant aged 9 for the custody of the child as against her husband, the appellant. The District Court refused to give her the general guardianship of the infant, but made an elaborate order giving her the custody of the child during the Easter school vacations, and every year in the month of July ; moreover the mother is to have access to the child at specified times throughout the year ; in particular she is to have access to the infant from the time it leaves school up to 6 p.m. on week days.

Three grounds of appeal have been argued on behalf of the husband who objects to the order of the District Court : first, that the Court should not have exercised its jurisdiction pending the determination of proceedings before the Greek Ecclesiastical Appellate Tribunal; secondly, that the appellant was taken by surprise and prejudiced by that part of the Court's order which relates to access, the application having been for custody not access; and, thirdly, that the granting of access to the mother at the time the child leaves school until 6 p.m. is unreasonable and against the interests of the infant.

As regards the first point, it is not denied that the District Court has jurisdiction but it is submitted that in the circumstances in which the application was brought, it should not have exercised its jurisdiction. The appellant relies on the decision of this Court in the case of *Efstratiou* v. *Efstratiou*, Civil Appeal No. 4079, decided on the 2nd April, 1954. That appeal related to an application to the District Court by a wife for access to her child whilst proceedings for divorce were pending before the Ecclesiastical Tribunal of the Greek-Orthodox Church. The District Court refused to exercise jurisdiction because of the pending proceedings for divorce and this Court on appeal refused to interfere with the discretion of the District Court. The case of *Higgs* v. *Higgs* (1935) Law Reports, Probate Division, p. 28, was cited where the point for decision was whether an order should be made by a Magistrate under the Summary Jurisdiction Acts pending the determination of a petition in the Divorce Division of the High Court ; it was held that no order in the circumstances should be made by a Magistrate.

In the case of *Higgs* v. *Higgs*, the Court relied on a sentence from the judgment of Avery, J. in *Rex* v. *Middlessex Justices Ex parte Bond* (1933) 1 K.B. 72, 80, which begins as follows : " The inconvenience of holding that there is concurrent jurisdiction in the Divorce Court and in the justices is obvious ..... ". In a later case, the case of *Klosser* v. *Klosser* (1945) 2, All E.R. 708, a wife brought proceedings under the Summary Jurisdiction Act while a petition by her husband was pending in the Courts of South Africa for a decree of divorce on the ground of desertion. The Magistrates held

that they had no jurisdiction because of the pending proceedings, but on appeal it was held that " the discretion to hear or not to hear the summons is theirs ". Lord Merrivale P. in his judgment at p. 710 states :

> " It is plainly indicated both in *Higgs* v. *Higgs* and *Knot* v. *Knot* that the procedure which this Court recommended, where there is an overlap between a petition pending in the High Court and proceedings arising out of the same subject-matter in the justices' court, is not obligatory in the sense that it depends upon any qualification in the Act itself but is rather a matter for the discretion of the justices to be exercised according to the manifest convenience and decency of the proceedings ".

Several of the considerations which a Magistrate's Court in England would have in mind in refusing to entertain a summons do not apply when a District Court in Cyprus is considering whether it will make an order under the Guardianship of Infants and Prodigals Law while proceedings are pending before an Ecclesiastical Tribunal. For example, in Higgs' case the Court of Appeal had in mind firstly that the pending proceedings were in a superior court ; secondly that, if there was undue delay, the English Rules of Court provide for expediting the petition or dismissing it for want of prosecution ; and thirdly the High Court (the superior court) had of course power to enforce its order. Compare this with the position in Cyprus. The District Court is of course not inferior to any Ecclesiastical Tribunal ; we are not aware of the remedies before an Ecclesiastical Tribunal where there is undue delay ; and it is of course well known that the Ecclesiastical Tribunal of the Greek-Orthodox Church has no power to enforce any order they make as to custody.

Now in the present case the Greek Ecclesiastical Court had already dismissed the wife's petition for divorce and she has appealed to the Appellate Tribunal. It may well be that it was undesirable, in the interests of the infant, any longer to delay the making of an order for custody and access by a Court having power to enforce its order. We are unable to hold that the District Court in making its order has not, in the exercise of its discretion, paid due regard (to use the words of Lord Merrivale in Klosser's case) to the convenience and decency of the proceedings. The question of whether or not as a matter of comity the District Court should make an order as to the custody of an infant while proceedings between the parents of the child are pending before an Ecclesiastical Tribunal is a matter which should be left to the discretion and good sense of the judicial officers of the District Court ; and this Court will not lightly interfere with the exercise of that discretion.

The other points taken on this appeal can be disposed of quite shortly. When an application for the guardianship or custody of an infant is made to a Court, the question of whether the party who does not obtain custody may be given right of access is always in issue. It is, however, desirable that where the Court contemplates, in certain cases, making an order as to access, that it should intimate to the parties or their counsel what it has in mind so that, if necessary, it can hear further evidence or arguments before making its decision. In the present case it is not clear from the record that the provisions as to access were discussed with counsel and parties, but we have no doubt that these provisions were inserted only after careful consideration; and it must be remembered that one of these provisions is that the mother should have access to the child from the hour it leaves school until 6 p.m.

In our view the order as to custody and access which was obviously carefully considered and drawn by the District Court should be allowed to stand. If the parties to this appeal put the welfare of their child above everything else and make a serious and sincere effort to carry out the order of the Court, we see no reason why the arrangements contained in the order should not work well.

In our view this appeal must be dismissed with costs.

[HALLINAN, C.J., AND ZEKIA, J.]
(June 30, 1954)

SHAKIR ILKAY, *Appellant*,

v.

HALIT KIAZIM, *Respondent.*

(*Civil Appeal No.* 4093)

Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231 *section* 21—*Roof separately owned—Room built on roof—Not built on "land" for purposes of section* 21.

Before the enactment of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, the appellant's predecessor in title for valuable consideration gave to the respondent's predecessor in title the roof of the appellant's house to use as a terrace and to build a room thereon. The terrace was made, and both roof and terrace were registered in the name of the respondent's predecessor. In 1953 the respondent began to build a room on the roof and the appellant brought proceedings to prevent this.

Section 21 of Cap. 231 provides that any building erected on land after Cap. 231 came into operation is deemed to be the property of the owner of the land. The District Court dismissed the claim.

Upon appeal,