

statement not on oath mentioned in para. (h) of the same section. In our view the prosecution is entitled to address the Court on such a statement, but should not comment on the failure of the accused to give evidence on oath as was done in this case.

However, it is quite clear from the remarks made by the trial judge when calling on the accused to elect what they would do at the close of the prosecution's case that his attention was directed to the relative weight to be attached to the evidence on oath on the one hand and an unsworn statement on the other. We do not consider that the comment of prosecuting counsel on this point materially influenced the trial Judge or amounted to a substantial miscarriage of justice.

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[HALLINAN, C. J. and ZANNETIDES, J.]

(April 7, 1956)

MICHAEL TSIVITANIDES of Nicosia. *Appellant,*

v.

MARY MICHAEL TSIVITANIDES of Nicosia, *Respondent.*

(*Matrimonial Petition No. 11/54*)

*Matrimonial cause—Nullity—Membership of Greek Orthodox Church—Marriage Law (Cap. 116) section 36—Right to secede from Greek Orthodox Church.*

The petitioner, born a Roman Catholic, was received into the Greek Orthodox Church the month before her marriage. The marriage was dissolved in 1946 and in 1951 the petitioner was readmitted into the Roman Catholic Church. Later that year the parties were re-married under the Marriage Law (Cap. 116) in 1954. Both the petitioner in her petition and the respondent in his answer sued for divorce. The respondent also in these proceedings alleged that the civil marriage under Cap. 116 was a nullity under section 36 of Cap. 116 as at the date of the marriage the parties were both members of the Greek Orthodox Church.

It was argued for the respondent that the petitioner could only cease to be a member of the Greek Orthodox Church if excommunicated.

The point as to nullity was argued as a preliminary issue. The trial Judge held that once the Court is satisfied that a party genuinely professed to be a member of a particular religion not only in words but in practice by attending a particular church for instance then that person is a member of that church; and held that the petitioner at the date of the civil marriage had left the Greek Orthodox Church.

*Upon appeal,*

*Held:* Any individual member of a Church is free to secede from his membership of that Church subject to the

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fulfilment of any contractual obligations which he may have entered into in relation to his membership: *Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, (1904) A.C. 515 applied.

The test of whether a person is or is not a member of the Greek Orthodox Church must be an objective one, namely, whether by a declaration or conduct or both he has seceded from that Church.

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Appeal by the respondent from the judgment of the Supreme Court in Matrimonial Petition No. 11/54.

*G. J. Pelagias* for the appellant (respondent).

*G.I. Clerides* for the respondent (petitioner).

Judgment was delivered by:

HALLINAN C.J.: The petitioner in this case was married to the respondent in the Greek Orthodox Church at Port-Said in January, 1937. The petitioner was born in October, 1918, and baptized in the Roman Catholic faith in February, 1919. In the month before she was married she was received into the Greek Orthodox Church. The marriage was dissolved while they were still in Egypt in 1946. Two years later the petitioner came to Cyprus and the respondent also came to this country in 1951. In May, 1951, the petitioner was readmitted into the Roman Catholic Church. In July, 1951, the petitioner and the respondent decided to marry again and in that month they contracted a marriage under the Marriage Law (Cap. 116). Three years later, in 1954, the petitioner instituted the present proceedings for divorce on the ground of cruelty; the respondent in his answer also petitioned for a divorce on the ground of cruelty, and further alleged that the marriage was a nullity because the petitioner was a member of the Greek Orthodox Church at the date of her marriage, since section 36 of the Marriage Law provides that it shall not apply to any marriage the parties to which are both members of the Greek Orthodox Church.

Mr. Papageorghiou was called by the respondent as an expert witness in the Ecclesiastical law of the Greek Orthodox Church. He stated: "The one and only occasion when a member of the Greek Orthodox Church can separate himself from the Church is when he or she is excommunicated, which means that the person concerned is separated altogether from the body of the Church". In cross-examination he was asked: "Is there a procedure if one wants to embrace another religion; should he apply for excommunication himself?" Answer: "There must be a complaint against him".

The legal point as to whether the marriage was or was not a nullity was first determined as a preliminary issue. The learned Judge found that at the time of the marriage the petitioner was a member of the Roman

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Catholic Church and decided the preliminary issue against the respondent. In giving his reasons he said: "It is within the domain of the liberty of an individual to profess and practise any religion he or she likes, and once the Court is satisfied that he or she genuinely professes to be a member of a particular religion, not only in words but in practice, by attending a particular Church for instance, then I shall consider that person to be a member of that Church." Of course the question which falls for decision is not exactly whether or not the petitioner is a member of the Roman Catholic Church but whether she is or is not a member of the Greek Orthodox Church. It is contended for the respondent that the test of whether a person has or has not left the Greek Orthodox Church is to be decided by the Ecclesiastical Law of that Church.

In perusing the evidence of the expert witness, Mr. Papageorghiou, one is left in doubt whether the procedure of excommunication which he describes is at all applicable in the case of a person who wishes voluntarily to secede from the Church. The procedure is not that of an applicant applying for permission to leave an organisation but a penal proceeding commenced by a complaint, and, if the ecclesiastical offence, whether heresy or otherwise, is established, the ecclesiastical law is enforced by excommunication.

But, in my view, it is not necessary to decide this appeal on the narrow issue as to whether Mr. Papageorghiou's expert opinion is or is not correct, for I consider that the Ecclesiastical Law of the Greek Orthodox Church is not relevant at all to decide the issue.

Part 1 of the article on Ecclesiastical Law in 11 Halsbury, 2nd Edition, contains a statement of legal principles which are applicable to all churches whether established or not. In note (r) on page 411 it is stated: "Any individual member of a Church is free to secede from his membership of the Church, subject to the fulfilment of any contractual obligations which he may have entered into in relation to his membership". The note then cites a passage from the judgment of Lord Halsbury, L.C., in the case of *Free Church of Scotland (General Assembly) v. Overtoun (Lord)*, (1904) A.C. 515 at page 626. Lord Halsbury said: "I do not suppose that anyone will dispute the right of any man or any collection of men to change their religious beliefs according to their own consciences". Now the phrase "member of the Greek Orthodox Church" which we are here called on to interpret, occurs in section 36 of the Marriage Law, a statute of Cyprus. Unless there is express provision to the contrary, in my view the legislative authority in this territory must be presumed to use the phrase so as not to conflict with the basic rights of a British subject. Whether or not a Church admits a person to its membership no doubt depends on the ecclesiastical law of that

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Church, but the right to secede, subject to fulfilment of contractual obligations, cannot be fettered by ecclesiastical law.

Whether a person has seceded from a Church is always a matter of fact, and this fact must be established by the conduct and declarations of the person concerned rather than by reference to ecclesiastical law. Before a marriage is celebrated under the Marriage Law the parties are required to make a declaration on oath or solemn affirmation that they know of no impediment or lawful hindrance to the marriage. It is not in the public interest that the validity of a marriage should depend on some point of ecclesiastical law of which the parties to the marriage may well be entirely ignorant. Ordinary men and women of the free world to-day know that they have freedom of conscience to choose their own religion, and when making their declaration before a marriage officer they will consider their faith to be that to which they at the time of their marriage adhere. This essential freedom in religious matters would be fettered if while adhering to one Church a person was bound by the law of the State to be married in another.

I do not consider that the test of whether a person is a member or not a member of the Greek Orthodox Church should be a subjective one, but should rather depend on the declared intentions and practice of the person concerned. The learned trial Judge seemed to consider that the Court must be satisfied that the person genuinely professes a particular religion before he can be said to be a member of a particular Church. The reference to the case of *Swift v. Swift* (1833), 3 Knapp 303, at page 331, cited in the note in Halsbury already referred to, tends to support this view of the trial Judge; but the note is I think misleading for Swift's case went on appeal in 1835 from the Arches Court of Canterbury to the Privy Council, and is reported in the same volume, 3 Knapp, 257. The wife in Swift's case had formally abjured the Protestant faith and as a result had been received into the Roman Catholic Church and had been married in Rome in conformity with the Roman Law. The Court of Arches had held that her abjuration of the Protestant faith was fraudulent and thus vitiated the marriage. The Privy Council held not only that, on the facts, the *mala fides* of the wife were not proved, but, in the words of Lord Brougham in delivering judgment at pages 287-288: "The Roman authorities can only be supposed to require that some outward act should be done; they can never undertake to judge of the inward heart"; and further on Lord Brougham states: "there needs no argument to show the alarming consequences that would follow from allowing the sincerity of such profession to be afterwards enquired of". Of course I do not say that a party to a marriage might not plead absence of consent because it was induced by the fraud of the other party, but where

the question is one of jurisdiction or the application of the Marriage Law, then the test of whether a person is or is not a member of the Greek Orthodox Church must be an objective one, namely, whether one of the parties, although a former member of the Greek Orthodox Church, had by a declaration or conduct or both shown that he had seceded from that Church.

*I consider that the decision of the trial Judge on the preliminary point is correct and this appeal should be dismissed with costs.*

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[HALLINAN, C. J. and ZANNETIDES, J.]  
(April 9, 1956)

1. GALATIS PETROU,
2. MICHALAKIS CHRISTOU CONSTANTINOU,
3. CHRISTAKIS THEOPHANOU KYPRIANOU,
4. CHRISTOS PAPA MICHAEL ORPHANOS,
5. STELIOS LEONIDHA, *Appellants,*

v.

THE POLICE, *Respondents.*

(*Criminal Appeal No. 2041*)

*Criminal Law—Riot—Common purpose—Submission of “no case”—Amendment of charge.*

In a charge for riot, the particulars stated the common purpose for which the crowd had assembled. At the conclusion of the prosecution's case evidence had been adduced of a common purpose but not that stated in the particulars. The trial Court rejected a submission of “no case” and amended the charge substituting particulars of the common purpose deposed to in the evidence. The accused were convicted.

*Upon appeal,*

*Held:* The trial Court did not err in rejecting the submission, or in amending the charge; but it is not necessary in charging riot to give particulars of the common purpose.

Appeal dismissed.

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Appeal by accused from the judgment of the Special Court of Limassol (Case No. 30/56).

A. P. Anastassiades for appellants 1, 2, 4 and 5.

G. Cacoyannis for appellant 3.

H. G. A. Gosling, Crown Counsel, for the respondents.

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

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