[JOSEPHIDES, P.D.C. and EVANGELIDES, D.J.]

TILEMAKHOS GR. GEORGHIADES AND ANOTHER, (*Plaintiffs*),

v.

ODYSSEAS IOANNOU PATSALIDES AND ANOTHER, (*Defendants*).

(*Civil Action No.* 154/59 *in the District Court of Kyrenia*).

Contract—Specific performance—Contract of dowry—Promise to marry—Action for breach of—Settlement recorded—Whereby the contract of dowry was amended—Effect of the settlement—Whether settlement entirely supersedes contract of dowry—The maxim "expressio unius est exclusio alterius"—Effect and scope.

*Specific performance of the entire contract i.e. of the original contract of dowry and the settlement—Subject to certain consequential directions—The Contract Law, Cap.*192, *section* 76.

Action—Whether action premature—In the context of a claim for specific performance.

Evidence—Inadmissible evidence received—Though not objected to, should be discarded.

Immovable property—Right of water passage—Contractual right as distinct from an easement.

The main interest of this judgment is bound up with its part dealing with the question of specific performance of a contract of dowry (coupled with the terms of a subsequent settlement recorded in Court) and certain consequential directions. The points raised in this case are set out in the rubric here above and the facts are clearly stated in the judgment of the Court.

Specific performance ordered subject to Court's directions.

Cases referred to:

Colquhoun v. *Brooks* (1887) 19 Q.B.D. 400;
Colquhoun v. *Brooks* (1888) 21 Q.B.D. 52;
Jacker v. *International Cable Co.* 5 T.L.R. 13;
Miller v. *Babu Madho Das* L.R. 23 Ind. App. 106;
Ellinas v. *Yianni* (1958) 23 C.L.R. 22;
Hasham v. *Zenab* (1960) 2 W.L.R. 374, P.C.;
Theofilo v. *Abraam* 3 C.L.R. 236.

Action.

Action for specific performance, according to the precise terms of paragraphs 3 and 4 of the settlement in Court in Action No. 282/58, and damages.

A. Liatsos for the plaintiffs.

D. Demetriades for the defendants.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court, delivered by:

JOSEPHIDES, P.D.C. : The Plaintiffs' claim in this case is for -

(1) Specific performance, according to the precise terms of paragraphs 3 and 4 of the settlement declared in Court in Action No.282/58; and
(2) £800 special and/or general damages.

Alternatively:

(1) £4000 value of the said property, or the same amount as damages and/or otherwise ; and

(2) £500 special or general damages for breach of agreement.

The plaintiffs were engaged to be married to each other on or about the 15th September, 1957. The defendants are the parents of plaintiff No. 2.

The facts of this case are as follows: On the 15th September, 1957, a contract of dowry (Exhibit No. 9) was signed by the two defendants and the plaintiffs in this case. That contract provided, *inter alia*, as follows:-

(a) Under paragraph 1, the defendants undertook to transfer and register in the name of plaintiff 2, their daughter, a piece of land, with trees standing thereon, of about 7 donums in extent. The whole plot was 9 donums in extent, but it was provided that defendant 2 would apply to the L.R.O. to have the 2 donums excluded;

(b) Under paragraph 2, the defendants would be entitled to occupy and enjoy the fruit of the garden including all the trees, until the 31st December, 1959, and to occupy the house until one month before the celebration of the marriage.

(c) Under paragraph 5 it was provided that the defendants would have a right of water passage over the 7 donums to be transferred to plaintiff 2 in favour of their excluded plot of 2 donums, such right of water passage to be along the eastern boundary of

the daughter's property with direction from North to South. It was further provided that this right of water passage would be for the watering of the plot of 2 donums belonging to defendant 2 and/or when it would belong to her children only.

(d) Under paragraph 7 it was provided that the defendants would be bound to transfer the aforesaid property into the name of their daughter not later than two months before the celebration of the marriage; and that they were bound to provide the necessary trousseau for their daughter.

(e) Paragraph 9 provided that the wedding would be celebrated not later than the 31st December, 1958.

Some 2 1/2 months before the 31st December, 1958, *i.e.* on the 14th October, 1958, the present plaintiff 1 brought an action against his fiancée and the two defendants claiming £500 damages for breach of a promise of marriage and £176 expenses incurred by him for the account of the defendants.

His fiancée, the present plaintiff 2, counter-claimed £1,500 damages for breach of promise to marry. That action was heard by the Full District Court of Kyrenia composed of the same Judges who are trying the present case. After a hearing lasting for 3 days the case was settled on the 13th March, 1959. The terms of the settlement (exhibit No.8) as recorded by the Court read as follows:

" All parties present.

" At this stage the claim and counter-claim are settled as follows in the presence of the parties who agree:

" 1. Claim and counter-claim withdrawn.

" 2. Each party to bear his own costs.

" 3. Paragraph 1 of the contract of dowry dated 15th September, 1957, (exhibit 2) to be complied with by defendants 1 and 2 who shall submit a fresh application for division to the Land Registry Office within 7 days from today. Registration in the name of defendant 3 shall be effected within 7 days from the receipt of the title-deed from the Land Registry Office.

" 4. Defendants 1 and 2 shall deliver vacant possession of the house promised as dowry to their daughter, defendant 3, not less than 1 1/2 months before the wedding day.

"Court:

" Action and counter-claim dismissed.

" No order as to costs.

" (Sd) J.P. Josephides,
" President, District Court ".

" 13th March, 1959 ".

In compliance with paragraph 3 of the above settlement defendant 2 submitted an application to the Land Registry Office on the 26th March, 1959 (exhibit 1) for the division of her plot as agreed upon.

On the 22nd May, 1959, the advocates of plaintiff 1 sent a letter (exhibit 10) to the defendants informing them that the two plaintiffs had decided to get married on the 20th July, 1959, and asking them (the defendants) to evacuate and deliver up possession of the house as promised.

A separate title deed in respect of the plot of 7 donums was issued by the L.R.O. on the 3rd June, 1959, and delivered to defendant 2 on the 9th June, 1959; that is, title deed under Registration No. 6151 (exhibit No. 12) in respect of plot 5/3, sheet/plan 12/30. The extent of the property is stated therein to be 7 donums, 1 evlek, 2800 sq. ft. and it includes a house consisting of 6 rooms and a considerable number of fruit-bearing trees.

On the 11th June, 1959, defendant 2 applied to the L.R.O. (exhibits 2 and 2A) requesting that her right of water passage over plot 5/3 (the one which was to be transferred to her daughter, plaintiff 2) should be recorded under the provisions of sections 10, 11 and 53 of the Immovable Property (Tenure, Registration and Valuation), Law, Cap. 231. In consequence of that application the following right was recorded on the title deed No. 6151 (exhibit 12) " subject to right of water passage in favour of plot 5/2 along the Eastern boundary with direction from North to South ".

On the same day, that is, on the 11th June, 1959, the defendants asked their daughter plaintiff 2, to attend the Land Registry Office for the purpose of having the aforesaid property subject to the easement, transferred in her name, but she, after consulting her fiancé, plaintiff 1, refused to accept the transfer of the property subject to the easement as recorded on the ground that the settlement dated 13th March, 1959, did not provide for such a right of water passage in favour of defendant 2.

As the parties could not settle their dispute as to the right of water passage the present action was instituted on the 16th June, 1959, that is to say, 7 days after the delivery of the title deed of the property by the Land Registry to defendant 2.

The following questions fall to be determined in this case:

(1) Was the contract of dowry, dated 15th September, 1957 (exhibit 9) superseded by the settlement recorded in Action No. 282/58 on the 13th March, 1959, *i.e.* were the terms of settlement intended to contain the whole contract between the parties, or is the entire contract composed of two documents,

namely, the contract of dowry and the settlement, which the Court ought to construe together?

(2) Is the action premature?

(3) Did the defendants offer vacant possession of the house to their daughter, plaintiff 2, in accordance with the terms of settlement?

(4) Were the defendants entitled to record the right of water passage under Cap. 231?

(5) If they were not, did they break the contract?

(6) If the defendants broke the contract, are the plaintiffs entitled to (a) specific performance; (b) damages, and how much?

As to question (1): It was argued on behalf of the plaintiffs that by the declaration of settlement in the breach of promise case on the 13th March, 1959, the contract of dowry was superseded and that the provisions in that contract should be excluded altogether. This argument was mainly based on the latin maxim "*Expressio unius est exclusio alterius*" It was stated that because mention in the settlement was only made of paragraph 1 of the contract of dowry, and of the delivery of the house and transfer of the property, all other terms of the original contract of dowry were excluded from the agreement, and that this was indeed the intention of the parties. But, to quote Wills J. in *Colquhoun* v. *Brooks* (1887) 19 Q.B.D. 400, at p. 406, this method of construction is one that certainly requires to be watched. " The failure to make the " expressio " complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind ".

As Lopes, L.J., said in the Court of Appeal: " The maxim '*Expressio unius, exclusio alterius*' has been pressed upon us. I agree with what is said in the Court below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The "exclusio" is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice". — *Colquhoun* v. *Brooks* (1888) 21 Q.B D. 52, at p. 65.

In the breach of promise case the contract of dowry itself, or any of its provisions, were not in issue; and when the parties were reconciled and the case settled, as the latest date by which their marriage had been fixed to be celebrated, i.e. the 31st December, 1958, had passed, and as the date of the transfer of the property and delivery of the house depended on that date of marriage, it was thought fit to fix the time within which the transfer of the property in the daughter's

name and the delivery of the house should be effected. And this is what was actually done by the settlement. What was recorded in the settlement was only the time limits which as a result of the passage of time had to be changed. There was no mention in Court of any abandonment of any right of the parties under the contract of dowry. If the parties had agreed to waive or cancel any or all of the other provisions of the contract of dowry it would have been natural for them to have expressed it in their terms of settlement rather than make no mention whatsoever of such waiver or cancellation, and let it be inferred from the exlusion of such terms from the settlement. In the settlement there was no mention of any other term of the contract which was not affected by the time limits originally fixed.

In cross-examination plaintiff 1 alleged for the first time that in consideration of his waiving the right to trousseau stipulated in the contract of dowry defendants orally waived their right to enjoy the yield of the garden until the 31st December, 1959, and their right of water passage; and that these oral waivers were conveyed to their respective advocates in the breach of promise case, but that no mention of such waivers was made in Court nor was the Court asked to record them as part of the settlement. This evidence was received without objection. But now, on considering this matter, we are of the view that this part of the evidence of plaintiff 1 is inadmissible, having regard to the written settlement, and it is our duty to reject it when giving judgment, as it is the duty of Courts to arrive at their decisions upon legal evidence only (*Jacker* v. *International Cable Co.*, 5 T.L.R.13; cp. *Miller* v. *Babu Madho Das*, L.R. 23 Ind. App. 106; quoted in Phipson on Evidence, 9th edition, p. 711; and *Ellinas* v. *Yianni* (1958) 23 C.L.R. 22); but, in any event, even if this evidence were admissible, we disbelieve plaintiff 1 who did not strike us as a witness of truth.

For these reasons we have no hesitation in holding that the contract of dowry was not superseded by the settlement and that the terms of the settlement were not intended to contain the whole contract between the parties. Consequently, the entire contract is composed of the aforesaid two documents, that is to say, the contract of dowry and the settlement, which the Court ought to construe together.

The second question is " is the action premature "? It was argued on behalf of the defendants that the present action is premature on two grounds —

(a) because the dowry is given in consideration of and conditional upon marriage taking place; and

(b) because the present action was instituted on the 16th June, 1959, that is to say, before the expiry of the

time limit of 7 days from the delivery of the title deeds to defendant 2 (paragraph 3 of the settlement).

The question whether an action was premature was considered in a recent case by the Judicial Committee of the Privy Council: *Hasham* v. *Zenab* (1960) 2 W.L.R. 374. It was contended on behalf of the defendant in that case that the plaint was issued prematurely, on the ground that the anticipatory breach by the defendant would not avail the plaintiff to support a claim for specific performance. It was held "that the plaintiff was entitled to an order for specific performance. The fallacy of the defendant's contention consisted in equating the right to sue for specific performance with a cause of action at law. In equity all that was required was to show circumstances which would justify the intervention by a court of equity".

As regards ground (a), it is correct to say that according to the Canon Law of the Greek Orthodox Church, to which the parties belong, the object of the dower is to provide a fund for the purposes of defraying the burdens and obligations arising from the existence of the marriage, and that the property is the property of the wife (*Theophilo* v. *Abraam* 3 C.L.R. 236, at p. 240); and it is likewise correct that the dower is conditional upon the marriage taking place, unless it is otherwise stipulated by the parties. In this particular case it was originally provided in the contract of dowry that the property in question should be transferred in the name of the daughter not later than two months prior to the date of the celebration of the marriage which had been fixed to take place not later than the 31st December, 1958. This provision was amended by paragraph 3 of the settlement which stipulated that the property should be transferred in the name of plaintiff 2 within 7 days from the receipt of the title-deed from the L.R.O. Consequently, having regard to the agreement of the parties in this case that the property should be transferred before the celebration of the marriage, we are of the view that the action is not premature on this point.

As regards ground (b), that is to say, that the action was instituted before the lapse of 7 days from the receipt of the title-deeds from the L.R.O., in view of our finding which will be given at a later stage of this judgment, to the effect that the defendant refused to transfer the property without the easement of water passage, it was no longer necessary for the plaintiffs to wait for the lapse of the 7 days as the defendants had already broken their part of the contract. Consequently, on this ground again the action is not premature.

Question (3) is whether the defendants offered vacant possession of the house to their daughter, plaintiff 2, in accordance with the terms of settlement, i.e. 1 1/2 months before the wedding day. We accept the evidence adduced by the defendants that vacant possession of the house was offered

to their daughter, plaintiff 2, at the end of May or beginning of June, 1959, but plaintiff 2, refused to accept delivery on the ground that her parents (defendants) were not prepared to transfer the property without it being subject to the easement of water passage. We are, therefore, satisfied that the defendants complied with paragraph 4 of the settlement as regards the delivery of the house as stipulated, that is, not less than 1 1/2 months before the wedding day.

Questions (4) *and* (5): Were the defendants entitled to record the right of water passage under Cap. 231? From a perusal of paragraph 5 of the contract of dowry it becomes apparent that the right given to defendant 2 and her children was a contractual right to pass water over the property of plaintiff 2 and not an easement or right on land capable of being recorded under the provisions of Cap. 231. It, therefore, follows that the defendants, by causing this right to be recorded as an easement in the Land Register and in the title-deed of the property intended to be transferred to their daughter, broke their contract.

Question (6) : On these findings what are the remedies to which the plaintiffs are entitled?

They are claiming specific performance and damages. On the question of specific performance there is provision in section 76 of our Contract Law, Cap. 192, that a written contract may be specifically enforced if it is not void, and it is signed by the party to be charged therewith, and the Court considers, having regard to all the circumstances, that specific performance would not be unreasonable or otherwise inequitable or impracticable. In *Hasham* v. *Zenab*, quoted above, it was held by the Privy Council that — "The order for specific performance often fell into two parts, the first being of a declaratory nature and the second containing consequential directions. The first of the forms in Seton's Judgments and Orders, 7th ed., vol. 3, 2136, was clearly suitable to a case where the time for performance might not have arrived even at the date of the order, but in such a case, in the event of subsequent non-performance the court would not require the issue of a fresh writ before making the consequential directions for performance. The court would not, of course, compel a party to perform his contract before the contract date arrived, and would give relief from any order in the event of an intervening circumstance frustrating the contract".

Having regard to the circumstances of this case we consider that it would be reasonable, equitable and practicable to order specific performance of the entire contract that is to say, of the original contract of dowry and the settlement. But as the marriage has already been postponed twice, that is to say, it was not celebrated as stipulated until the 31st December, 1958, nor until the 20th July, 1959, nor indeed

until today, and in view of the statement of plaintiff 1 in evidence to the effect that if the property is not transferred free from any easement or any other contractual right, he will reconsider whether he will marry plaintiff 2 or not, we consider that it would be reasonable and equitable to declare that the contract of dowry and the settlement ought to be specifically performed, subject to certain consequential directions which will be stated at the end of this judgment.

On the question of damages the plaintiffs claim under two heads —

(a) £500 for loss of the fruit and crop of the garden in 1959; and

(b) £300 for damage caused to the trees due to the failure of the defendants to water such trees.

As to paragraph (a), we have already held that the original contract of dowry is in full force and effect between the parties and, consequently, under clause 2 the defendants were entitled to occupy the garden and enjoy the fruit and crop until the 31st December, 1959. Consequently, the plaintiffs are not entitled to any damages under that head, but even if they were entitled their evidence on this point is altogether unsatisfactory and we would not be prepared to act on it.

As to paragraph (b), that is to say, the alleged damage to the trees owing to the non-watering, no agreement was proved before us that the defendants were bound to water these trees. There is evidence that there was no sufficient water to water the trees from the well in the garden, and that the father of plaintiff 1 who owns the only source of water nearby refused to give water on payment to the defendants to water the trees. But even if the defendants were bound to water the trees we are not satisfied on the evidence of the plaintiffs that any damage was caused to such trees. Consequently, they are not entitled to any damage on this head either.

Having regard to all the circumstances of this case, we consider that no order should be made as to costs.

We accordingly declare that the plaintiffs are entitled to specific performance and order and adjudge the same accordingly, subject to the following directions:-

(1) Subject to the provisions of paragraph 2 hereunder, defendant 2 shall within three months from today transfer and register in the name of plaintiff 2 the house and garden under Reg. No. 6151 dated the 3rd June 1959, plot 5/3, free from any easement or right of water passage, i.e. after the cancellation of the following easement recorded on the title deed "subject to right of water passage in favour of plot 5/2

along the Eastern boundary with direction from North to South ":

Provided that in the meantime plaintiff 2 shall have been married to plaintiff 1; and provided further that only defendant 2 and/or her children shall have the contractual right to pass water over the aforesaid property in accordance with the provisions of paragraph 5 of the contract of dowry dated 15th Sept. 1957 (exhibit 9).

(2) Defendant 2 shall transfer the aforesaid property in the name of plaintiff 2 within 7 (seven) days after the latter's marriage to plaintiff 1; and in case defendant 2 shall fail to do so then transfer of the aforesaid property shall be effected by an order of this Court to be issued on the filing of an affidavit by plaintiff 2 supported by the marriage certificate, without any notice to the defendants unless the Court shall otherwise direct.

(3).—(a) During the aforesaid period of three months defendant 2 is restrained from selling, transferring, mortgaging, parting, or in any way dealing with or disposing of the aforesaid property; and

(b) During the aforesaid period defendant 2 is likewise restrained from selling, transferring, mortgaging, parting or in any way dealing with or disposing of plot No. 5/2, Sheet/plan XII/30, Kazaphani, without cancelling the aforesaid right of water passage in favour of this plot as a dominant tenement over plot 5/3.

(4) On receiving from plaintiff 2 fifteen days notice in writing defendant 2 shall deliver vacant possession to plaintiff 2 of the house forming part of the aforesaid registration No. 6151 not less than 1 1/2 months before the wedding day to be fixed by the plaintiffs.

Plaintiffs' claim for damages dismissed.
No order as to costs.
Judgment and order accordingly.

Specific performance ordered subject to Court's directions.