

SMITH, C.J.
&
MIDDLE-
TON, J.
1895.
—
Nov. 18.

[SMITH, C.J. AND MIDDLETON, J.]

DESPINOU THEOPHILO

Plaintiff,

v.

HARALAMBO ABRAAM

Defendant.

DOWER, AGREEMENT FOR—PAYMENT OF MONEYS MENTIONED THEREIN BY PROMISSORY NOTES—RECEIPT BY HUSBAND AS FOR MONEYS—DISSOLUTION OF MARRIAGE—RIGHTS AND LIABILITY OF HUSBAND—RIGHTS AND LIABILITY OF WIFE—FRAUD OF HUSBAND—NEGLIGENCE OF HUSBAND—CANON LAW OF THE EASTERN CHURCH.

The father of the plaintiff, T., and the defendant, by a document dated 27th September, 1889, agreed that after the expiration of two years, T. should give to the defendant, by way of dower to be possessed by the defendant, but owned by the plaintiff, £275 in cash and divers other articles, in consideration that defendant should marry the plaintiff. On the 18th/30th April, 1892, the defendant acknowledged that he had received two bonds signed by T. to defendant's order, in payment of the £275 and the other articles. The plaintiff and defendant were married a few days subsequently, and in December, 1894, were divorced. The defendant received certain payments on account of these bonds from T. and sued him for the balance, and T. in part payment of the balance due from him to the defendant, obtained a transfer of certain debts due to T. by two villagers to the defendant, to whom these persons gave fresh bonds, leaving, however, a balance still due and owing from T. to the defendant. T., however, became bankrupt, and the defendant proved against T.'s estate, on behalf of his wife, for the balance due, and a dividend was declared on this proof.

The plaintiff having sued the defendant to recover the £275, agreed to be given by T. and the value of certain things forming part of the dower which had not been returned, the defendant expressed his willingness to pay to the plaintiff the amount of money he had actually received from T., to hand over to her the two bonds given by the villagers, and to pay the value of the things, which consisted principally of stones built into a house and which could not, therefore, be returned.

The District Court held that the defendant was a trustee of his wife's property, and having chosen to invest it by leaving it in T.'s hands, without taking security, was liable to pay to the plaintiff the £275.

HELD: Reversing the decision of the District Court, that the plaintiff had no property until after the solemnization of the marriage in the moneys agreed to be advanced by T., her father, as dower, and that consequently defendant, by consenting to take bonds from T. in lieu of cash, was not investing his wife's property without obtaining security, so as to render him liable as a trustee to the plaintiff for the whole amount agreed to be given by T. as dower, and was, therefore, only liable to pay to the plaintiff the amount he had actually received from T., the loss arising from T.'s bankruptcy not being attributable to the fraud or negligence of the defendant.

HELD ALSO: That the defendant was liable to pay to the plaintiff the amount of the two bonds given to him by the villagers (with one of whom the defendant had an account current in the course of which the bond had been partly satisfied to an extent known only to the defendant himself), on the ground that it was doubtful whether the plaintiff could sue upon them, and might be involved in expensive litigation to establish her right: that if the plaintiff failed to obtain the moneys remaining due on the bonds she would be entitled to recover it from the defendant, and that unnecessary litigation should be avoided.

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APPEAL from the District Court of Limassol.

Pascal Constantinides for the appellant.

J. Kyriakides for the respondent.

The facts and arguments sufficiently appear from the judgment.

Judgment: This is an appeal of the defendant from the judgment of the District Court of Limassol ordering him to pay the sum of £297 2s. to the plaintiff.

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The action was brought under the following circumstances:—

In the year 1889 the plaintiff and defendant were betrothed. On the 27th September, 1889, a document of dower was drawn up which recited that Theophilo, the father of the plaintiff, wishing to marry her to the defendant, agreed to give and deliver to him at the expiration of a period of two years the sum of £275 in cash, and certain properties consisting of furniture, jewellery, building stones, etc., by way of dower. The document goes on to say that the defendant Haralambo accepts the agreement and will acknowledge the receipt of the things mentioned, which shall be in his possession, but in the ownership of his wife.

The document is signed by both parties.

On the 18th/30th April, 1892, there is an endorsement on the document, signed by the defendant, to the following effect, viz.: that the marriage being about to be solemnized he acknowledges that he has received in payment of the moneys mentioned, two bonds signed by Theophilo to defendant's order, one for £125 expiring on the 1st/13th September, 1892, and the other expiring on the 1st/13th December, 1892, for £150. He also acknowledges the receipt of the furniture, jewellery, etc., mentioned in the document and a few other articles.

The parties were married, and were divorced in December, 1894.

The plaintiff, in May, 1895, brought this action claiming from the defendant the sum of £275 as money received by the defendant from his father-in-law, and the value of certain stones and other articles alleged to form part of the dower.

SMITH, C.J. It appeared from the evidence that the two bonds were not paid when they became due, but the defendant received about £150 on account. He subsequently sued his father-in-law, but there is nothing on the notes of evidence to shew what was the result of the litigation. Presumably the defendant's claim was partially settled by the defendant accepting two bonds given by certain villagers to his father-in-law for a total amount of £98 2s. The villagers agreed to this transfer of their obligation, and entered into fresh bonds to the order of the defendant himself to this amount. A balance of £50 was still owing by Theophilo on account of the bonds given by him as dower. Shortly afterwards, Theophilo became a bankrupt. The defendant proved against his estate in respect of this £50, and a dividend was declared on his claim. The amount of this dividend is not stated, and whatever it was, the money appears to be, so far as we can learn, in the hands of the syndics or *jugc commissaire*, as neither the plaintiff nor defendant have, we are informed, claimed it. Evidence was gone into as to the value of the stones supplied by Theophilo to the defendant under the document of dower, and as to certain other matters which it is not necessary for us to discuss for the purposes of our judgment.

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The District Court gave judgment against the defendant for £275, the amount of the bonds received by him from his father-in-law, on the ground that he had elected to invest his wife's money by leaving it with her father at interest : that he was his wife's trustee, and should have insisted on security, and is responsible for the loss that has occurred.

Judgment was also given against him for the value of the building stones, and money received for the purchase of a mirror.

Against this judgment the defendant appeals, and it was contended for him, that under this document of dower the defendant only received from his father-in-law two bonds : that he is only liable to return what he has actually received, and can only be responsible for any loss that may have arisen owing to his own negligence in administering the property. In the present case it was contended that there was no evidence of any negligence or default on the part of the defendant, but that on the contrary, he had taken the most prudent steps to safeguard the plaintiff's interest. It was alleged for him that he had always been willing to hand to the plaintiff the cash he had actually received, and the bonds in his possession signed by the villagers. With regard to the value of the stones, the appellant's counsel stated that, though he did not admit any legal liability, his client was perfectly ready to pay for them.

For the respondent it was contended, that the defendant by taking these bonds to his own order was responsible to the plaintiff for the full amount of them, and that had he wished to protect himself he should have been careful to see that the bonds were made in favour of his wife : that with regard to the bonds of the villagers, he never consulted his wife about the matter, and that he can sue on them and recover the money.

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With regard to these arguments, it will be necessary in the first place to determine what is the nature and object of this agreement for dower ; and, in the second place, what are the rights and obligations of the parties to it, and of the plaintiff, who is not a party to the document itself.

There can be no question that the nature of the document is an agreement between Theophilo and the defendant, that in consideration of the marriage arranged between the plaintiff and defendant, Theophilo will deliver to the defendant £275 and certain goods and furniture. The day before the marriage, the defendant agreed to accept two bonds signed by Theophilo in lieu of the £275, which, according to the evidence, Theophilo had not ready in cash to give, and the marriage was solemnized accordingly. In our view the plaintiff had no property until after the solemnization of the marriage, and, therefore, the opinion of the District Court that the defendant was investing his wife's property, without obtaining security, by consenting to take these bonds, is not well founded. The plaintiff herself before her marriage would certainly have had no right to sue her father for the £275, which he had agreed with the defendant to give in consideration of his daughter's marriage with him. If the defendant had refused to take the bonds, even though the plaintiff had been willing that he should do so, the result would have been that the marriage would not have been celebrated at all. We are, therefore, of opinion that the real effect of the endorsement on the agreement of dower signed by the defendant is, that he agreed to accept as dower on his marriage with the plaintiff the two bonds, with the rights and liabilities thereby created, and the goods and furniture that were delivered to him.

We have now to ascertain what are the rights and liabilities of the plaintiff and defendant, respectively, which have arisen in consequence of the dissolution of the marriage in December last. It was admitted that there is nothing in the Ottoman Civil Codes which regulates the respective rights of the husband and wife in respect of dower, which arise on a dissolution of the marriage. It appears to us that these are matters which must be regulated by the Canon Law of the Eastern Church, and that following the principle laid down in the judgment of the Privy Council in *Happaz*

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We find from the Canon Law, that 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 : that the husband has the control of the property given as dower : that the property is the property of the wife, and must be handed back by the husband on the dissolution of the marriage to the person giving the dower, in those cases where the dower giver has stipulated for this to be done, or to the wife. The husband is only liable for loss or damage to the property, where such loss or damage arises from his own fraud, or his own negligence. The husband will not be liable for any loss or damage, provided he had shewn such care as he ordinarily takes in the management of his own property ; and if the dower consists of claims, *e.g.*, bonds securing the payment of money, given by the wife or her father or a third person, it will not be considered as negligence if the husband do not prosecute his claim by legal proceedings. If the dower consists of obligations due to the dower giver from a third person, the husband will be held responsible, if he has not taken in due time all proper legal means to secure the fulfilment of these obligations, notwithstanding that he has exercised the care he ordinarily shews in the transaction of his own business.

In the present case, in our view of the facts, the wife's dower consisted of two bonds signed by her father and handed to the defendant.

The defendant received altogether, on account of these bonds, a sum of about £150 in cash the exact figures not being stated at the hearing in the District Court, and received from Theophilo two bonds, representing together £98 2s. owing to Theophilo. A sum of £50 remained owing by the father-in-law when he became bankrupt, for which the defendant proved, informing, as it is alleged before us, the syndics, that he did so on behalf of his wife, and a dividend was declared, and we suppose the money representing it is still in the hands of the syndics and may be claimed by the party entitled to it. We are unable to see that the loss arising from the bankruptcy of Theophilo, is attributable to the fraud, or the negligence of the defendant, who, as a matter of fact, did bring an action against his father-in-law to try and recover the amount remaining due on the two bonds, and we, consequently, hold that he cannot be made responsible for this loss.

With regard to the two bonds given by the villagers, they have been replaced by two others, made payable to the defendant, and are now in the defendant's possession.

The one is for £81 12s., dated the 5th/17th November, 1893, due on demand, and the other for £16 10s., dated 9th/21st December, 1893, and due on the 1st/13th November, 1894. With regard to the former of these two bonds, the defendant admits that he has received carobs on account of the moneys due on it from one of the persons giving it, with whom he keeps a current account, but there is nothing to shew what the value of these carobs is, or what amount now remains due on the bond. The defendant offers to hand over these bonds to the plaintiff, but it is questionable if they would be of any use to her, if, as is most probably the case, they are not commercial documents. The question might arise, supposing these bonds were endorsed to her, whether they are capable of being transferred to her by endorsement, and she might find herself involved in expensive litigation in consequence. We say that the probability is that they are not commercial documents, as we observe that when the defendant received the bonds from his father-in-law, the debtors assented to the transfer of their liability to the defendant, and made fresh bonds payable to him personally.

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If the plaintiff could sue on them, she might find with regard to one of them that some portion, if not the whole of the obligation, had been discharged by the delivery to and receipt of carobs by the defendant. Furthermore, both of these bonds being due and unpaid prior to the dissolution of the marriage, if any loss be occasioned owing to the inability of the debtors to pay the bonds in full, that loss would fall on the defendant, who should have taken legal proceedings in due time to recover the moneys due under them.

We have been unable to find anything in the Canon Law which is precisely applicable to the state of things we find here : but having regard to the fact that some undetermined amount of carobs has been received and accepted by the defendant against one of the bonds, the possible difficulties in the way of the plaintiff suing on the bonds, and to the fact that the defendant owing to his not having taken steps to recover the amount due under the bonds when he should have done so, would most probably be held bound to recoup the plaintiff for the amount of any loss, which would have to be recovered in an action brought against him by the plaintiff after she had recovered what she could on the bonds, we think that convenience and justice both require that he should now pay the amount of these bonds. The bonds, of course, remain in his hands, and he can take proceedings against his debtors to recover the amount really owing on the bonds.

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With regard to the value of stones and other things for which the District Court has given judgment against the defendant for a total amount of £22 2s., as the appellant's advocate stated that the defendant was willing to pay, though he did not admit any legal liability to do so, we shall not disturb the decision of the District Court, though we share the doubts of the defendant's advocate as to his legal liability. No value was placed upon them in the document of dower, and they were doubtless intended to be used, as it was alleged they were, in the construction of the defendant's house, and we think it questionable how far the defendant could be held liable for their value in this action. However, it is not necessary for us to decide the point. The plaintiff's advocate did not address any argument to us on the point, considering, doubtless, that it was not necessary to do so after hearing the expression of the defendant's willingness to pay the amount of the value.

Our judgment, therefore, will be for the plaintiff, for the amount actually received by the defendant in cash, which is said to be £150 together with £98 2s. the amount of the bonds now in the defendant's possession. These bonds bearing interest at the rate of 12 per cent. the plaintiff is entitled to interest at that rate from the date of the dissolution of the marriage up to the date of the judgment of the District Court, which comes, according to our calculation, to £6 9s. 5cp. The amount for which, in our opinion the District Court should have given judgment, thus amounts to £276 13s. 5cp. and for this amount, together with legal interest from the date of the judgment of the District Court, we shall direct that judgment be entered for the plaintiff. Before drawing up judgment, we must be informed whether the parties are agreed that the sum received by the defendant in cash was £150, if less or more, the amount we have stated judgment will be entered for, will be rectified accordingly.

We shall not interfere with the decision of the District Court as to the costs of the action in the Court below. With regard to the costs of this appeal, the appellant has succeeded in reducing the sum ordered by the District Court to be paid, but has not succeeded in his main contention. He appears to us to have acted with the greatest fairness throughout to the plaintiff, and we should have been very willing to give him the costs of this appeal, had we felt ourselves fairly entitled to do so. Having regard to the fact that he has only succeeded in reducing the amount of the judgment of the District Court by about £21, we shall direct each party to bear his own costs of this appeal.

Judgment varied.