

TYSER, C.J.
&
BERTRAM
J.
1909
Nov. 29

[TYSER, C.J. AND BERTRAM, J.]

PASCHALES CONSTANTINIDES AND OTHERS

v.

NEKTARIOS, BISHOP OF ALEPPO AND OTHERS.

CIVIL PROCEDURE—"FRIVOLOUS AND VEXATIOUS ACTION"—CLAIM FOR BARE DECLARATION—ACTION AGAINST BISHOPS HOLDING ARCHIEPISCOPAL ELECTION—APPLICATION TO EXAMINE WITNESSES ON COMMISSION ABROAD.

The Court will not make an order for the examination of witnesses on commission abroad in an action which, though valid when originally instituted has become by the course of events "frivolous and vexatious."

Theodotou v. Philotheos 7 C.L.R., 41, followed.

In the course of an Archiepiscopal election held under the Archiepiscopal Election Law, 1908, the Plaintiffs sued the Bishops, who as an Episcopal Synod were conducting the election, claiming (1) an injunction restraining them from proceeding further with the election on the ground that they did not possess the qualifications required by the law, (2) a declaration that their proceedings up to the date of the action were null. An interim injunction was applied for but the election was accelerated and was concluded before the application could be heard.

The Plaintiffs applied to the Court to order a commission to examine certain witnesses in Constantinople on the ecclesiastical issues involved.

HELD: That, inasmuch as the Plaintiffs' claim did not disclose any legal right to damages, and as the claim for an injunction could no longer be considered, the action had by the course of events been reduced to a claim for a bare declaration to which effect could only be given by further proceedings against persons not parties to the action, and as such was "frivolous and vexatious," and that consequently no commission could issue.

This was an appeal from an order of the District Court of Nicosia, directing an examination of certain ecclesiastical witnesses on commission at Constantinople.

The Plaintiffs were fourteen in number, four of Nicosia, three of Limassol, one of Larnaca, two of Famagusta, two of Papho and two of Kyrenia, described as "all Greek-Orthodox inhabitants of the "Island of Cyprus."

The Defendants were described as "Nektarios, Bishop of Aleppo, "Michael, Titular Bishop of Ptolemais, Christophoros, Titular Bishop "of Axome."

The Defendants were three Bishops acting as an Episcopal Synod under the Archiepiscopal Election Law, 1908.

The Plaintiffs claimed—

- (i) An injunction restraining the Defendants from proceeding with the election.
- (ii) A declaration that all their proceedings up to the date of the action were null and void.
- (iii) £1,000 damages.

At the settlement of the issues various important ecclesiastical questions were raised, which are not material to this report. The

claim for damages was based upon an allegation that since the arrival of the Defendants in the island the lessees of various ecclesiastical properties in the island had refused to pay their rents.

The writ was issued on February 17th, 1909. No interim injunction having been sought or granted, the Defendants proceeded with the necessary preliminaries, and the election of the Archbishop was fixed for April. An application for an interim injunction was filed on April 19th, and ordered to be heard on April 21st. The election was however accelerated, and took place on the morning of April 21st, being concluded before the application for the interim injunction could be heard by the Court.

The Plaintiffs nevertheless proceeded with the action, and on May 6th, applied for a Commission for the examination at Constantinople of the Oecumenical Patriarch, and other personages on the ecclesiastical questions involved in the action.

The District Court granted the application.

The Defendants appealed.

Theodotou, Severis, Kyriakides, severally, for the Appellants.

Artemis and Neoptolemos Paschales for the Respondents.

The Court allowed the appeal.

Judgment: THE CHIEF JUSTICE: The commission should issue if any good can result from it. Assuming that it issued and Plaintiffs proved as they seek to prove, *i.e.*, that the Defendants were not Bishops and that their acts were a nullity—would it benefit the Plaintiffs?

The first claim for an injunction fails because the act sought to be enjoined is finished and done with.

The claim for a declaration against the Defendants if granted would not affect the legal rights of any other person. Such a declaration would not bind any person not a party to this action. The Court will not make such a declaration as that here asked for. See *Theodotou v. Philotheos* (1906) 7 C.L.R., 41.

It is said that the Plaintiffs claim damages against the Defendants. But there really is no claim to damage. No damage is alleged. The only thing alleged at the settlement of the issue by way of damage is that the administration of the property of the Archbishopric is suffering damage.

Assuming that the Archbishop elected under the proceedings conducted by the Defendants causes damage and that he is not acting under lawful authority it would be the Archbishop not the Defendants who would be liable, even if the Plaintiffs have a right to sue for such damage.

But further it is not alleged that any of the Plaintiffs is damaged. It is not alleged that they or any of them are interested personally

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or at all in the property or have any right which is infringed. Therefore the claim does not disclose any right of action in the Plaintiffs, even if damage is proved, and even if the right persons are being sued.

If the Plaintiffs prove all they seek to prove on the commission the Court can give no judgment in their favour.

Therefore leave to issue the commission should be refused, and the appeal must be allowed with costs here and below.

BERTRAM, J.: As originally framed this action had three branches.

1. Restraint of pending proceedings.
2. A declaration incidental to that restraint.
3. Damages.

As events have developed—whether by the misfortune or the fault of Plaintiffs—the proceedings pending at the commencement of the action are now completed.

The result is that the claim for a declaration becomes a claim for a bare declaration, which can have no effect in itself, and the case is exactly covered by *Theodotou v. Philotheos* (1906) 7 C.L.R., 41.

There are two distinctions sought to be drawn between that case and this—the one is that in the present action, as originally instituted an injunction was claimed, the second is that there is a claim for damages which still has to be decided.

As to the injunction—the possibility of this is gone, and I do not think that we can treat it as though it still existed. As to the damages—I do not like to say the claim is frivolous, but it is, if I may say so, “legally frivolous”—in having no possible legal basis. For the purpose of considering our action at this stage of the proceedings, I think it must be ignored.

The result is that we are asked to sanction the issuing of a highly expensive commission for the purpose of an action which, owing to the course of events, has become, (according to a previous judgment of this Court) “frivolous and vexatious.”

It is true that if the Plaintiffs had a good cause of action at the date of the writ, and if their rights to a remedy then existed and were only made ineffectual by the act of the Defendants pending the case, it may be that the Plaintiffs would be entitled to their costs up to the date of that act. It would not however be reasonable that a Commission of the sort should issue merely to determine a question of costs. Moreover the Plaintiffs have not asked for it with that object, but with a view to persisting in the the whole action.

I agree therefore that the appeal must be allowed with costs.

Appeal allowed.