IN THE MATTER OF AN APPLICATION BY EFROSYNI MICHAELIDOU, FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION

and

IN THE MATTER OF THE DECISIONS OF THE ECCLESIASTICAL TRIBUNAL OF NICOSIA IN CASE No 75/66 AND OF THE ECCLESIASTICAL APPEAL TRIBUNAL IN APPEALS No 4/67 AND 5/67, BETWEEN DINOS MICHAELIDES (PETITIONER) AND EFROSYNI MICHAELIDOU (RESPONDENT)

(*Civil Application No* 5/68).

Ecclesiastical Tribunals—Prohibition—Article 155.4 *of the Constitution—Ecclesiastical Tribunals of the Greek-Orthodox Church—Article* 111.1 *of the Constitution—Principles on which prohibition will lie to an ecclesiastical tribunal—Refusal of adjournment by ecclesiastical tribunal of the Greek Orthodox Church in a divorse case between members of that Church—Tribunal acted within its jurisdiction—No breach of general laws of the land or violation of any fundamental principle of justice—Alleged defect not apparent on the face of the proceedings—Therefore, writ of prohibition is a matter of discretion—And in the exercise of this discretion the Court will have to consider,* inter alia, *any delay in moving the Court—Assuming, without deciding that paragraph* 1 *of Article* 111 *of the Constitution does not oust the jurisdiction of this Court in the matter—The writ of prohibition must be refused not only for the above reasons, but, also, as a matter of discretion in view of the delay in moving for it—See, also herebelow.*

Prohibition—Grounds upon which prohibition lies—Excess of jurisdiction—Breach of the general laws of the land or violation of some fundamental principle of justice—Prohibition—Essence of—Prohibition is a preventive rather than a corrective remedy—It goes only to prevent commission of a future act and not to undo act already done—It will not lie when there is nothing left for prohibition to operate upon—Order of prohibition goes as of right when defect is apparent on the face of the proceedings—Not-

withstanding delay, laches or acquiescence on the part of the applicant—Otherwise it is a matter of discretion and delay, laches etc. have to be taken into account by the Court in the exercise of its discretion—See, also, above and herebelow.

Certiorari—Certiorari does not lie to an ecclesiastical tribunal—Only order of prohibition lies—See also, herebelow.

Prerogative Orders—Article 155.4 *of the Constitution—Prerogative orders provide means of questioning the legality but not the discretion of judicial or quasi-judicial acts—See, also, hereabove and herebelow.*

Constitutional Law—Article 111.1 *of the Constitution—Whether it ousts the jurisdiction of the High Court (now Supreme Court) in proceedings for an order of prohibition in matters relating to divorce of members of the Greek Orthodox Church—Question left open—Prerogative orders under Article* 155.4 *of the Constitution—See, also, hereabove.*

The applicant lady is seeking the leave of this Court to apply for an order of prohibition addressed to the Ecclesiastical Tribunal of Nicosia, and the Ecclesiastical Appeal Tribunal of Nicosia, of the Greek Orthodox Church of Cyprus, prohibiting such tribunals "from allowing the validity of the divorce granted by them" on the petition of her husband.

The applicant's complaint is that (a) on the 27th September 1967, the Ecclesiastical Tribunal and (b) on the 11th July 1968, the Ecclesiastical Appeal Tribunal, acted contrary to the rules of natural justice and to Articles 8, 12.1 and 5(c), 28.1, and 30.1 and 3(c) and (d) of the Constitution, in that she was not given the opportunity of being heard and she was refused an adjournment.

The facts of the case are shortly as follows:

Both the applicant and her husband are members of the Greek Orthodox Church of Cyprus; they were married in accordance with the rites and ceremonies of that Church on the 28th July, 1958. On the 4th August, 1966 the husband instituted proceedings in the Ecclesiastical Tribunal of Nicosia seeking a divorce from his wife (the applicant). The petition came on for hearing on the 11th July, 1967, before the Tribunal composed of a president and two members. The case was partly heard on that day and it was adjourned on the 27th

September 1967 for the continuation of the hearing. On the resumption of the hearing the Tribunal was composed of the original president and one of the two original members. The wife's (applicant's) counsel took objection to the composition of the tribunal. His objection was overruled and he immediately filed an appeal against this ruling of the Tribunal. The Tribunal intimated that the hearing of the case would continue and that no adjournment would be granted; thereupon counsel accompanied by his client, the present applicant, walked out of the Court-room. The Tribunal went on with the hearign of the case in the absence of the applicant and her counsel. Judgment was delivered on the 1st October, 1967, granting a decree of divorce to the husband on the ground of the wife's (applicant's) adultery. The wife lodged an appeal against that judgment on the 31st October, 1967. Both appeals were heard together by the Ecclesiastical Appeal Tribunal which delivered its judgment on the 21st June, 1968, dismissing both appeals and giving full reasons for doing so. At the hearing of the appeals the wife (applicant) was again legally represented by the same counsel and she was given every opportunity of presenting her case.

On the 5th July 1968, the applicant filed with the said Appeal Tribunal an application for review of their judgment (αἴτησιν ἀναψηλαφήσεως) which was fixed for hearing on the 11th July, 1968. It is the applicant's case that on that day her counsel was taken suddenly ill. Another advocate appeared on her behalf and applied for an adjournment on the ground of counsel's said illness. The adjournment sought was opposed and the Appeal Tribunal refused it. Then the applicant voluntarily abandoned her case. A few days later a copy of the Appeal Tribunal's judgment dated the 11th July, 1968 was received by the parties. This judgment — produced in Court — dismissed the applicant's (wife's) application for review of the previous judgment of the Appeal Tribunal and stated the reasons for such dismissal.

On the 28th August, 1968, the present application was filed for a writ of prohibition and on the 22nd October, the hearing was began. As the statement and affidavit before the Court did not give sufficient particulars, counsel applied for an adjournment to enable him to file a supplementary statement giving full particulars of the case and such adjournment was granted. The application was taken off the list and directions given that when counsel was ready he should apply to the Re-

gistrar to have the application refixed for hearing. It took learned counsel three months to file his supplementary statement (on January 20, 1969) which is only two typed pages and does not, in fact, add much to the original statement filed in the previous August. Eventually the present application was heard on February 5, 1969.

Under paragraph 1 of Article 111 of the Constitution, any matter relating, *inter alia*, to divorce of members of the Greek Orthodox Church is governed by the law of that Church and is cognizable by a tribunal of the aforesaid Church, and no appeal lies to this Court. On the other hand, under paragraph 4 of Article 155 of the Constitution "the High Court shall have exclusive jurisdiction to issue orders in the nature of *hapeas corpus, mandamus, prohibition, quo warranto and certiorari.*"

The Court, refusing leave to apply for an order of prohibition.

Held, (1). In the present case this Court is not acting as a Court of Appeal from the Ecclesiastical Tribunal but as the High Court in England in the exercise of its supervisory function over the ecclesiastical Courts by the writ of prohibition. This is on the assumption that Article 111 of the Constitution (*supra*) does not oust the jurisdiction of this Court even in the case of proceedings for prohibition, which matter is left entirely open. But assuming, without deciding, that Article 111 does not oust our jurisdiction would prohibition lie to an ecclesiastical tribunal in England in the circumstances of this case? If it does not lie then that would be the end of the matter; but if it lies then I would have to consider the effect of the provisions of Article 111 of the Constitution.

(2) It is well settled that certiorari does not lie to an ecclesiastical Court to have its order brought up to be quashed; and that the only remedy in case of an excess of jurisdiction or an error manifestly contrary to the general laws of the land or so vicious as to violate some fundamental principle of justice is the writ of prohibition.

(3) Regarding the present case, in the first place there is no doubt that both ecclesiastical tribunals were acting within their jurisdiction in hearing and determining a matrimonial cause between two members of the Greek Orthodox Church of Cyprus. What remains, therefore, to be considered is

whether the said Ecclesiastical Tribunal of Nicosia, or the Ecclesiastical Appeal Tribunal of Nicosia offended against the general law of the land or acted in so vicious a way as to violate a fundamental principle of justice. The present application has nothing to do with the merits of the case (see *The King* v. *North, Ex parte Oakey* [1927] 1 K.B. 491, at pp. 499 and 501).

(4) (a) With regard to the complaint as to what happened on the 27th June, 1967, before the trial Tribunal (*supra*) can it be said on the material before me, that there was any breach of the general laws of the land or of any fundamental principle of justice? The answer is unhesitatingly in the negative.

(b) With regard to the second complaint as to what happened on the 11th July, 1968, before the Ecclesiastical Appeal Tribunal at the hearing of the application for a review of its own decision of the 21st June, 1968 (*supra*) we know the reasons why the Appeal Tribunal refused the adjournment sought; the applicant was legally represented by another counsel and up to the present moment we do not know what was the illness of her first advocate; and no affidavit to contradict the facts and reasons given in the Appeal Tribunal's said decision of the 11th July, 1968, has been filed by or on behalf of the present applicant. In any event the Appeal Tribunal, as a matter of discretion, refused the adjournment and stated their reasons; and it is well settled that prerogative orders provide the means of questioning the legality, but not the discretion, of judicial or quasi-judicial acts (Wade and Philips, Constitutional Law, 3rd ed. p. 283).

(c) The *Oakey* case *supra* should be distinguished, because in that case a man was ordered to pay a penalty for an offence without first receiving notice of such proceedings against him, while in the present case notice of the proceedings had been given to the interested party. She was legally represented before the tribunal but an adjournment was refused.

(5) For the above reasons I would dismiss the present application.

But assuming that excess of jurisdiction as such, or through violation of fundamental principle of justice, had been proved, then we have to consider what is the relief sought.

(6) On the authorities, prohibition will not lie where, as a

result of the delay judgment or execution has been satisfied and there is no longer anything to prohibit. It is a preventive rather than a corrective remedy, and is used only to prevent the commission of an act and not to undo an act already performed. It is never allowed to usurp the function of certiorari or take the place of an appeal; and to my observation that there were not *certiorari* proceedings to quash the decisions already taken by the Ecclesiastical Tribunals, but proceedings to prohibit or prevent the commission of a future act by the tribunal and, if so, what act, learned counsel was unable to give me any reply.

(7) Where the defect is not apparent on the face of the proceedings — and in the present case no such defect exists — the order of prohibition goes not as of right and irrespective of any laches or acquiescence, but merely as a matter of discretion; and the Court in exercising such discretion would have to consider whether the delay in moving for the remedy is reasonable or not. Assuming there is something left for prohibition to operate upon, I would still refuse the application as a matter of discretion in view of the delay in moving for the remedy, even if a ground had been shown for a prohibition. But I have already held that, in the circumstances of this case, neither the Ecclesiastical Tribunal, not the Ecclesiastical Appeal Tribunal, exceeded its jurisdiction or acted contrary to the laws of the land or violated some fundamental principle of justice.

Application dismissed.

Cases referred to:

Rex v. *Chancellor of St. Edmundsbury and Ipswich Diocese. Ex parte White* [1948] 1 K.B. 195 at pp. 208—209, 216, 224;

Bishop of St. David's v. *Lucy*, 1 Ld. Raym. 539, at p. 544 per Holt C.J.;

Mackonochie v. *Lord Penzance* [1881] 6 A.C. 424 at p. 443 per Lord Blackburn;

Ex parte Smyth (1835) 3 Ad. and E. 719 at p. 724;

Ex parte Story (1852) 22 L.J. (Ex.) 33, at p. 35 per Parke, B.;

Parochial Church Council of St. Magnus etc. v. *Chancellor of London Diocese* [1923] P. 38, at p. 44 per Avory J.;

The King v. *North. Ex parte Oakey* [1927] 1 K.B. 491 at pp. 503, 504 per Scrutton L.J. also at pp. 493, 499, 501;

Martin v. *Mackonochie* (1879) 4 Q.B.D. 697 at p. 732 per Thesiger L.J.;

Yates v. *Palmer* (1849) 6 Dow. and L. 283;

Denton v. *Marshall* (1863) 1 H. and C. 654;

Rex v. *Electricity Commissioners* [1924] 1 K.B. 204;

Lambrianides v. *Marvides* (1958) 23 C.L.R. 49, at 63;

Kyriakides v. *Chilimindri* (1963) 2 C.L.R. 171, at p. 179;

Full v. *Hutchins* (1776) 2 Cowp. 422; 98 E.R. 1165, per Lord Mansfield C.J.;

In re London and Scottish Permanent Building Society (1894) 63 J.(Q.B.) 112, at p. 113.

Application.

Application for leave to apply for an order of prohibition addressed to the Ecclesiastical Tribunal of Nicosia and the Ecclesiastical Appeal Tribunal of Nicosia, of the Greek Orthodox Church of Cyprus prohibiting such tribunals "from allowing the validity of the divorce granted by them."

Ch. Kyriakides for *ex-parte* applicant.

Cur. adv. vult.

The facts sufficiently appear in the judgment delivered by:

JOSEPHIDES, J.: The applicant is seeking the leave of this Court to apply for an order of prohibition addressed to the Ecclesiastical Tribunal of Nicosia, and the Ecclesiastical Appeal Tribunal of Nicosia, of the Greek Orthodox Church of Cyprus, prohibiting such tribunals "from allowing the validity of the divorce granted by them".

The applicant's complaint is that (a) on the 27th September, 1967, the Ecclesiastical Tribunal and (b) on the 11th July, 1968 the Ecclesiastical Appeal Tribunal, acted contrary to the rules

of natural justice and to Articles 8, 12(1) and 5(c), 28(1) and 30(1) and (3)(c) and (d), of the Constitution.

The facts, as shown in the applicant's statements, are briefly as follows: Both the applicant and her husband are members of the Greek Orthodox Church of Cyprus and they were married in accordance with the rites and ceremonies of that Church on the 28th July, 1958. On the 3rd October, 1964, the husband instituted proceedings in the Ecclesiastical Tribunal of Nicosia seeking a divorce from his wife (the present applicant), on the ground of her adultery with one Y.L. The parties having subsequently been reconciled, the petition was dismissed.

On the 4th August, 1966, a fresh petition for divorce on the ground of the present applicant's adultery with one F.C. was filed by the husband in the Ecclesiastical Tribunal of Nicosia (Case No. 75/66). The petition came on for hearing on the 15th September, 1966, and by reason of the pregnancy of the present applicant it was adjourned on several dates and the hearing eventually began on the 11th July, 1967, before the above mentioned ecclesiastical tribunal, composed of a president and two members. The case was partly heard on that day and it was adjourned to the 27th September, 1967, for the continuation of the hearing.

On the resumption of the hearing on the 27th September the tribunal was composed of the original president and one of the two original members. The present applicant (wife) was legally represented by advocate Mr. L. Papaphilippou, who took objection to the composition of the tribunal. His objection was overruled and he immediately filed an appeal against this decision of the tribunal (appeal No. 4 of 1967). The tribunal intimated that the hearing would continue and that no adjournment would be granted and, thereupon, the present applicant's counsel accompanied by the applicant herself walked out of the Court-room. The tribunal went on with the hearing of the case in the absence of the applicant and her counsel; and, according to the applicant's counsel, judgment was delivered on the 1st October, 1967 granting a decree of divorce to the husband on the ground of the applicant's (wife's) adultery. No copy of this judgment or decree was, however, produced before this Court. The present applicant lodged an appeal against that judgment on the 31st October, 1967 (appeal No. 5 of 1967).

Both appeals were heard together by the Ecclesiastical Appeal Tribunal which delivered its judgment on the 21st June, 1968, dismissing both appeals and giving full reasons for doing so. A copy of this judgment and reasoning (dated 21.6.1968) has been annexed to the applicant's statement before this Court. At the hearing of both appeals the applicant was again legally represented by Mr. Papaphilippou and she was given every opportunity of presenting her case, as stated in the appeal tribunal's judgment.

Briefly, the reasons given by that tribunal for dismissing the appeals were –

(1) as regards the *first appeal* (No. 4 of 1967); that the ecclesiastical tribunal was on the 27th September, 1967, lawfully composed pursuant to the provisions of Article 4 of the Ecclesiastical Tribunals' Code of Procedure;

(2) as regards the *second appeal* (No. 5 of 1967) against the divorce on the merits:

(a) that the trial tribunal was lawfully composed of the President and the one member (under Article 4 of the Ecclesiastical Tribunals' Code of Procedure);

(b) that the trial tribunal rightly overruled the applicant's (wife's) objection and resumed the hearing of the case;

(c) that the applicant (wife) was not deprived of the opportunity of defending herself but that on the contrary she deprived herself of such an opportunity, that is to say, by her unjustified walk-out of the Court-room, together with her advocate, she deprived herself of such an opportunity;

(d) that, although at the hearing of the appeal, when she was legally represented, the applicant had the opportunity of defending herself on the merits, she failed to do so; and

(e) that the trial tribunal's findings of fact and conclusions were based on the credibility of witnesses and that such tribunal applied the law correctly.

For these reasons the appeal tribunal dismissed the applicant's (wife's) appeal dated the 31st October, 1967 (No. 5 of 1967) and affirmed the judgment of the trial tribunal.

On the 5th July, 1968, the applicant filed with the appeal tribunal an application for review of their judgment (αἴτησιν ἀναψηλαφήσεως), which was fixed for hearing on the 11th July, 1968 at 2.30 p.m. It is the applicant's case that on that day her advocate, Mr. Papaphilippou, was taken suddenly ill at noon and did not appear before the tribunal at 2.30 p.m. Mr. Ch. Kyriakides, advocate, appeared on her behalf before the appeal tribunal and applied for an adjournment stating the reason for such adjournment and, according to him, producing a medical certificate. No copy of this certificate was produced before this Court at the hearing of the present application and Mr. Kyriakides, who appeared in the present proceedings, was unable to inform me what was Mr. Papaphilippou's illness. The applicant's application for an adjournment was opposed before the appeal tribunal and the tribunal then rose and, according to the applicant's advocate Mr. Kyriakides, they said on rising that they would consider their decision and announce it in due course.

A few days later a copy of the appeal tribunal's judgment, dated the 11th July, 1968, was received by the parties and this had been produced in the present proceedings. The judgment, which is signed by the President of the appeal tribunal, states the reasons for dismissing the applicant's (wife's) application for review of the previous judgment of the appeal tribunal. Briefly those reasons are:

(a) that neither the trial tribunal nor the appeal tribunal deprived the applicant of the opportunity of defending herself;

(b) that before both tribunals she had such an opportunity of defending herself but that she failed to do so;

(c) that she applied for an adjournment on the 11th July, 1968, on the ground of her advocate's illness, and without any sufficient reason she voluntarily abandoned her defence although it was stressed to her by the tribunal that she could appear through another advocate to prove her case;

(d) that the appeal tribunal had reconsidered the whole case, as well as all the points of law raised and the facts as appearing in the evidence, and had come to the conclusion that the trial tribunal had correctly

reached their decision dated the 1st October, 1967. In the circumstances, the application for review was dismissed.

On the 16th July, 1968, the present applicant filed with this Court an application for leave to apply for an order of certiorari "to remove into the Supreme Court of Cyprus and quash the decree and/or decisions of the Ecclesiastical Court of Nicosia and the Appellate Ecclesiastical Court". This application was heard on the 23rd July, 1968, before a judge of this Court, and, eventually, the applicant's advocate applied for an adjournment to enable him to file an application for leave to apply for an order of prohibition, and the present application was accordingly filed on the 28th August, 1968.

On the 22nd October, 1968, the first application for leave to apply for an order of certiorari was withdrawn by counsel and dismissed, and the hearing of the present application for leave to apply for prohibition was began. As the statement and affidavit before the Court did not give sufficient particulars, counsel applied for an adjournment to enable him to file a supplementary statement giving full particulars of this case and such an adjournment was granted. The application was taken off the list and directions given that when counsel was ready he should apply to the Registrar to have the application refixed for hearing. It took learned counsel three months to file his supplementary statement (on 20.1.1969) which is only two typed pages and does not, in fact, add much to the original statement which was filed in the previous August. Eventually the present application was heard on the 4th February, 1969.

Now, what is the law to be applied in the present case. Under paragraph 1 of article 111 of the Constitution, any matter relating to divorce of members of the Greek-Orthodox Church is governed by the law of the Greek-Orthodox Church and is cognizable by a tribunal of that Church, and no appeal lies to this Court.

The power which the applicant is asking this court to exercise in the present case is that conferred on the High Court under the provisions of Article 155, paragraph 4, of the Constitution whereby it is provided that "the High Court shall have exclusive jurisdiction to issue orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari".

In the present case this Court is not acting as a Court of appeal from the ecclesiastical tribunal but as the High Court in England in the exercise of its supervisory function over the ecclesiastical Courts by the writ of prohibition. This is on the assumption that Article 111 of the Constitution does not oust the jurisdiction of this Court even in the case of proceedings for prohibition, which matter is left entirely open. But assuming, without deciding, that Article 111 does not oust our jurisdiction, would prohibition lie to an ecclesiastical tribunal in England in the circumstances of this case? If it does not lie then that would be the end of the matter; but if it lies then I would have to consider the effect of the provisions of Article 111.

So far as I am aware this is the first proceeding of its kind in Cyprus and learned counsel for the applicant has not been able to cite any English case in which a writ of prohibition was directed by the Courts at Westminster to an ecclesiastical tribunal in England, after the grant of a decree of divorce, when those Courts were exercising matrimonial jurisdiction before it was transferred to the civil Courts in England by the Matrimonial Causes Act, 1857.

The history and principles of the common law writs of certiorari and prohibition were recently reviewed in England in *Rex* v. *Chancellor of St. Edmundsbury and Ipswich Diocese. Ex parte White* [1948] 1 K.B. 195, where it was held that certiorari does not lie to an ecclesiastical Court to have its order brought up to be quashed; and that the only remedy in case of an excess of jurisdiction is the writ of prohibition. As Evershed L.J. said (at page 221), "in my view the true inference to be drawn from all the considerable material placed before us by the industry and research of counsel is that the writ of certiorari as it developed was universally treated as by its nature inapplicable for any purpose to the ecclesiastical Courts, at least in so far as they purported to administer a system of law which, albeit was the King's ecclesiastical law, yet was a law substantially distinct in history and substance from the system administered by the temporal Courts."

The ecclesiastical Courts were always liable to be kept within the limits of their jurisdiction by the writ of prohibition issuing during the last four or five hundred years out of the King's Bench, whenever they should transgress those limits. So long as the ecclesiastical Courts acted within those limits, no process

was available issuing from the common law Courts to control or correct them (at page 216 of the report). Holt C.J. in *Bishop of St. David's* v. *Lucy* (1 Ld. Raym. 539, 544), said: "It is without precedent to grant a prohibition to the ecclesiastical Court, because they proceed there contrary to the canons"; meaning that not even this writ could be resorted to to correct ecclesiastical Courts, so long as they erred within their jurisdiction (at pages 208–9 of *Rex* v. *Chancellor of St. Edmundsbury etc.* (*supra*)).

Lord Blackburn defined the limits of the writ of prohibition as follows: "Prohibition is the common law proceeding by which any of the superior temporal Courts at Westminster (not the Queen's Bench only) are enabled to restrain, amongst others, the Courts Ecclesiastical from acting in excess of their jurisdiction; but it does not enable the temporal Court to act as a Court of Appeal from the Court Ecclesiastical, so as to correct any irregularity or even injustice which may have been done by the Ecclesiastical Court, if done in the exercise of their jurisdiction" (*Mackonochie* v. *Lord Penzance* [1881] 6 A.C. 424, at page 443).

The principles on which prohibition will lie in an ecclesiastical suit were also stated by Thesiger L.J. in *Martin* v. *Mackonochie* [1879] 4 Q.B.D. 697, at page 732, as follows:

"The mode in which that suit is to be conducted, the sentence which it is open to the judge to pronounce, and the means by which that sentence is to be enforced, are all, in the absence of statutory provision relating to these matters, to be regulated by the practice of the Court itself, and in respect of which, if the judge errs, appeal and not prohibition, would be the proper remedy, unless his error involves the doing of something which, in the words of Littledale J. in *Ex parte Smyth* (1835) 3 Ad. & E. 719, 724, is 'contrary to the general laws of the land,' or, to use the language of Lush J. in the Court below, is 'so vicious as to violate some fundamental principle of justice' ".

In *Ex parte Smyth* (1835) 3 Ad. & E. 719, 724, a wife's suit for restitution of conjugal rights, the husband appeared under protest, and, being ordered by the Ecclesiastical Court to appear absolutely, applied for a prohibition. The King's Bench refused the writ. Littledale J., delivering the judgment of the Court, said: "Whether they are right in so decreeing or not is a

question of practice, not of jurisdiction. The temporal Courts cannot take notice of the practice of the Ecclesiastical Courts, or entertain a question whether, in any particular cause admitted to be of ecclesiastical cognizance, the practice has been regular. The only instances in which the temporal Courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court. The proceeding here complained of comes within neither of these heads."

In *Ex parte Story* (1852) 22 L.J. (Ex.) 33, a party was cited in August 1850 to appear in the Consistorial Court to answer his wife in a suit for restitution of conjugal rights. He duly appeared and was heard. On the 26th of April 1851, he received a notice from the wife's proctor that the Court would be moved on the 30th for an order to take his wife home, and also that he should be pronounced in contempt for disobeying two monitions for payment of alimony. On the 9th of June two decrees, ordering him to receive his wife home, and to pay alimony, were made in his absence and without his knowledge, no notice thereof having been given to him till the 2nd of September. It was held that no ground was shewn for a prohibition; and that as the ecclesiastical Court had jurisdiction, and the matter related to the practice of that Court, the remedy was by appeal, or by application to that Court.

Parke, B., at page 35, said:

> "The point before us has been well argued, but we see no ground for a prohibition. The law in this case is analogous to that which was laid down in the *Marshalsea case* (10 Rep. 68), where it was said that when a Court has jurisdiction of the cause, and proceeds inverso ordine, or erroneously, neither the party suing nor the officer is liable to actions. In this case the ecclesiastical Court had jurisdiction; and if any irregularity has been committed that does not take away jurisdiction, but merely forms the ground of an appeal. The case of *Ex parte Smyth* is in point. There it was contended that the Judicial Committee of the Privy Council had exceeded their jurisdiction in ordering a party to appear absolutely in a suit instituted against the party in the Consistory Court, and it was held that a prohibition ought not to be granted. In that case Littledale, J. says 'whether they (the Judicial Committee)

are right in so decreeing or not is a question of practice, not of jurisdiction. The temporal Courts cannot take notice of the practice of the ecclesiastical Courts, or entertain a question whether in any particular cause, admitted to be of ecclesiastical cognizance, the practice has been regular'. Here the case is within the jurisdiction of the ecclesiastical Court. If a question arises as to enforcing the decree, that is a point which that Court must decide for itself.....

This is a case relating to the practice of a Court, and if there is anything defective, the course is to apply to that Court, or to a superior tribunal. What has been done in this case does not amount to a contravention of natural justice. At one portion of the proceedings in the suit Mr. Story was present. He does not appear to have had a special notice that a decree was about to be pronounced; but if by the practice of the ecclesiastical Court such notice was necessary, and was not given, that forms a ground of application to that Court. In the superior Courts parties to suits take notice of the judgments pronounced by the Courts."

In *Parochial Church Council of St. Magnus, etc.* v. *Chancellor of London Diocese* [1923] P. 38, the Chancellor ordered a faculty to issue within one month without informing himself at the hearing of the views of the Parochial Church Council. This Council allowed the month to elapse, and, on its expiry, applied for prohibition on the grounds that they had not been cited, and that their views had not been considered. It was held that even if the alleged error were one of jurisdiction, and not merely of procedure, still there had been such unreasonable delay on the part of the Council that prohibition should be refused as a matter of discretion. As Avory J. said, at page 44, "What is complained of here is matter of procedure, not of jurisdiction. As to the complaint that the Council was not heard, having regard to the facts, the members of the Council must be presumed to have had notice of the proceedings. Their course was simply one of lying by".

In *The King* v. *North Ex parte Oakey* [1927] 1 K.B. 491, a faculty was granted to a vicar and churchwardens to restore a screen in a church. In the course of the work of restoration damage not authorized by the faculty was done to a fresco. A parishioner interested in the fresco petitioned the Consistory Court for a faculty to repair the damage. The petition alleged

that the damage was done by the vicar's order, but did not ask that he should pay the cost of reparation. A general citation was issued citing all the parishioners and inhabitants to show cause why a faculty should not be granted to allow of the repair, but no special citation was issued to the vicar. The vicar knew of the petition, but did not appear. In his absence the judge of the Consistory Court on July 24, 1925, granted the faculty asked, and ordered him to pay the expense of reparation and the costs of the petition. On February 11, 1926, a monition was issued ordering him to pay the said sums under threat of sequestration. On March 9 the vicar applied for prohibition. It was held –

"(1) that as the order of July 24 and the monition were made without giving the vicar an opportunity of being heard in his defence they were made without jurisdiction and prohibition ought to issue.

(2) That there was no such delay in applying for prohibition as would justify a refusal of the writ.

(3) That even if the order and the monition might have been the subject of an appeal to the Court of Arches, which was very doubtful, as the vicar was not a party to the proceedings, that fact was not ground for refusing prohibition".

As Scrutton L.J. said, at page 504, "to order a man to pay what is in the nature of a penalty for an offence without first giving him notice that an application for such an order is going to be made, is both contrary to the general law of the land, and is so vicious as to violate a fundamental principle of justice. The case therefore falls within the exceptions to the general rule".

What I have to consider now is whether on the facts of this case the Ecclesiastical Tribunal of Nicosia, or the Ecclesiastical Appeal Tribunal of Nicosia, either exceeded their jurisdiction or offended against the general law of the land or acted in so vicious a way as to violate a fundamental principle of justice; and whether, in such a case, prohibition will lie. The present application has nothing to do with the merits of the case (see *The King* v. *North. Ex parte Oakey* [1927] 1 K.B. 491, at pages 499 and 501).

The applicant's complaint is that (a) on the 27th September, 1967, the ecclesiastical trial tribunal; and (b) on the 11th

July, 1968, the ecclesiastical appeal tribunal, acted contrary to (i) the rules of natural justice; and (ii) Articles 8, 12(1) and (5)(c), 28(1) and 30(1) and (3)(c) and (d), of the Constitution in that she was not given the opportunity of being heard and she was refused an adjournment.

In the first place there is no doubt that both ecclesiastical tribunals were acting within their jurisdiction in hearing a matrimonial case between two members of the Greek Orthodox Church. What remains, therefore, to be considered is whether there is any breach of the general laws of the land or any fundamental principle of justice.

Let us first consider what happened on the 27th September, 1967, before the trial tribunal. Was anything done either contrary to the general laws or to fundamental justice? The applicant had notice of the proceedings, she was legally represented, her counsel took an objection to the composition of the tribunal, his objection was overruled, he lodged an appeal and the tribunal informed the parties that they would be going on with the hearing of the case. Is this a matter of jurisdiction or breach of law or violation of fundamental principles of justice, or, rather, a matter of procedure? Counsel instead of going on with the hearing of the case preferred to walk out of Court accompanied by the applicant and the case went on in their absence.

The procedure followed in the ecclesiastical tribunals has not been proved before me, but if I had to decide the case by our standards, to my mind, it would be inconceivable for any counsel or party to walk out of Court whenever any of his objections was overruled, or to have piecemeal appeals in the course of the hearing of a case. In any event, the applicant was subsequently given full opportunity before the appeal tribunal and her counsel was heard on the question of the composition of the trial tribunal; and she was also given the opportunity of putting forward her defence on the merits before the appeal tribunal, but she failed to do so. Can it be said then that there was any breach of the general laws of the land or of fundamental justice? The answer is unhesitatingly in the negative.

Now, with regard to the second complaint as to what happened before the appeal tribunal at the hearing of the application for a review of its own decision on the 11th July,

1968. I have earlier summarised the reasons given in the appeal tribunal's decision why they refused the adjournment sought. The applicant was legally represented by another counsel and up to the present moment we do not know what was the illness of her first advocate; and no affidavit to controvert the facts and reasons given in the appeal tribunal's decision of the 11th July, 1968, has been filed by or on behalf of the present applicant, although her counsel took three months to prepare and file his supplementary statement in these proceedings. In any event, the appeal tribunal, as a matter of discretion, refused the adjournment and stated their reasons: and it is well settled that prerogative orders provide the means of questioning the legality, but not the discretion, of judicial or quasi-judicial acts (Wade & Phillips' Constitutional Law, third edition, page 283). It should also be stated that the appeal tribunal reconsidered the whole case and came to the same conclusion (see the summary of their decision of 11.7.1968 given earlier in this judgment).

Even if this may be an irregularity or injustice – which, to my mind, is not – it does not amount to a contravention of natural justice and I am not here sitting as a Court of appeal from the ecclesiastical Court so as to correct such matter, so long as it was done in the exercise of their jurisdiction: see per Lord Blackburn in *Mackonochie* v. *Lord Penzance* [1881] 6 A.C. 424, at page 443; *Parochial Church Council of St. Magnus etc.* v. *Chancellor of London Diocese* [1923] P. 38; *Ex parte Story* (1852) 22 L.J. (Ex.) 33; *Ex parte Smyth* (1835) 3 Ad. & E. 719, 724; and *Martin* v. *Mackonochie* [1879] 4 Q.B.D. 697, at page 732, per Thesiger L.J. case quoted earlier in this judgment.

The case of *The King* v. *North Ex parte Oakey* [1927] 1 K.B. 491, should be distinguished, because in that case a man was ordered to pay a penalty for an offence without first receiving notice of such proceedings against him, while in the present case notice of the proceedings had been given to the Interested Party. She was legally represented before the tribunal but an adjournment was refused.

For these reasons I would dismiss the present application.

But, assuming that excess of jurisdiction as such, or through violation of fundamental principle of justice, had been proved, then we have to consider what is the relief sought.

The relief sought in the applicant's statement is for "an order prohibiting the ecclesiastical tribunal of Nicosia, and the ecclesiastical appeal tribunal of Nicosia, from allowing the validity of the divorce granted by them". In addressing me, learned counsel for the applicant stated that the relief sought was "an order to prohibit the validity of the decree of divorce granted by the ecclesiastical tribunal on the 1st October 1967"; and he explained that by this prohibition the ecclesiastical tribunal would have to hear the case afresh. To my observation that these were not certiorari proceedings to quash the decision or decisions already taken by the ecclesiasticel tribunal, but proceedings to prohibit or prevent the commission of a future act by the tribunal and, if so, what act, learned counsel was unable to give any reply.

On the authorities, prohibition will not lie where, as a result of the delay, judgment or execution has been satisfied and there is no longer anything to prohibit (*Yates* v. *Palmer* (1849), 6 Dow. & L. 283; *Denton* v. *Marshall* (1863), 1 H. & C. 654; and 11 Halsbury's Laws of England, third edition, page 120, paragraph 222). It is a preventive rather than a corrective remedy, and is used only to prevent the commission of a future act and not to undo an act already performed (Short & Mellow's Crown Office Practice, second edition, page 252). It is never allowed to usurp the functions of certiorari or take the place of an appeal; but the fact that an appeal lies, or that a certiorari might be granted, does not destroy the right to a prohibition (ibidem, at page 253).

Prohibition restrains the tribunal from proceeding further in excess of jurisdiction and certiorari requires the record or the order of the Court to be sent up to the King's Bench Division to have its legality inquired into and, if necessary, to have the order quashed (per Atkin L.J. in *Rex* v. *Electricity Commissioners* [1924] 1 K.B. 204).

With regard to the question of delay, where the defect of jurisdiction is apparent on the face of the proceedings and the application is made by a party, the order goes as of right and it is not a matter of discretion. Prohibition in such case lies at any time, even after judgment or sentence inspite of laches or acquiescence of the applicant, and can go to prohibit steps being taken in execution to enforce anything that can be done in transgression of the limits of jurisdiction. But where the defect is not apparent on the face of the proceedings

the order is granted as a matter of discretion; and the Court in exercising such discretion would have to consider whether the delay in moving for the remedy was reasonable or not; *Lambrianides* v. *Mavrides* (1958) 23 C.L.R. 49, at page 63; and 11 Halsbury's Laws of England, third edition, paragraphs 214 and 220; and *Kyriakides* v. *Chilimindri* (1963) 2 C.L.R. 171, at page 179.

The distinction in respect of cases where a prohibition does or does not lie after sentence is this: "if it appears on the face of the libel that Ecclesiastical Court has no jurisdiction of the cause a prohibition shall go, because there *interest reipublicae* that they should not encroach upon the jurisdiction of the temporal Courts (per Lord Mansfield, C.J. in *Full* v. *Hutchins* (1776), 2 Cowp. 422; 98 E.R. 1165).

It has been held that "so long as a sentence for the payment of penalty is unexecuted, prohibition may lie if there is a threat to execute it. In such a case delay is immaterial": per Scrutton L.J. in the *Oakey* case [1927] 1 K.B., at page 503, where he approved the dictum of Wright J. in *In re London and Scottish Permanent Building Society* (1894) 63 L.J. (Q.B.) 112, 113, that "an application for prohibition is never too late so long as there is something left for it to operate upon".

It will thus be seen that there must remain something to which prohibition can apply, some act which the tribunal if not prohibited may do in excess of its jurisdiction, including any act, which may be done by it in carrying into effect any order which has been wrongly made.

In the *Oakey* case (*supra*, at page 493) the application was for a writ of prohibition directed to the Chancellor to prohibit him from further proceeding in the matter of (a) an order directing the vicar to pay all restoration expenses and legal costs and (b) of the monition ordering payment within 14 days or to show cause why the profits of his benefice should not be sequestered; that is, it was an application to the secular Court to prohibit further proceedings of an order of the consistory Court on the ground that order was made without jurisdiction, the want of jurisdiction complained of being based upon the breach of a fundamental principle of justice.

In the present case this Court will be asked to prohibit "the validity of a decree of divorce" granted by the ecclesiastical tribunal on the 1st October, 1967. No copy of that decree

has been produced before me and I am left in the dark as to the finality or effect of that decree. Furthermore, there is nothing to show on the face of the two judgments produced before me (dated 21.6.1968 and 11.7.1968) any excess of jurisdiction; and, in any event, there is no allegation that the ecclesiastical tribunal had no jurisdiction in the matter or that it encroached upon the jurisdiction of the temporal Courts. Consequently, the order cannot go as of right but as a matter of discretion, as the alleged defect is not apparent on the face of the proceedings as produced before this Court.

As stated earlier, "an application for prohibition is never too late so long as there is something left for it to operate upon"; that is, there must remain something to which prohibition can apply, some act which the ecclesiastical tribunal if not prohibited may do in excess of its jurisdiction. Furthermore, "so long as a sentence for the payment of penalty is unexecuted, prohibition may lie if there is a threat to execute it. In such a case delay is immaterial".

In the present case a decree of divorce was granted on the 1st October, 1967, and for all we know it may be a final decree and the successful husband may have already changed his position or taken steps affecting not only himself but, possibly, some third person. In any event, the maximum that this Court could do would be to prohibit the ecclesiastical tribunal from further proceeding in the matter of the decree of divorce dated 1st October, 1967, and *not*, as requested by the applicant, to prohibit such tribunal from allowing the validity of the divorce granted by it. But here there is nothing left for prohibition to operate upon. The applicant has not been able to point out what future act the ecclesiastical tribunal may be prevented from doing.

Consequently, both having regard to the relief sought and the delay in moving for the remedy, as a matter of discretion, I would still refuse the application, even if a ground had been shown for a prohibition. But I have already held that, in the circumstances of this case, neither the Ecclesiastical Tribunal, nor the Ecclesiastical Appeal Tribunal, exceeded its jurisdiction or acted contrary to the general laws of the land or violated some fundamental principle of justice.

For these reasons the present application is dismissed.

Application dismissed.