[SMITH, C.J. AND TYSER, ACTING J.]

SMITH, C.J. & TYSER, ACTING J. 1897

DESPINOU THEOPHILO, *Plaintiff*,

v.

HARALAMBO ABRAAM, *Defendant*.

July 3

DIVORCE—MAINTENANCE OF CHILD—"CAUSE OF DIVORCE"—CANON LAW.

The Plaintiff, who was the divorced wife of the Defendant, obtained an order against him for maintenance of a child, the issue of the marriage.

The Defendant applied to the Court to set aside the order for maintenance, alleging that the Plaintiff's conduct was the cause of the divorce, that under the Canon Law that party "who was not the cause of the divorce" was entitled to the custody of the child, and that he was willing to maintain the child.

The evidence relied upon by the Defendant to prove that the Plaintiff was the cause of the divorce, was the document of divorce itself, which stated that the parties had frequently quarrelled and separated and been reconciled by the Ecclesiastical Authorities, but had at last "quarrelled so badly with each other" that the wife summoned her husband before the Civil Authorities and obtained an order for maintenance: that the husband applied for divorce, and the wife, having refused to be reconciled and live with her husband again, the divorce was granted.

HELD: *that the mere fact that the Defendant had obtained the divorce on the ground of the Plaintiff's refusal to be reconciled to and live with him did not establish that the Plaintiff was the cause of the divorce within the meaning of the Canon Law, as the Defendant's conduct might have been such as to justify the Plaintiff in refusing to return to him.*

The principle on which the rule of the Canon Law confiding the custody of the children to the innocent party is founded, is that regard should be had to the welfare of the children.

APPEAL of the Defendant from the District Court of Limassol.

Pascal Constantinides for the Appellant.

Iconomides for the Respondent.

The facts and arguments sufficiently appear from the judgment.

Judgment: This is an appeal from an order of the District Court of Limassol dismissing the Defendant's application which was in the following terms: *July* 17

"That the Court will set aside every order issued against the Defendant as he is ready now to take his child, Abraam, belonging to him under Ecclesiastical Law—the Plaintiff being the cause of the divorce proceedings."

The history of this matter is shortly as follows: The parties were husband and wife but are now divorced.

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On the 14th August, 1894, before the divorce, the Plaintiff brought an action for herself and on behalf of her infant child claiming maintenance at the rate of £3 per month from the Defendant, she alleging that he had turned her out.

At the settlement of the statement of the matters in dispute the Defendant denied turning the Plaintiff out, and alleged that she left of her own accord.

At the hearing, the Defendant, through his Advocate, stated that he wished to withdraw from the action, and the case was heard as an undefended action. The Plaintiff gave evidence to the effect that the Defendant had assaulted her and turned her out of their house, and the Court made an order against him to pay £3 per month.

Subsequently the Defendant obtained a divorce from the Plaintiff on the 22nd December, 1894.

An application was then made to the District Court to set aside the judgment on the ground that after the divorce the Plaintiff was no longer entitled to maintenance.

The Court on this application ordered the amount to be reduced to £2 to be paid for the maintenance of the child.

The Defendant on the hearing of this application expressed his willingness to pay sixpence per day for the maintenance of the child.

Both parties appealed, but the appeals were not proceeded with.

In October, 1895, the Defendant applied to have the amount reduced to 15/- on the ground that he could not afford to pay more, and he also applied for the custody of the child on the ground that he could maintain it for less.

The Defendant gave evidence to the effect that he had had to borrow moneys to pay back the dower to his wife, and that his pecuniary position was affected thereby and he was not in a position to pay more than 10/- per month.

The District Court dismissed the application on the ground that no substantial change in the Defendant's pecuniary position had been proved.

The Defendant appealed, and on the 6th July, 1896, the Supreme Court directed the amount to be reduced to £1, leaving either party at liberty to apply to the District Court to vary this order should the justice of the case require.

At the hearing of this appeal, mention was made by Mr. Pascal, who appeared for the Appellant, of the point that under the Canon Law the Defendant ought not to be called on to pay anything as he was entitled to the custody of the child, the Plaintiff, according to his contention,

having been the cause of the divorce. The point had not been raised in the District Court, and there was no evidence on the point one way or the other, and the Supreme Court, therefore, decided solely on the evidence that was adduced as to the amount the Defendant, having regard to his pecuniary position, should be called on to pay.

The present application was then made, and it was contended for the Defendant both in the Court below and in the Supreme Court that by the Canon Law that party who was not the cause of the divorce was entitled to the custody of the child, that the document recording the divorce shewed that the Plaintiff was the cause, and that, therefore, the order directing the Defendant to pay £1 per month maintenance should be set aside as he was prepared to take the custody of the child.

This application was based upon the Canon Law, there being admittedly no other Law dealing with the matter.

We may observe that it appears to us that under the principle laid down by the Privy Council in the case of Happas and others *v.* Parapano and another, C.L.R. vol. iii., p. 69, this is a case in which the decision of the Civil Court should be based upon the Law of the Church to which the parties belong.

The only Law pointed out to us is that mentioned in Armenopoulos, p. 220, which is to the effect that, in case of divorce, the children remain in the custody of that party who was not the cause of the divorce. This is a very meagre and not very clear statement, but it appears to us that the principle on which it is based is the welfare of the children, and the meaning of the Law is, that the party whose conduct has not led to the divorce being *prima facie* the most fitting party to have the care of the children, their custody shall be given to him or her, as the case may be.

The only evidence relied upon by the Defendant to shew that the Plaintiff was the cause of the divorce is the document of divorce itself. This sets forth that the parties were married in 1892, and lived for a year in harmony, that quarrels then broke out between them which resulted in their separation, that the Church often reconciled them but the reconciliations were but temporary, that in July of the year 1893, they quarrelled so badly "with each other," that the wife summoned her husband before the Civil Court and obtained an order for maintenance, that the husband repeatedly applied for a divorce but that the Church adjourned the application in the hope that the parties would become reconciled, that finally the husband applied that the wife should be ordered to return or that a divorce should be granted, that the wife being summoned was counselled to become reconciled to and live with

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her husband, but refused and continued to make charges against him, definitely refusing to go back to him, and preferring to live with her parents.

This evidence does not satisfy us that the wife was the party who was the cause of the divorce, within the meaning we attach to the phrase.

The question is what is to be considered as the cause of the divorce. It may be that, although the divorce is grounded on the refusal of the wife to return to her husband, it was the conduct of the husband which led to this refusal, and that the wife was justified in declining to return to her husband. In such a case having regard to what we believe to be the ground on which the Canon Law is based, viz. the welfare of the children, we should hold that the conduct of the husband was the cause of the divorce. We do not say that this was the case here, but it may have been for anything which appears to the contrary. On this ground, therefore, we should uphold the judgment of the Court below.

There is another ground, too, on which we think this judgment should be supported.

In an Epitome of the Canon Law in our possession, the Law on the subject is thus stated: "In case of divorce, if the marriage is dissolved by the fault of the father, the children are brought up by the innocent wife; the Authority (ἡ Ἀρχὴ) can, however, leave their bringing up to the guilty party if it is convinced that the children run the risk of being corrupted by the innocent party. (*Νεαρὰ* 117, c. 7.) If both the parents were the cause of the dissolution of the marriage, the Authority (Ἀρχὴ) has the power to divide the children between them. In general it appertains to the Judge (*Δικαστὴς*), in the case of divorce, to decide with whom the children shall remain: but the expense of maintenance and bringing up is the charge of the husband, whether guilty or innocent, and only when he is without means and the mother wealthy is the obligation of maintenance cast upon her." (*Νεαρὰ* 117, c. 7.)

According to this statement of the Law, it is recognized that both parties may be in fault, and that the Authority or Judge has the discretionary power of deciding to whom to entrust the custody of the children in case of divorce. This being so, it appears to us, whatever the meaning to be placed upon Authority (Ἀρχὴ) and "Judge," the Civil Courts would have the like discretion when their aid is invoked in such matters.

In this case, if the application were for the custody of the child, the Defendant has, in our opinion, failed to shew any reason why the Court should interfere with the present arrangement.

But no such application is made, or, in our opinion, could be made, in this case, with any prospect of success.

The Defendant has failed to prove his right to the custody of the child.

It has not been shewn that the child would benefit if the present application were granted. The pecuniary advantage to be derived by the father, is not, in itself, sufficient ground for making the order sought.

For all these reasons we are of opinion that the decision of the District Court was right, and this appeal must be dismissed with costs.

Appeal dismissed.