TAYLOR *v.* DAVIES

SUPREME COURT (Kingsley, J.): April 24th, 1951
(Civil Case No. 117/50)

[1] **Evidence—burden of proof—breach of promise of marriage—burden on plaintiff to show readiness to carry out own part of contract:** In an action for breach of promise to marry, the burden of proof is on the plaintiff to show that she has always, within reason, been prepared to carry out her part of the contract (page 125, lines 5–7).

[2] **Family Law—breach of promise of marriage—burden of proof—burden on plaintiff to show readiness to carry out own part of contract:** See [1] above.

[3] **Family Law—breach of promise of marriage—defences—offer to perform contract good defence if made before writ issued and refused:** In an action for breach of promise to marry, an offer by the defendant to perform the contract is a good defence if it is made before the issue of the writ and refused by the plaintiff (page 124, lines 37–39).

The plaintiff brought an action against the defendant for damages for breach of promise after refusing an offer of marriage by the defendant.

The Supreme Court considered whether she had shown her willingness to perform her part of the contract.

R.B. Marke for the plaintiff.
The defendant did not appear and was not represented.

KINGSLEY, J.:

There has long been a school of thought which has held that breach of promise actions should be abolished, the argument being that the plaintiff has invariably escaped, to her benefit of course, what must have turned out a disastrous marriage. I am satisfied that this is the case here, so that even had I found for the plaintiff the damages, on a general score at any rate, would have been purely nominal. But I cannot see on her own story how she can possibly succeed.

An offer by the defendant to perform the contract by marrying the plaintiff, if made before the issue of the writ and refused by the plaintiff, is a good defence to a breach of promise action: *vide* 16 *Halsbury's Laws of England*, 2nd ed., at 558. I am satisfied on the evidence that this is the case here. The defendant has obviously

been asking for an early marriage which the plaintiff on her own story has declined, either because the defendant's aunt told her it was quite wet in The Gambia or, alternatively, because her trinkets or other articles of apparel were not ready. Neither excuse is in my view valid. The burden of proof is on the plaintiff to prove that she has always, within reason, been prepared to carry out her share of the contract, and I am unable to find that she has discharged that burden adequately. If she has spent the small sums of money she has spoken of for the defendant's use, they must be the cause of another action. In the meantime her claim in this case today must fail, and there will be judgment for the defendant. As the latter has not even bothered to notify either his own counsel or the court as to his non-attendance, there will be no order as to costs.

Suit dismissed.

JAFFA *v.* JAFFA and BANGURA

SUPREME COURT (Kingsley, J.): May 2nd, 1951
(Divorce Case No. 9/49)

[1] Family Law—divorce—damages—measure of damages—damages for adultery compensatory not punitive—factors to be considered in assessment: Damages for adultery should be compensatory and not punitive, and while, in assessing them, the court should in the first place ask itself how far the co-respondent has been the cause of the break-up of the marriage, possibly more important considerations are whether the petitioner has been subjected to intolerable insult and wrong by another man's seduction of his wife, or whether on the evidence his principal loss has been that of a completely worthless and unsuited wife; and in any event the court must bear in mind the general position and obligations of the parties, and make an award which it will be possible for the co-respondent to meet (page 128, lines 9–23; page 129, lines 9–21).

The petitioner petitioned for a decree of divorce from the respondent, his wife, on the ground of adultery, and claimed damages from the co-respondent.

The petitioner and the respondent, who were of different races, married and lived together in Port Loko until the petitioner moved to Freetown. The respondent did not at first go with him, and when she joined him there she became friendly with the co-respondent.

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They met and corresponded with the aid of intermediaries. The petitioner instituted divorce proceedings for alleged adultery, and claimed damages from the co-respondent for breaking up the matrimonial home and seducing his wife.

The Supreme Court considered the nature and assessment of damages for adultery.

Cases referred to:

(1) *Burne* v. *Burne,* [1920] P. 17; (1919), 122 L.T. 224, *dictum* of Duke, P. applied.

(2) *Evans* v. *Evans,* [1899] P. 195; (1899), 81 L.T. 60, *dicta* of Jeune, P. applied.

O.I.E. During and *R.W. Beoku-Betts* for the petitioner;
Cole and *Dobbs* for the respondent;
Margai for the co-respondent.

KINGSLEY, J.:

In this suit the husband petitions for a divorce on the ground of his wife's adultery with the co-respondent from whom he also claims damages. Both the respondent wife and the co-respondent deny the alleged adultery. The facts of the case are in my view simple and, having carefully reviewed the evidence I have had no difficulty in arriving at my decision.

The petitioner is a Syrian, the respondent an African, and apparently the petitioner's people from the very outset disapproved of his getting married to somebody not of his own race. It is not in dispute that they did not even attend the wedding, and that although thereafter the petitioner continued to visit his mother, the estrangement between him and his family became such that he found it necessary to ask for and obtain his share of the family property. His father had died in 1937. There can be little doubt that it is in this mixed marriage and its consequent estrangement of the petitioner from his family that the mainspring is to be found of the trouble which has led to this suit. Whether the suit would have actually eventuated without that mainspring being oiled, so to speak, by the co-respondent is a matter which I shall indicate presently.

The parties were married in Freetown on April 23rd, 1946, and thereafter lived at Port Loko until 1948 when the petitioner decided to come to Freetown, where he set up in the transport business. He had apparently been a general trader at Port Loko, and according

to him they were perfectly happy while they lived there. He said it was, to use his own words, "ordinary domestic palaver" which caused him to come to Freetown. He had found he said £20 in a wooden box belonging to his wife, which caused him some concern. What this concern was he did not say, but at any rate the respondent admitted his finding this £20, although she denied that he was in any way upset by it. But whatever the reason, he came to Freetown where he set up in the transport business. At first the respondent refused to go with him, according to her story because he said they would be staying with his mother. The petitioner however said that she followed him in about one month's time, and they lived together at No. 33 Goderich Street where the incidents took place upon which this action is founded. This was towards the end of 1948, and then apparently they started to quarrel. Why, I was not told by either party. Neither was asked and I was left to infer the reason.

Now whilst the parties were at Port Loko, the petitioner had given the respondent a sum of £250 with which she opened a shop for general trading. He had in addition, on the respondent's own story, built a house there, where they lived together until he went to Freetown, leaving her behind. Where she lived after he had left is in dispute. The respondent said that on leaving Port Loko the petitioner let his own house to a man named Hassan Awair, while he found a place for her in the house of a man named Pa Kail, the uncle of the co-respondent. According to the petitioner, however, it was because of his discovery that she was staying at this latter house that he closed up her shop and brought her to Freetown. I am inclined to prefer the petitioner's story. I cannot otherwise imagine why he should have been in such a terrific hurry to sell up the business which he had left with his wife at Port Loko. It is not in dispute that he sold the whole show in a matter of three days. Whether, when he went back to attend to this, he stayed with the respondent or not is beside the point. Having left her in charge of the business, there is no obvious reason why he should not have been able to entrust her with its disposal. The fact remains however that he chose to go, post-haste so to speak, to deal with the matter himself, which seems to me to savour of dissatisfaction of some kind or other with what had been happening at Port Loko in his absence.

[The learned judge considered the evidence and continued:]

Taking the evidence as a whole, and bearing in mind the *Ginesi*

standard of proof, I am satisfied beyond the slightest doubt that the petitioner has adequately discharged the burden of proof which is upon him, and that he is accordingly entitled to his decree.

There only remains now the question of damages and the quantum, if any, to which the petitioner is entitled. He bases his claim as I see it on two grounds: the breaking-up of his home and the seduction of his wife. As was said in *Evans* v. *Evans* (2) ([1899] P. at 198–199):

> "What, then, are the grounds to be taken into consideration in assessing damages? One main ground is the breaking up of the home . . . . The breaking up of the matrimonial home is not by any means the only element, nor has it been considered by some authorities as even the chief element. . . . A man is wronged, by the seduction of his wife, far beyond the loss which he sustains by the breaking up of his home, however important an element of damage this may be. It is a matter for consideration, whether a man, whose wife has been seduced by another man has not been subjected to intolerable insult and wrong."

In directing the jury, the learned President then went on (*ibid.*, at 199): "In the first place, you should ask yourselves how far has the co-respondent been the cause of the misfortune that has befallen the petitioner." [These words do not appear in the report of the case at 81 L.T. 60.]

Now whilst it is true that the marriage here meant the estrangement of the petitioner from his people, the fact remains that there is before me his unchallenged evidence that until they came to live in Freetown he and the respondent were perfectly happy at Port Loko. Though she refused at first to go with him to Freetown, he actually gave her £250 in cash with which she opened a shop, apart from of course fixing her up with accommodation. Whether it was his own house or not is beside the point. The petitioner certainly did all that could be asked of him. Many a husband would not have been nearly so obliging in similar circumstances. Whilst he said he had been somewhat suspicious about her before September 1949, it was not until that month that the first real incident of this case occurred. It is, however, in my view clear beyond doubt that the illicit relationship between the respondent and the co-respondent had been in existence for some time before that. When it actually commenced it is difficult to say, but the evidence leads me to think that it was in all probability when the petitioner left Port Loko

leaving his wife behind. Whilst his people's hostility must obviously have been disturbing to her, I can see nothing in the evidence which could lead me to say that the respondent of her own volition would have betrayed the petitioner and I am forced to the irresistible conclusion that the co-respondent, in his persistent and nefarious attack on the matrimonial home, has been the principal cause of that home having been broken up. When I use the word "nefarious" I am I feel describing a strong case extremely mildly.

Damages in divorce are of course purely compensatory. Had they been punitive, in this case I feel no sum could have been too large. In deciding their quantum, I have had in mind what I think were the very wise words spoken by Duke, P. in the case of *Burne* v. *Burne* (1), where he said ([1920] P. at 19; 122 L.T. at 225): ". . . [C]ommonsense tells me that I must bear in mind the general position and obligations of the parties and make an award which it will be possible for the co-respondent to meet . . . ." I have accordingly decided that in all the circumstances of this case a correct award would be one of £20. In fixing the damages at this figure, I cannot resist a feeling which becomes stronger every time I read through the evidence that the petitioner's principal loss has been that of a completely worthless and unsuited wife. I have also given anxious consideration to the prayer that the respondent should be mulcted in her separate estate, if such exists, in payment of the costs of this action. I do not think I should go quite as far as this; she will pay her own costs only.

In the result then I grant the petitioner a decree nisi, £20 damages and costs against the co-respondent. The respondent will pay her own costs. All costs will of course be on the High Court scale.

Order accordingly.