

GEORGE v. GEORGE and LEWIS

SUPREME COURT (Tejan, J.): January 21st, 1970  
(Divorce Case No. 34/68)

- [1] Evidence—burden of proof—standard of proof—divorce—adultery must be strictly proved: Although an action for divorce is a civil suit, the standard of proof of adultery is higher than that required in other civil proceedings, and strict proof is necessary (page 2, lines 39-41). 5
- [2] Evidence—presumptions—presumption of law—legitimacy—child of married woman presumed legitimate unless spouses judicially separated—evidence of spouses living apart for three years, nine months rebuts presumption: There is a strong presumption of law that the child of a married woman is her husband's child, and this continues even though the spouses are separated unless by a valid separation decree or order of court, but the presumption will be rebutted to the satisfaction of the court by evidence that the spouses have been living apart for three years, nine months (page 4, lines 9-37). 10 15
- [3] Family Law—divorce—adultery—definition: Adultery is consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage (page 2, lines 37-39). 20
- [4] Family Law—divorce—adultery—standard of proof—adultery must be strictly proved: See [1] above.
- [5] Family Law—divorce—desertion—consists of separation and intention to end cohabitation without reasonable cause or consent of spouse: Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse (page 3, lines 31-34). 25 30
- [6] Family Law — illegitimacy — child of married woman — presumed legitimate unless spouses judicially separated—evidence of spouses living apart for three years, nine months rebuts presumption: See [2] above. 30

The petitioner sought a divorce in the Supreme Court on the grounds of the adultery and desertion of the respondent. 35

The petitioner alleged that the respondent committed adultery with the co-respondent and that he and a witness had discovered them in the act of adultery. He also alleged that the respondent had deserted him following a disagreement about one of their children who had been sent away for medical treatment without his 40

knowledge. He claimed that the respondent had left the house when he insisted on seeing the child and had not returned since. Finally, the petitioner maintained that he was not the father of the child born to the respondent after she had left him as he had had no access to her since that time.

**Case referred to:**

(1) *Preston-Jones v. Preston-Jones*, [1951] A.C. 391; [1951] 1 All E.R. 124.

*Miss Wright* for the petitioner;  
*Gelaga-King* for the respondent;  
*Cummings-John* for the co-respondent.

TEJAN, J.:

The petitioner, Emanuel Modupeh Robert George was lawfully married to the respondent, Marie Georgiana George on August 28th, 1951, at St. John's Church, Brookfields, and after the marriage, the petitioner and respondent lived and cohabited in various places and finally at 2 Water St. Freetown. There are four children of the marriage, namely (a) Emanuel Adebeyi Benjamin, born on June 5th, 1953; (b) Ellen Letitia, born August 28th, 1955 (c) Roberta Georgiana, born on May 7th, 1958; and (d) Beryl Maribell, born on August 28th, 1961. The respondent gave birth on May 31st, 1966 to a male child by the name of Donald and whose paternity the petitioner is disputing.

The petitioner presented a petition dated October 3rd, 1968, for dissolution of the said marriage on the grounds of adultery and desertion. The respondent also filed a cross-petition, and this cross-petition I now dismiss for want of prosecution with no order as to costs. I have taken this step to dismiss the cross-petition owing to the continuous difficulties created by the absence of the respondent and her counsel on the numerous occasions of the hearing of the petition, and the cross-petition was adjourned merely for the convenience of the respondent and her counsel.

In the petition, the petitioner alleges that some time in January, 1963 the respondent committed adultery with the co-respondent. Adultery is the consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage. Although a divorce proceeding is a civil suit, strict proof of adultery is necessary, and the proof must at all events be higher than the proof necessary in civil suits.

[The learned judge reviewed the evidence, which was as follows :  
Sometime in January 1963, the petitioner, acting on information  
he had been given, went with one Jimmy Jarrett to No. 17 Campbell  
St. Freetown. By standing on a table in one of the rooms he could  
see through a gap between the wall and ceiling into the adjoining  
room, and he saw the respondent and the co-respondent having sexual  
intercourse. He went into the room and there was a struggle. The  
co-respondent escaped but Mr. Jarrett saw him coming down the  
stairs and recognised him. He ran after him, but was unable to catch  
him.]

In adultery cases, the evidence of the petitioner is seldom  
accepted without corroboration either by a witness or at least by  
strong surrounding circumstances. I have given careful consideration  
to the evidence of the petitioner and his witness with regard to the  
alleged adultery. I have no doubt that both of them are truthful and  
honest witnesses. I am satisfied from what I myself saw when the  
court visited No. 17 Campbell St. that it was possible for the  
petitioner to see into the room of the respondent through the openings  
between the wall and the ceiling when standing on top of a table. I  
believe the evidence of the petitioner that he saw the respondent and  
co-respondent having sexual intercourse in the room of the respondent.

The petitioner also alleges that the respondent had deserted him  
since September 15th, 1962. [The learned judge reviewed the  
evidence of desertion which followed a disagreement between the  
petitioner and the respondent over one of their children who had been  
ill and sent away for treatment. The petitioner wanted to see the child  
but was prevented from doing so by the respondent and an aunt. The  
petitioner finally stated that he would not see the respondent until he  
had seen the child, whereupon the respondent left the house and had  
lived separately from the petitioner ever since.]

Desertion, in its essence is the separation of one spouse from the  
other, with an intention on the part of the deserting spouse of bringing  
cohabitation permanently to an end without reasonable cause and  
without the consent of the other spouse. As a ground of divorce, it  
must exist for a period of at least three years immediately preceding  
the presentation of the petition. I have said earlier that I find the  
petitioner to be a truthful and honest person, and I believe his story  
about the incident which led the respondent to leave the house. But  
the question is, was it unreasonable on the part of the petitioner to  
insist that he wanted to see his child, who had been taken to an  
unknown destination for further treatment without the knowledge of



the petitioner? I do not consider such conduct on the part of the petitioner unreasonable, and such conduct in my view is not sufficient cause to drive the respondent from the matrimonial home. I also find that the respondent deserted the petitioner.

5        There is also an allegation in the petition that on May 31st, 1966, the respondent gave birth to a male child by the name of Donald. Evidence was given by the Registrar of Births and Deaths of the registration of this child.

10        The petitioner is now disputing the paternity of the child. There is a strong presumption of law that a child born in wedlock to a married woman was begotten by her husband, and this is so even though the spouses are separated, unless such separation is in pursuance of a valid separation decree or order of a competent court. The law is that where a child is born in wedlock, sexual intercourse is  
15        presumed to have taken place between the husband and wife, until evidence is adduced to prove to the satisfaction of the court that such sexual intercourse did not take place.

20        The petitioner said that since the respondent deserted him in 1962, he had no access to her. What is to be considered in such cases is the period of gestation. In *Rayden on Divorce*, 8th ed., at 157 (1960) it is said that:

25        "The mean duration of pregnancy, calculated from the cessation of the last menstrual period, is from 275 days to 280 days, but even where the lapse of time between possible coition with the husband and the birth of the child was 331 days, the evidence of expert witnesses showed that in the present state of medical knowledge such an interval could not be said to be impossible. . . ."

See *Preston-Jones v. Preston-Jones* (1).

30        The respondent deserted the petitioner on September 15th, 1962. The respondent gave birth to the male child Donald in May, 1966. This covers a period of almost three years and nine months after the respondent had deserted the petitioner when the respondent gave birth to the child. Although in the light of advanced medical know-  
35        ledge, a period of gestation of 331 days has been found to be not impossible, it is my view that a period of gestation could not under any exceptional circumstances, be extended to a period of three years and nine months. In the circumstances, I have no doubt that the respondent committed another act of adultery during the subsistence of the marriage. I hold that the petitioner is not the father of the  
40        child Donald.

I have been asked by the petitioner to exercise the court's dis-

cretion in his favour notwithstanding that he had repeatedly committed adultery since January 1967. I have looked carefully into every aspect and circumstance of this case, and I have come to the conclusion that it is a case in which the discretion of the court ought to be exercised in favour of the petitioner, and I do so exercise it.

I am satisfied that the respondent committed adultery with the co-respondent in January, 1963, and that the respondent has deserted the petitioner since September 15th, 1962, and I therefore pronounce the decree that the marriage heard and solemnised between the petitioner and the respondent be dissolved by reason of the respondent's adultery and desertion. And I further order that the child Donald is not the child of the petitioner, and that the children Emanuel Adebeyi Benjamin, Ellen Letitia, Roberta Georgiana and Beryl Maribell be in custody of the petitioner. The respondent shall have access to the children twice monthly. Costs are to be paid by the co-respondent.

*Order accordingly.*

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MORLAI v. SEDULA

SUPREME COURT (Tejan, J.): January 21st, 1970  
(Mag. App. No. 5/67)

[1] **Civil Procedure—assessors—replacement of assessors during trial—replacement possible at any stage with consent of parties and approval of magistrate:** Where a civil case is being heard with assessors in a local court there must be two assessors throughout the hearing, but the parties may, with the approval of the magistrate, replace one assessor by another at any stage of the proceedings (page 7, line 33—page 8, line 1).

[2] **Courts—local courts—assessors—replacement of assessor during trial—replacement possible at any stage with consent of parties and approval of magistrate:** See [1] above.

The parties sought a declaration in a local court as to the ownership of certain land.

A dispute concerning the ownership of land was taken before a District Appeal Court, consisting of a magistrate and two assessors. During the trial one of the assessors was absent and the parties selected a replacement with the approval of the magistrate. A