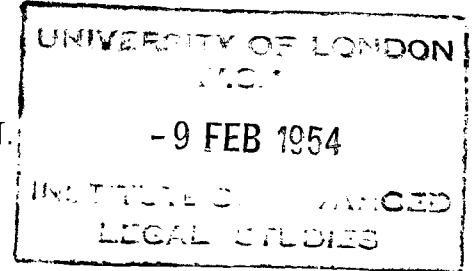


18, 1953

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.



BETWEEN—

S. D. M. DEAN (2nd Defendant) *Appellant*

— AND —

1. ERIC ALLEN ANTHONISZ (Plaintiff)

Respondent

and 2. MAUD MAGDALENE ANTHONISZ née
TRADIGO (1st Defendant) *Respondent.*

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CASE FOR THE APPELLANT.

RECORD.

1. This is an Appeal from a judgment and decree of the Supreme Court of Ceylon dated the 1st day of September, 1950, affirming a judgment and decree of the District Court of Colombo dated the 21st day of December, 1948, in matrimonial proceedings instituted by the first named Respondent (hereinafter called "the Respondent husband") against his wife, the second named Respondent (hereinafter called "the Respondent wife") in which the Appellant was cited as Co-Defendant.

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2. The issue in this Appeal is whether, having regard to the circumstances of the case and the principles of law to be applied thereto, damages in the sum of Rs.10,000 awarded to the Respondent husband against the Appellant ought to be set aside or modified.

3. The proceedings were commenced in the District Court of Colombo by the Respondent husband by Plaint dated the 20th day of March, 1947, in which he claimed against the Respondent wife a decree of divorce a *vinculo matrimonii* on the grounds of malicious desertion and adultery with the Appellant, and against the Appellant damages in the sum of Rs.25,000.

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p. 11, l. 10.

4. By her Answer dated the 23rd day of January, 1948, the Respondent wife denied that she had maliciously deserted the Respondent husband, but admitted the adultery alleged with the Appellant.

p. 10, l. 20.

5. By his Answer dated the 1st day of August, 1947, the Appellant admitted all and singular the averments contained in the Plaintiff in so far as the same concerned him, save and except the averment that the Respondent husband was entitled to claim a sum of Rs.25,000 or any sum whatsoever by way of damages and further the Appellant pleaded that having regard to the conduct of the Respondent husband and to all the circumstances of the case no damages whatsoever should be awarded to the Respondent husband. 10

6. The suit was heard in the District Court of Colombo on the 27th day of August, 1948, 15th day of September, 1948 and the 5th day of October, 1948 and on the 21st day of December, 1948, judgment was delivered in which the issues which had been framed were answered in the following manner:—

p. 48, l. 11.

(1) The Respondent wife did about the month of November, 1945, maliciously desert the Respondent husband;

p. 48, l. 18.

(2) The Respondent wife committed adultery with the Appellant and they had both since October, 1946, been living together in adultery; 20

p. 49, l. 17.

(3) The Respondent husband was entitled to Rs.10,000 damages against the Appellant;

p. 49, l. 18.

(4) The Respondent husband was entitled to the custody of the two children of his marriage.

p. 49, ll. 20-25.

Accordingly a decree nisi dissolving the marriage between the Respondent husband and the Respondent wife was entered and it was ordered that the Appellant should pay to the Respondent husband Rs.10,000 damages and his costs of the action. 30

p. 16, l. 12.

p. 12, l. 29.

p. 12, l. 31.

p. 12, l. 30.

p. 13, l. 1.

7. The general history of the marriage prior to the events giving rise to this action was related by both Respondent husband and the Respondent wife, and with the exception of the matters set out in paragraph 17 hereunder both parties were in general agreement, and no issue relevant to this Appeal turns upon it. The Respondent husband, then a man of 35 years of age, was married to the Respondent wife, then 18 years of age, on the 28th day of December, 1933. There were two children of the marriage born in December, 1934 and January, 1936, respectively. After living at various addresses the Respondent husband and the Respondent wife were, at all times relevant to this Appeal, living in a house in Nelson Place, Colpetty. The Respondent husband was employed at all material times by the Colombo Commercial Company, and received 40

a modest but adequate salary, namely Rs.175 a month, at the time of the marriage and Rs.250 a month when the action was heard. Throughout the greater part of the marriage the Respondent wife had supplemented the family budget by doing dressmaking, an activity which declined after the war started due to shortage of materials, and by supplying lunches to persons attending the local school. p. 36, l. 4.

8. There was no dispute concerning the circumstances in which the Appellant entered upon the matrimonial scene. The Respondent husband stated that he first met the Appellant towards the end of 1944, and made his acquaintance through the Respondent wife who had in her turn met him through her sister-in-law. The Respondent wife confirmed this and stated that she first met the Appellant at his shop in Main Street with her sister-in-law in January, 1944; that she saw him once again about two weeks later, and again in April, 1944, when the Appellant took her in his car to fetch some household servants. On this occasion although the Appellant called with his car at the Respondents' house, the Respondent husband did not meet him but did so some time later. p. 18, l. 12.

10 Thereafter the Appellant used to "turn up from time to time", but the Respondent husband denied, contrary to the allegations of the Respondent wife, that he ever became particularly friendly with the Appellant, saying "I cannot say I took a fancy to Dean. I did not take a fancy to Dean. I cannot say I did not like him. It was not a matter of liking or not. I hadn't time to gauge him at the time. At the back of my mind I was doubtful." Whatever be the truth of the Respondent husband's views of the Appellant, there is no doubt that from about November, 1944 until about September, 1945, the Appellant was constantly in the house. He had lunch there almost every day, and frequently dinner as well. The Appellant kept a suitcase with clothes in at the house, and used to change there for riding practice. The Respondent husband agreed that the Appellant was very kind to the Respondents' children and used to take them to the pictures. From about June, 1945, the Appellant slept in the house. There is no doubt from the Respondent husband's own evidence that during this period the Appellant spent considerable periods in and about the house and with the Respondents' family, and until the events which brought this state of affairs to end, did so with the full knowledge and consent of the Respondent husband. p. 32, l. 15.

20 The Appellant ceased to visit the house after the Respondent husband had told him that he did not wish the Respondent wife to go to the pictures with him as often as she did. The Respondent husband stated that the Appellant "got huffed" over this remonstrance and ceased to visit the house after September, 1945. p. 32, l. 40.

30 p. 17, l. 10.

p. 13, l. 35.

p. 13, l. 22.

p. 13, l. 33.

p. 13, l. 28.

p. 18, l. 18.

40 p. 13, l. 30.

9. The collapse of the marriage came in November, 1945. On the 28th day of October, 1945, the Respondent wife spent the night away from the matrimonial home, returning the next day. On this occasion she told the Respondent husband that she had been to see her mother, and had been too late to return. This she confirmed as true in her own evidence. The Respondent wife was again out the whole night on the 3rd November, and again two days later. On her return the Respondent husband told her "if she stayed out again "she need not come back". She again went and this time remained away. It was not disputed that at any rate two weeks after her departure she went to live with the Appellant in a house he had bought, and committed adultery with him. It is submitted that it is relevant to the issues in this Appeal that after leaving the matrimonial home and setting up house with the Appellant the Respondent wife used daily to visit the old house to look after the children, and on the 28th day of December, 1945, she returned and stayed the night in the matrimonial home for a party to celebrate the wedding anniversary of the Respondent husband and herself.

10. One aspect of the case regarding which the Respondent husband gave evidence—and this was largely agreed by the Respondent wife—concerned certain gifts which the Appellant made to the Respondent wife whilst she was still living with her husband and during the period in which the Appellant was a frequent visitor to the house. The learned Judge found that "it was the wealth of the Appellant and the giving of expensive presents by him to the (Respondent wife) that won her affections and resulted in the "break up of the home." It is submitted that even upon the husband's own version of the nature of these gifts and the circumstances in which they were given, no such inference should properly be drawn. The first alleged gift was a piano which apparently cost Rs.1,000. The Respondent husband's own version is that it was bought from a cousin of his, and he contradicts himself when he says "I could have paid for the piano" and "I could not have paid "Rs.1,000 for the piano." He admits, however, that the original arrangement was that the piano should be paid for by the Respondent wife out of her Post Office savings and the balance by her dressmaking, and that the piano was bought in order that the Respondents' daughter should be taught music. It was in the house for about six months and when the Respondent husband saw that his daughter was not being taught it was removed. The Respondent husband's evidence regarding payment for the piano was as follows:—"The original arrangement was that she was to "pay for it with the savings in the Post Office and the balance by her "dressmaking. This was her arrangement. She arranged to repay "Dean in about 6 instalments The money was in the Post

“Office in her name. There was about Rs.400. She was to pay for the piano out of that and the balance in 6 instalments of perhaps Rs.100. I do not know whether she paid anything. I asked her. “Nothing was paid When it was not being paid for I ordered it out of the house. After she stopped coming home and did not also teach music I told her the piano must leave the house Dean did not give my wife a piano. I did not take it as a loan. “I would have minded if she took a loan of Rs.1,000 from Dean. “She never took a loan.” Whatever the arrangements concerning the payment for the piano and the circumstances of its removal, it is quite clear that it was obtained and remained in the house with the full knowledge and consent of the Respondent.

11. The second gift which it is alleged operated as an enticement was a sewing machine, but as on the Respondent husband’s own version this was not obtained—if indeed it was ever obtained, the only evidence of this apparently being hearsay—until after the Respondent wife left the matrimonial home, it is submitted that such a gift could not have operated in any way to entice the Respondent wife away from the Respondent husband.

20 12. A refrigerator was also brought into the matrimonial home; this was apparently the property of an Indian officer with whom the Appellant was friendly, and who had asked the Appellant to remove it. So far from this being used in any way to entice the Respondent wife or to dazzle her with the prospect of riches, the Respondent husband’s own evidence is “He [the Appellant] was going to put it in store when my wife jumped at the idea of keeping it and it was brought home.” This evidence clearly showed that it was the Respondent wife’s opportunism rather than a desire to entice which caused the refrigerator to be in the matrimonial home. Further, under cross examination the Respondent husband said “We did not make much use of the refrigerator. I cannot say whether my wife was pleased with it. . . . When Dean [the Appellant] stopped coming for meals he removed it.”

13. Another gift relied upon and about which the Respondent husband gave evidence was a bicycle. It is, however, quite clear from his own evidence that his objections were directed not to the source from which it came but to his disapproval of his wife riding a bicycle at all. Again the Respondent husband’s evidence contradicts itself, for he says “I am not too sure that he paid for her cycle” and “I knew that Dean had given the cycle to her.”

40 14. The final gift alleged concerns a typewriter, and again the Respondent husband’s evidence is contradictory to the point of incoherence: “Dean bought her a typewriter. He did not give her a typewriter. He kept one temporarily at home. I say he did not

p. 22, ll. 1-9. "give it to her because then I would have known it. She wanted
 "to practice and a typewriter came home. It was not a new type-
 "writer: it had been used. . . . I do not know whether she asked
 "him for a typewriter or whether he volunteered. I told her how
 "to manipulate the typewriter. I did not give her lessons. I
 "showed her how to manipulate it." In view of this evidence it is
 submitted that no inference could or should be drawn adverse to the
 Appellant.

p. 33, ll. 25-32. 15. The final allegation in support of enticement is that the
 Appellant either lent or gave the Respondent wife Rs.300. The 10
 Respondent wife's own evidence upon this is that this sum was
 borrowed by her because the Respondent husband was in arrears
 with his Provident Account and that she handed the money over
 to him and that so far as she knew the Respondent husband never
 paid it back. Subsequently a clerk from the Respondent husband's
 Company was called who affirmed that at this date the Respondent
 husband was not in arrears with his accounts, but even if the
 Respondent wife's version regarding the loan be not accepted upon
 this aspect it is submitted that no inference adverse to the Appellant
 can be drawn from the Respondent husband's own version of the 20
 facts, which was as follows:—

p. 22, l. 10.

(Q) Was the Rs.300 a gift or a loan?

(A) I do not know anything about it. This was before the
 piano and the typewriter. It was a loan.

(Q) What was it for?

(A) I really do not know. I did not enquire why she
 wanted Rs.300 from this outsider.

(Q) Did you make her pay it back?

(A) She undertook to pay it back. 30

p. 22, l. 21.

He then went on to say "It was not for me to tell him [the
 "Appellant] that I did not like her borrowing money from him".

16. It is submitted that none of the evidence regarding any of
 these gifts or loans can be construed as showing that the Appellant
 either did, or had any intention of enticing the Respondent wife,
 and that the learned Judge was wrong when he put such an
 interpretation upon the evidence. There is, it is submitted, no
 evidence whatsoever that gifts were made by the Appellant with any
 corrupt motive, or that the gifts in fact had any effect at all upon
 the mind of the Respondent wife. At the time the articles were 40
 taken into the house the Appellant was so frequent a visitor that
 he could or should be regarded almost in the light of a member of
 the family, and there is nothing, it is submitted, in any of the
 evidence to show that the articles in question (with the exception

of the bicycle, to which the Respondent husband made no complaint other than a disapproval of cycling in general, and the sewing machine which was not received until after the marriage had broken up) were given any more to the Respondent wife than to the Respondent husband himself or for use in the family circle generally. None of these gifts are of a type which would be likely to operate as an enticement to a wife, nor are they indicative of great wealth or position, and it is submitted that the learned Judge was wrong in holding that it was the giving of expensive presents that won her affections and resulted in the break up of the home.

10 17. The Respondent wife gave evidence and in general her evidence agreed with that of the Respondent husband concerning the events which led immediately to the break up of the marriage. She disagreed, however, with the Respondent husband's statement that "Up to the time of the Appellant coming on the scene I was "living a very happy life with my wife". She described her early married life, and said "he never took my side in any family quarrel; "he supported the other party". In general she painted a picture of disappointment with her marriage, and suggested that the Respondent husband was paying undue attentions to her sister Olga, and treated herself with indifference and lack of sympathy. She dealt generally with the alleged 'gifts' and in addition she alleged that money for the household was provided by the Appellant. She admitted adultery with the Appellant, saying that she "fell in love "with him about the end of September between the end of September "and early October 1945" Further, she alleged that the Respondent husband knew that the Appellant was making love to her "because "he came into the bedroom one day and he found me with Dean and "Dean was holding my hand and we had a friend outside and my "husband said: what if that fellow comes in and sees this, and went 20 "out. He did not ask Dean to get out or anything like that. He "never protested, except that he did protest when he wanted me to "treat Dean and him alike".

30 18. One further matter relevant to the issue in this Appeal arises upon the evidence. It is agreed by both parties to the marriage that in April the Appellant took the Respondent husband and the Respondent wife and the son and daughter of the marriage in his motor car to Nuwara Eliya to stay with some people called Britton. On arrival it was discovered that only one bedroom was available for the whole party. Accordingly the Respondent husband, the Respondent wife and the daughter slept in one bed; the son in another; and the Appellant in the third bed. The Respondent wife in her evidence suggested that a room outside had been prepared for the Appellant, but that the Respondent husband said it was "all "right, we can all sleep in one room". The Respondent husband's

p. 46, ll. 44-48.

version was that these arrangements were made of necessity, but though the learned Judge accepted the Respondent husband's version of the reason for the sharing of the bedroom, he said that the Respondent husband "may have been weak in falling in with "this arrangement made by his wife's relations but I am unable to "find that he was out to sponge on Dean or connived at his wife's "conduct with Dean as the latter was well to do and was useful to "them in the way of money and presents". It is submitted that even though this conduct falls short in law of conduct conducing the adultery and connivance, it is certainly an example of disinterestedness on the part of the Respondent husband in his wife's relations with the Appellant, and should have been given full weight by the Judge when considering the issue of damages to be awarded. 10

19. Judgment of the District Court was delivered on the 31st day of December, 1948. It is not proposed in this Appeal to challenge any of the learned Judge's findings so far as they relate to the issues of desertion or adultery, nor the definitions which the learned Judge gave of connivance or condonation, neither of which were in fact in issue in the proceedings.

20. It is submitted that upon the evidence and his findings of fact the learned Judge was wrong in his assessment of the attitude of the Respondent husband to the Respondent wife's conduct. The Appellant had for six months at least prior to the break up of the marriage lived with the Respondent husband's family on terms of intimacy; according to the Respondent wife love making had been going on in the house for some time; and it is undisputed that on one occasion at least, namely at Nuwara Eliya, the Appellant shared a bedroom with the Respondent wife and the Respondent husband. After the Respondent wife left the matrimonial home, she visited the house daily to the Respondent husband's knowledge, yet no evidence was tendered by him to show that he took any proper steps to try and get her to return, or even to remonstrate with her. On the contrary, at his request she returned to the house for one night to celebrate her wedding anniversary. No steps were taken to commence divorce proceedings until March 1946, some fifteen months after the Respondent wife left the matrimonial home. It is submitted that such facts are explainable only upon the basis that the Respondent husband was, to say the least, indifferent as to whether his wife committed adultery or not. 40

21. The learned Judge was no doubt right in refusing to consider the Respondent husband's actions as amounting in law to connivance or condonation, but it is submitted that he omitted consideration of material factors relevant to the issue of whether any damages ought to be awarded, and to the amount of such damages. The learned Judge seems to have considered that provided 30

the Respondent husband's actions did not amount in law to connivance or condonation, such actions were irrelevant to the issue of damages. It is submitted that such is not the case, and that the whole of the circumstances, including the Respondent husband's own character and actions in relation to his wife and the Appellant, were most relevant, even though such actions fall short of connivance in the adultery. It is submitted that the dicta of McCardie J. in *Butterworth v. Butterworth & Englefield* 1920 P. at p. 157 correctly state the law on this topic "In assessing damages to
10 "the husband it seems to be essential that his whole character, and
"conduct and affection should be tested; these matters bear directly
"not only on the value of the wife but also on the question of any
"shock to his feelings which he may assert to have been caused by
"the adultery. The character and the conduct of the husband is as
"fully in issue as the character and conduct of the wife". In this
case it is submitted that the actions of the Respondent husband,
even though they fall short of connivance, disentitled him to any
or any substantial award of damages.

22. It is further submitted that the learned Judge failed to
20 give adequate consideration to the character of the Respondent wife,
and consequently to her value to the Respondent husband. The
learned Judge appears to have considered only the fact that she
looked after the children, kept house, and assisted in providing the
family income. Whilst it is not contended that these factors are
not without relevance, it is submitted that the true significance of
the gifts reflects not upon the Appellant as the giver but upon the
wife as recipient. If the gifts affected the wife's relations with the
Respondent husband in any way, then this is a factor which should,
it is submitted, be considered as detrimental to the wife's character
30 rather than the Appellant's, since there is no evidence that the gifts
were given with any corrupt intention.

23. Finally, it is submitted that the learned Judge was wrong
in concluding "that it was the wealth of the Appellant and the
"giving of expensive presents by him to the Respondent wife that
"won her affections and resulted in the breaking up of the
"Respondents' home". There is no evidence that the presents had
any such effect, or that they were given in order to benefit the
Respondent wife any more than the Respondent husband. The
learned Judge based his award of damages upon this factor, and it
40 is submitted that no such award should in the circumstances have
been made; alternatively that a nominal sum only should have been
awarded.

24 From this decision and order the Appellant appealed to the
Supreme Court. The Appeal was heard on the 1st day of September,

1950 and was dismissed with costs, no reasoned judgment being given.

25. The Appellant was granted conditional leave to appeal to the Privy Council by decree dated the 26th day of September, 1950 and this was made final by decree dated the 24th day of October, 1950.

26. It is submitted that the decree of the Supreme Court dated the 1st day of September, 1950 and the judgment and decree of the District Court of Colombo dated the 21st day of December, 1948 in so far as damages were awarded to be paid by the Appellant to the Respondent husband ought to be set aside or varied for the following amongst other 10

REASONS.

1. BECAUSE the conduct of the Respondent husband disentitled him to the award of any or any substantial damages.
2. BECAUSE the conduct of the Appellant did not warrant the award of any or any substantial damages against him.
3. BECAUSE the trial Judge's assessment of the value of 20 the Respondent wife was erroneous.
4. BECAUSE the trial Judge's assessment of the evidence as to the giving of presents to the Respondent wife was erroneous.
5. BECAUSE the trial Judge in fact assessed the damages on a punitive basis although recognising that this was not correct in law.
6. BECAUSE in all circumstances of the case the damages awarded were excessive.

STEPHEN CHAPMAN.

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In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

S. D. M. DEAN

v.

**1. ERIC ALLEN ANTHONISZ
and 2. MAUD MAGDALENE
ANTHONISZ née TRADIGO.**

CASE FOR THE APPELLANT.

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36, John Street,
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