

Privy Council Appeal No. 127 of 1928.

Eugene Berthiaume - - - - - *Appellant*

v.

Dame Anne-Marie Yvonne Dastous - - - - - *Respondent*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC
(APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 16TH JULY, 1929.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

MR. JUSTICE DUFF.

SIR LANCELOT SANDERSON.

[*Delivered by* VISCOUNT DUNEDIN.]

In 1913 the respondent, a French Canadian of the Roman Catholic faith, being then a girl 19 years of age who had just graduated from a convent in a small town in Montreal, went on a trip to Europe with her father. She there met the appellant, a member of a Quebec family and also of the Roman Catholic faith, who had been living in Paris for several years. He proposed marriage to her, and she accepted. The appellant asked the respondent to make the necessary arrangements, and she called on the curé of the parish where her fiancé had been residing and where she was then temporarily residing. The curé informed her that there were certain civil formalities to be gone through and that he would celebrate the marriage. She asked her fiancé to attend to the civil formalities and he took her to the British Consulate where certain papers were signed

and a certificate issued which was given to her fiancé. After that the parties proceeded to the church, the certificate was handed to the curé who then proceeded to celebrate the marriage according to the form of the Roman Catholic church. The parties lived together as husband and wife until the year 1926, when on returning from an absence from home the respondent discovered that the appellant had been guilty of infidelity and had introduced a mistress into their home. The respondent then applied to the Court in Paris for a divorce. That Court before proceeding further demanded the exhibition of a civil certificate of marriage. This the respondent was unable to produce. She discovered that the certificate which her fiancé had procured at the British Consulate was only a notice of intended marriage, and that the officiating curé had carelessly omitted to notice that it was not a certificate of marriage. As a matter of fact he had exposed himself to severe penalty by celebrating the religious ceremony without the production of a certificate. As no certificate of marriage could be produced—none such ever having been in existence—the Court declined to proceed with the case for divorce. The respondent then raised another action in the French courts, craving a judgment “*pour faire statuer le mariage,*” and craving alternatively that if the marriage was declared void it should be held that she had contracted it in good faith and was entitled to a declaration of civil effects in her favour. The appellant appeared and denied the jurisdiction, he having still retained his Canadian domicile. This plea was sustained and the action dismissed. The respondent then raised the present action in the Superior Court of the Montreal district. The action sought a declaration of marriage, decree of separation, a dissolution of the *communauté des biens*—the marriage having been without a marriage contract, *communauté des biens* would ensue—and a judgment for alimony. Damages were also claimed but that claim was departed from. Alternatively a declaration was sought that as the respondent had been in good faith, the marriage was a putative marriage and in terms of Article 164 of the Civil Code produced civil effects. The case depended before Loranger J. who held the marriage valid, pronounced a decree of separation, dissolved the community of goods and granted a decree against the appellant for an alimentary allowance of \$1,500 a month. On appeal the Court of King’s Bench by a majority upheld the judgment. Bernier J. dissented and held that the marriage was null and that a null marriage could not be a putative marriage. The present appeal is from that judgment.

Their Lordships are unable to agree with the judgment under appeal. If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—*locus regit actum*. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place

would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicil would be considered a good marriage. These propositions are too well fixed to need much quotation. They were laid down long ago in England in the well-known case of *Dalrymple v. Dalrymple*, 2 Hag. Con. 54 and in *Scrimshire v. Scrimshire*, 2 Hag. Con. 395 approved by Lord Stowell in *Ruding v. Smith*, 2 Hag. Con. at p. 393. A question precisely the same as the present had been decided in Scotland in the case of *Johnstone v. Godet* (1813) Ferg. Con. Law Rep. 8, mentioned by Lord Fraser in his work on Husband and Wife, vol. 2, p. 1310, where the parties had undergone a ceremony of marriage in Martinique, where the Code Napoleon prevailed. This marriage, if it had taken place in Scotland, would have been good. But there was no civil ceremony and the marriage was bad under the Code ; and it was held no marriage in Scotland.

Of course, these results may be altered by positive, *i.e.*, statute law. A good illustration may be given in the legislation which was passed in order to cure what was thought to be abuse of Gretna Green marriages. Marriage in Scotland can be constituted by mere words of *consent de presenti* in the presence of witnesses, and English couples used to cross the border by Gretna to be married by interchange of consent in the presence of the blacksmith and his assistant. A statute was passed declaring a marriage constituted by *consent de presenti* null where the parties had not previously resided in Scotland for at least three weeks.

Now in face of the facts set forth in the narrative above given, and these facts were found by all the Judges of the Courts below and are amply borne out by the evidence, it is clear that under international law there was no marriage in this case. The law of France is peremptory. There must be a civil ceremony of marriage and if that has not taken place any religious ceremony is an idle performance so far as the law is concerned. Learned counsel for the respondent could not controvert this statement of international law, and therefore he sought to show that the validity of the marriage was established upon positive law contained in the Civil Code of Quebec. The articles he relied on were the following :—

“ 7. Acts and deeds, made and passed out of Lower Canada, are valid, if made according to the forms required by the law of the country where they were passed or made.

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“ 51. On proof that, in any parish or religious community no registers have been kept, or that they are lost, the births, marriages and deaths may be proved either by family registers and papers, or other writings, or by witnesses.

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“ 128. Marriage must be solemnised openly, by a competent officer recognised by law.

"129. All priests, rectors, ministers and other officers authorised by law to keep registers of acts of civil status, are competent to solemnise marriage. . . .

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"135. A marriage solemnised out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid, if solemnised according to the formalities of the place where it is performed, provided that the parties did not go there with the intention of evading the law.

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"156. Every marriage which has not been contracted openly, nor solemnised before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the Court to decide according to the circumstances.

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"159. No one can claim the title of husband or wife and the civil effects of marriage, unless he produces a certificate of the marriage, as inscribed in the registers of civil status, except in the cases provided for by Article 51.

"160. Possession of the status does not dispense those who pretend to be husband and wife, from producing the certificate of their marriage.

"161. When the parties are in possession of the status and the certificate of their marriage is produced, they cannot demand the nullity of such act."

The last seven articles appear in chapter 2 of the Code, the heading of which is "Of the formalities relating to the solemnising of marriages." It is out of the question to suppose that the legislature is dealing with anything except the formalities to be observed in the Province of Quebec. It would be idle to provide formalities to be observed in all the parts of the world. This is clear enough from the heading, but it is made more clear by the phraseology implied in the articles. Take for instance article 129. Who can "keep registers of acts of civil status" except the persons that can be so authorised in the Province of Quebec? The term is inapplicable to anyone elsewhere. Article 130 with its reference to the early articles as to the publication of bans is also utterly inappropriate to a marriage except in the Province of Quebec.

The article however on which the respondent laid greater stress and on which the judgment of the Court below mainly proceeded is article 156. This is in a fasciculus of articles headed "Of actions for annulling marriage." It is not in such a division that one would expect the power of dealing with the constitution of marriage said to be contracted abroad. The article runs :—

"Every marriage which has not been contracted openly, nor solemnised before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the Court to decide according to the circumstances."

The first sentence gives the right of challenge and doubtless every foreign marriage could come within its words for no foreign marriage could have been solemnised by a competent officer, which obviously refers to such a person in Quebec. The words which are appealed to are the last words, and it is supposed to

add to their weight the fact that in the Code Napoleon on which the Quebec Code is obviously modelled the first sentence appears, but the words at the end do not. Let it be observed what the argument comes to. International law being as set forth, it is to be held that this saving clause gives a power to the Court to override that law as upheld in every other country of the civilised world, but it also if so interpreted would do more. It would enable the Court to declare marriage to arise from a proceeding which under the law of no country was ever supposed to be marriage. Naturally the good sense of the Quebec Judges would prevent them from doing any such thing; but when construction is in question the results of construction must be looked at. The truth is, that their Lordships can only look on this as a most preposterous suggestion and they agree with the view that Bernier J. took on this matter.

The case of a foreign marriage is dealt with in terms by article 135, and that expresses the doctrine of international law. As this is in the section dealing with the constitution of marriage, it would have been quite out of place to express the converse of the doctrine, so that the brocard *expressio unius est exclusio alterius* cannot apply. Their Lordships have therefore no hesitation in declaring that the so-called marriage in this case was *ab initio* null.

There remains however the question arising in sections 163 and 164. They are :—

“ 163. A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children, if contracted in good faith.

“ 164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage.”

Now as regards good faith, all the Judges held, and their Lordships agree with them, that there was perfect good faith on the respondent's part. She was a very young girl, quite ignorant of law, and from her antecedents and religion probably quite incapable of considering marriage as anything but a religious ceremony and ordinance. It is true that she was told that some civil formalities were necessary, but she had no exact knowledge of what that meant, and she would be amply satisfied with the assurance that they had been gone through at the British Consulate, all the more that the certificate produced was accepted as good by the officiating priest. Article 163 is only necessary for grammatical reasons; the real article touching this case is 164. It applies to this case in terms and deals with civil rights. Holding the views they did as to there being a real marriage, the majority of the learned judges found it unnecessary to deal with article 164, a case of what is generally known as putative marriage. The doctrine of putative marriage was well known to the canon law, and has been adopted by many systems which have founded

their law on the canon law. In England the canon law on this subject has been abandoned. In Scotland it is *in viridi observantia*. Scotland so far deserted canon law at the Reformation as to make divorce *à vinculo* competent, but otherwise its matrimonial system is founded on the canon law. Bernier J. who disagreed with the other learned Judges as to the question of marriage, dismisses this point with the curt observation that a putative marriage cannot be a marriage which is null. This is indeed an extraordinary proposition. It is just when a marriage is declared null that the doctrine of putative marriage becomes necessary. Cases of the insistence of the so-called wife on her rights are more rare, but cases of the assertion of legitimacy of children born of a marriage subsequently declared null are numerous in every system which accepts the doctrine of putative marriage.

Two arguments were then put forward by the learned counsel for the appellant directed as to the lady's right to alimony. First, he said that the civil rights referred to were only those which existed up to the date when the marriage was declared null. The simple answer is that the word is "produces," not "has produced," and the absurdity of such a doctrine when applied to the legitimacy of children, who in the article are linked with the wife, is manifest. Secondly, he said that obviously all the civil rights of a wife which flow from marriage could not continue to exist, *e.g.*, the right to cohabit, and therefore the right of alimony could not exist. It is, however, impossible to suggest on this view that any civil right still exists. It is quite true, as said, that all civil rights appendant to real marriage are not produced by a putative marriage. But the criterion is obvious, those only subsist which are consistent with a real marriage not existing. Alimony is such a right. The duty of a husband to support his wife is quite apart from his duty to cohabit with her. This is correctly shown in the form of a decree of separation which deals with the mensa as separate from the torus.

Their Lordships are therefore of the opinion that the respondent is entitled to alimony. The argument of learned Counsel turned so specially on the question of alimony, that scant mention was made as to the *communauté de biens*. Their Lordships would have felt inclined to hold that inasmuch as nullity of marriage was declared, it was equivalent to saying that no *communauté de biens* ever really existed; to declare the dissolution of what never existed would be a pleonastic proceeding. But the learned Judges of the Court below who decided that the marriage was valid have had no opportunity of saying what are exactly the civil rights of a putative marriage, and since the case was first heard their Lordships have had their attention directed to several cases which seemed to point to a settled practice as to this, which their Lordships in such a matter would not willingly disturb. They are, therefore, of opinion that the case should be remitted to the Superior Court of Quebec to deal with the civil effects of a marriage held null

but allowed to be putative: it being distinctly understood that their Lordships are clearly of opinion that the continuance of alimony to the wife is one of the civil effects, the amount of which it will be for the Court of Quebec to determine, the amount decreed for in the judgments recalled being continued in the meantime.

The costs of the appeal will be borne as between solicitor and client by the appellant, who will also fulfil the other articles of the conditions on which special leave to appeal was granted.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the case remitted to the Superior Court accordingly.

In the Privy Council.

EUGENE BERTHAUME

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DAME ANNE-MARIE YVONNE DASTOUS.

DELIVERED BY VISCOUNT DUNEDIN.

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