

Ernest Clarence Hill - - - - - Appellant

v.

Ernest Carlton Hill - - - - - Respondent

FROM

THE COURT OF ORDINARY OF BARBADOS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY, 1959

Present at the Hearing:

LORD SOMERVELL OF HARROW

LORD DENNING

MR. L. M. D. DE SILVA

[Delivered by LORD SOMERVELL OF HARROW]

This is an appeal pursuant to special leave from a judgment of the Chief Judge in the Court of Ordinary of Barbados dismissing a petition by the appellant for a declaration that a marriage between Ernest Clarence Hill and Marion Allanzena Green was invalid and to grant Probate in solemn form of a Will dated the 19th September, 1952.

Ernest Clarence Hill hereafter called the deceased died on the 30th April, 1955. He was over 80 years of age.

The deceased had been married in early life. There are three surviving children of that marriage. It is common ground that the wife of that marriage had died before October, 1954, when the ceremony in issue took place.

Since about 1925 the deceased had cohabited with Marion Allanzena Green and he continued to do so until his death. She bore him eight children of whom the appellant is one. The will made provision for Miss Green and several of the said children and under it the appellant and Miss Green were appointed executors.

The appellant filed the will for probate on the 6th April, 1956. On the 21st June, 1956, a caveat was entered on behalf of the respondent as heir at law. He petitioned for Letters of Administration on the basis that the deceased had died intestate the will having been revoked by a subsequent marriage.

In October, 1954, the deceased suffered from dysentery and a strangulated hernia. His physical state was critical. An operation was necessary and was performed at Dr. Bayley's Clinic on 25th October. It was doubtful whether he would survive. He did so and left the Clinic on 1st November.

Miss Green said in her evidence that on the evening after the operation "he told me to go and bring the Reverend and he would marry me". The Reverend was a Mr. Winter a Christian Minister of the New Testament Church of God in Barbados. Mr. Winter who died before the trial and Mrs. Winter who gave evidence were friends of the deceased and Miss Green and the family. Miss Green told Mrs. Winter whom she saw on the 26th what the deceased had said to her. Mrs. Winter told her husband and as a result Mrs. Winter took Miss Green on the morning of the 27th to get the licence which was necessary as no banns had been published.

On the evening of the 27th a ceremony of marriage took place between the deceased and Miss Green. Two witnesses were present one of whom gave evidence, the other not being available. Mrs. Winter was present and two of the children.

The appellant submits that the deceased had not capacity in that he was not sufficiently capable of understanding the contract of marriage. It is convenient to consider this point first.

Their Lordships accept the formulation of the test as laid down by Singleton, L.J., in *In re Park deceased Park v. Park* [1954] p. 89. "Was the deceased . . . capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage" (loc. cit. p. 127). The onus is on the appellant to negative capacity.

The deceased had been married before. Mr. Winter, as one would expect, had previously urged him to marry Miss Green. The idea was not a new one. The deceased told Miss Green on 25th October that he would marry her. Dr. Emtage said that after his operation his general condition improved rather rapidly:—"he talked to me every day normally. He answered my questions normally. Of course my questions were only professional." Mr. Gill the witness (who was not cross-examined) said "When we got there Rev. Winter asked Mr. Hill if he knew who he was. He said 'Yes'. He asked if he knew what he had come there about. He said 'Yes, to marry him to Miss Green.'" A Mr. Thomas went to see the deceased two days after he returned home. The deceased remembered his name and Mr. Thomas said he had heard he was married. "He" the deceased- "said there was no difference between the first and the second" referring to his two marriages.

in their Lordships' opinion the point as to capacity clearly fails.

The appellant submits that the marriage was invalid as to form. This raises in the first place a question on the construction of section 2 of The Marriage Act. That section applies to "any Minister of the Christian religion, . . . according to the usage of the persuasion to which he may belong". The earlier part of the section deals with the publishing of banns which does not arise here because of the licence: it then proceeds to authorise the Ministers as set out above "to solemnise matrimony between the said parties according to such form and ceremony as shall be in use or be adopted by the persuasion to which the Minister solemnising such marriage shall belong; provided that whenever the form and ceremony used shall be other than that of the Anglican Church in this island each of the parties shall in some part of the ceremony make the following declaration.

I do solemnly declare that I know not of any lawful impediment why I, A.B. may not be joined together in matrimony to C.D. here present."

And each of the parties shall say to the other:

"I call upon these persons here present to witness that I, A.B. do take thee C.D. to be my lawful wedded wife (or husband)."

And provided also that there be no lawful impediment to the marriage of such parties.

If the first proviso has to be literally complied with the marriage was invalid. Neither the deceased nor Miss Green made the declarations as set out. There are a number of cases in which courts have had to determine whether provisions are mandatory or directory. It depends in each case on the general subject matter of the statute in relation to the provision in issue. Marriage is admittedly *sui generis* and no help is to be got from decisions in other fields. In *Catterall v. Sweetman* 1 Rob. Eccl. 303 at p. 320 Dr. Lushington had to decide whether non-compliance with the provisions of a local Marriage Act nullified a marriage. He said

"In any case of doubt, I ought never to pronounce a marriage null and void. In this case I do entertain (to express my opinion in the weakest terms) the gravest doubts as to this act creating a nullity. I think so, firstly, because I find no instance of any words in any Marriage Act being held to import a nullity if the act did not expressly create a nullity. Secondly, if this interpretation should be at variance with decisions of other courts on other matters, it must always be remembered that marriage is essentially distinguished from every other species of contract."

In *Beamish v Beamish* 9 H.L.C. 274 the House of Lords considered the question whether a man in holy orders could officiate at his own marriage (loc cit 339). It was decided he could not. In delivering his Opinion Lord Campbell, the Lord Chancellor, said "It was argued, as a conclusive objection, that, the bridegroom officiating as clergyman, it would be utterly impossible for him to use the language of the marriage service in the Prayer Book, or to follow the directions of the Rubric respecting the opening address to the congregation; the adjuration to the couple about to be married, as to confessing any lawful impediment to their union; the demand, 'Who giveth this woman away to be married to this man?' the putting on of the ring on the finger of the bride, and in pronouncing the benediction. But none of these is absolutely essential to the validity of the marriage, although very fit to be strictly observed; and marriages have been held to be valid where each of these parts of the service has been omitted, the essential part of the service being the reciprocal taking each other for wedded wife and wedded husband till parted by death and having joined hands, being declared married persons." The Judges were dealing of course with an Anglican marriage and the provisions of the rubric.

Their Lordships are of opinion that a failure to comply literally with the proviso does not invalidate the marriage. It must however be clear that each party intended to contract a Christian marriage and there must be in the service passages which make plain the necessity for the absence of lawful impediment and the taking of one another to be the lawful wedded wife or husband.

Mrs Winter produced the book which her husband used. It was the Book of Common Order of the Church of Scotland. (It had interleaved a page from another marriage service similar to that in the Revised Prayer Book of the Church of England.) The service in the book contains the following passage:

"Into this holy estate these two persons now desire to enter. Wherefore if any one can shew any just cause why they may not lawfully be joined together in marriage, let him now declare it.

Also I require and charge you both, as you shall answer at the day of judgment, that if either of you know any just cause why you may not lawfully be joined together in marriage, you do now confess it."

Under an alternative form in the book the parties do not have each to make a declaration but only reply to a question:

"Do you, N., take this woman, N., to be your wedded wife; and do you, in the presence of God and before this congregation (or, these witnesses), promise and covenant to be to her a loving, faithful, and dutiful husband, until God shall separate you by death?

I do."

Owing to the state of the deceased it would be natural that Mr Winter should use this form.

In their Lordships' opinion this form if carried out would be a compliance with the proviso. There is some conflict of evidence as to what happened and there are some gaps in the evidence. The learned Chief Judge in upholding the validity of the marriage relied on the presumption of validity as stated in Halsbury's Laws of England

"Where there is evidence of a ceremony of marriage having been gone through, followed by the co-habitation of the parties, everything

necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence”.

It was submitted that the presumption as so worded could not apply with full force to this case where co-habitation preceded as well as followed the ceremony. There is no substance in this as the presumption is laid down clearly in *Piers v. Piers* 2 H.L.C. 331 and in that case the parties had, as here, co-habited and had children for many years before the ceremony. It is clear that a balance of probabilities is insufficient to rebut the presumption. Various epithets have been used but their Lordships accept the word in the passage cited by the learned Judge :- the evidence must be decisive.

It would need very strong evidence to justify a conclusion that Mr. Winter did not conduct the service in accordance with the form in his book. It was plainly to all concerned a marriage ceremony. Mr. Gill remembered Mr. Winter “speaking about just cause etc.” He saw the bride and bridegroom holding hands, though it may be this was not essential. There was no ring. He did not hear the deceased say anything. Mrs. Winter said that the deceased answered audibly. Mrs. Hill (as their Lordships are holding she became), gave evidence which was consistent with the deceased not realising what was happening. She said she did not hold hands and took no part in the service. There is therefore a conflict of evidence but in their Lordships’ opinion there is no sufficiently satisfactory or decisive evidence to establish the invalidity of this ceremony.

The result of Mr. Winter’s good intention is very unfortunate for Mrs. Hill and the children. Their Lordships would like to associate themselves with the concluding observations of the learned Judge.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. Their Lordships think the appellant was justified in bringing this appeal in a difficult case and that the costs of each side should come out of the estate.



In the Privy Council

ERNEST CLARENCE HILL

v.

ERNEST CARLTON HILL.

DELIVERED BY
LORD SOMERVELL OF HARROW