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32 C, 187 (=9 C. W. N. 323=1 C. L. J. 55.)

[187] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

H. A. LUCAS *v.* THEODORAS LUCAS.*

[16th December, 1904.]

Marriage, validity of—Roman Catholic of Indian domicile—Marriage with deceased wife's sister—Nullity of Marriage—Domicile.

The courts in India will not disallow a Roman Catholic of Indian domicile, who has obtained the necessary dispensations, from marrying his deceased wife's sister who by the law of her own Church may be incapable of contracting the marriage. The husband's capacity renders the marriage valid in law.

Lopes v. *Lopes* (1) referred to.

(*Per* MITRA, J.) In India there is no enactment forbidding absolutely the marriage of a domiciled British Indian subject with his deceased wife's sister. In such a case the rule to be applied is that of equity, justice and good conscience, and for which the usages of the class to which the parties belong may be looked to.

Brook v. *Brook* (2) ; *In re Bozzelli's Settlement, Husey. Hunt* v. *Bozzelli* (3) referred to.

SECOND APPEAL by the defendants, Mrs. Harriet Andriana Lucas and others.

This appeal arose out of an action brought by the plaintiffs, Theodoras Lucas and others, to recover possession of certain immoveable property, on declaration that the plaintiffs were the legitimate sons of one L. T. Lucas, deceased.

It was alleged by the plaintiffs that L. T. Lucas, was a Greek domiciled in British India for three generations ; that he had by his first wife an only son, the defendant No. 2 ; that on the death of the first wife their father married his deceased wife's uterine sister [188] Anna Stephanos, an Armenian lady and a member of the Armenian Church, and that the marriage was celebrated in the Roman Catholic Church at Dacca by the Pro-Vicar Apostolic of East Bengal, necessary dispensations having been previously granted by him ; that they were the lawfully begotten offsprings of this marriage ; that after the death of their mother, Anna Stephanos, their father married Harriet Andriana, the defendant No. 1, and had by her seven children; that their father having died intestate they were entitled to a share of the property left by him ; that the defendant No. 1 applied for letters of administration to the estate of L. T. Lucas and impugned the validity of the marriage between their (the plaintiff's) parents ; that the District Judge granted letters of administration to the defendants, but left the question of the plaintiffs' legitimacy open ; and hence this suit.

The defence, *inter alia* was a denial of the marriage between L. T. Lucas and Anna Stephanos. The defendants stated that L. T. Lucas was born a Greek, died a Greek and never became a Roman Catholic ; and that according to the Greek Church to which L. T. Lucas belonged there could be no valid marriage with the deceased wife's sister.

* Appeal from Appellate Decree, No. 2254 of 1902, against the decree of J. H. Temple, District Judge of Backergunge, dated July 11, 1902, confirming the decree of Ananda Nath Mozumdar, Subordinate Judge of that District, dated Oct. 7, 1901.

(1) (1885) I. L. R. 12 Cal. 706.
(2) (1861) 9 H. L. C. 193.
(3) (1902) 1 Ch. 751.

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The Court of first instance decreed the plaintiffs' suit, holding that there was a valid marriage between L. T. Lucas and Anna Stephanos; and, on appeal, the District Judge affirmed the decision of the first Court.

The defendants appealed to the High Court.

Mr. *A. M. Dunne* (Mr. *W. Gregory*, Babu *Charu Chandra Ghose* with him), for the appellants. The husband was a Greek by birth, was a member of the Greek Church, and remained a member of that church till his death, though the suggestion is that at the time of the marriage in question he was a Roman Catholic by religion. The lady was an Armenian and a member of the Armenian Church. Under these circumstances, the question would arise—Could a lady, who is an Armenian by birth and religion, legally marry a Greek who is, the husband of her deceased sister? The evidence is, that a dispensation had been obtained, but it was a dispensation relating to an **[189]** impediment of the second degree of affinity. Now, the impediment which subsisted between the contracting parties was an impediment of the first degree of affinity, and it is submitted that a dispensation for the second degree could not cure the defect arising from the subsistence of an impediment of the first degree of affinity. I say, therefore, that the presumption which would ordinarily arise and which undoubtedly would be very strong in favour of the validity of a marriage, is displaced in the present case. The onus of proof therefore which would lie in the first instance on the party impugning the marriage is, and has been, satisfactorily discharged. It is submitted, therefore, that even assuming that the husband was a Roman Catholic when he contracted such a marriage, it is bad, inasmuch as there was no proper dispensation of marriage. In the second place, it is submitted that, having regard to the decision of the Full Bench in *Lopez* v. *Lopez* (1), the law governing such marriages in India, in cases where it is shown that the law as it prevails in England does not apply, will be the customary law of the class to which the parties belong. The question, therefore, arises—Can a Roman Catholic, assuming that the husband was such, marry an Armenian whose law prohibited her from entering into such a marriage? The rule of law in deciding a question like this is stated in Dicey on Conflict of Laws, p. 626, thus:—"A marriage is valid when each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other": see *Brook* v. *Brook* (2), *Sottomayer* v. *De Barros* (3), *Mette* v. *Mette* (4); see also Dicey, pp. 642 and 646. In the third place, it is submitted that having regard to the findings that the husband was a Greek by birth and religion and died in the faith of the Greek Church, the marriage was bad, even assuming he got the necessary dispensation from a dignitary of the Roman Catholic Church. Does dispensation get rid of the disabilities imposed by the Greek Church? The exception suggested from Sir James Hannen's decision in *Sottomayer* v. *De Barros* (5) has been criticised by Mr. Westlake and is, it is submitted, opposed to *Mette* v. *Mette* (4).

[190] Mr. *S. P. Sinha* (Babu *Chandra Kanta Ghose* with him), for the respondents. The argument of the other side, that if the marriage is to be treated as a valid one having regard to the laws of the Roman Catholic Church, the evidence is that the marriage cannot be valid, presupposes that whatever dispensation was given is contained in the certificate. It is submitted that there is nothing on the record to show that

(1) (1885) I. L. R. 12 Cal. 706.
(2) (1861) 9 H. L. C. 193.
(3) (1877) L. R. 3 P. D. 1.
(4) (1859) 1. S. W. Tr. 416.
(5) (1879) L. R. 5 P. D. 94.

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a proper dispensation was not given, and that the presumption in favour of a marriage like the present one, which according to *Lopez* v. *Lopez* (1) is of unusual strength, is not at all displaced.

In the second place, it is submitted that the Courts in England have not adopted the rule that each of the contracting parties must have capacity to marry according to the law of his or her domicile. It would be enough if it were shown that the husband had the capacity: see *Sottomayer* v. *De Barros* (2); Dicey on Conflict of Laws, p. 626 (foot note). The opinion of Savigny is in favour of such limitation of the rule: so Dicey, p. 647 (foot-note): see also Westlake's Private and International Law, pp. 55 and 59.

Babu *Charu Chandra Ghose*, in reply.

Cur. adv. vult.

PRATT, J. The two plaintiffs in this case sued for a declaration that they are the legitimate sons of the late L. T. Lucas, and as such are entitled to a certain share of his estate. The defendants are the widow of L. T. Lucas, who is administratrix of his estate, and also his children and the children by Lucas's first wife.

Lucas was a Greek and Anna Stephanos, the mother of the plaintiffs' was an Armenian and sister of his first wife. They were all domiciled in British India.

The plaintiffs succeeded in both the lower Courts, it being held that though Lucas belonged to the Greek Church which does not recognize the validity of a marriage by a man to his deceased wife's sister, nevertheless he did for a time profess the Roman Catholic faith and that he was lawfully married to Anna **[191]** Stephanos at Dacca by the Pro-Vicar Apostolic. Such a marriage is permissible by the Roman Catholic Church only if the necessary dispensations have been obtained, one of which is for an impediment of affinity in the first degree. The extract from the Marriage Register of the Dacca Roman Catholic Church is in the following terms :—

" On the 4th May, 1857, without any publication of banns previous dispensation being given, and after diligent enquiries an impediment of affinity in the second degree being discovered, and previous dispensation being given by virtue of my powers received from Rome, and dispensation being given also *disparitate cultus*, I the undersigned, Pro-Vicar Apostolic of Eastern Bengal having previously observed what is prescribed by the Holy Catholic Church for the validity of mixed marriages, have united in matrimony " [here follow the names and descriptions of L. T. Lucas and Anna Stephanos.]

The lower Courts held that in spite of an impediment of only the second degree being recited in the Marriage Register, it must be presumed that all the necessary dispensations had been obtained and that this presumption had not been rebutted.

In appeal before us it is contended,—

(i) that the presumption relied on is rebutted by the recitals in the Register itself;

(ii) that marriage between the parties was absolutely prohibited by both the Greek and Armenian Church and could not be possibly legalized;

(iii) that the law of the Roman Catholic Church was not the law of the class to which Lucas belonged.

(1) (1885) I. L. R. 12 Cal. 706. (2) (1879) L. R. 5 P. D. 94.

32 C. 187=9 C. W. N. 323 1 C. L. J. 55.

As regards the question of presumption it was observed by Wilson, J., in the case of *Lopez* v. *Lopez* (1) that the presumption in favour of everything necessary to give validity to a marriage is one of very exceptional strength, and that the evidence to rebut the presumption must be strong, distinct, satisfactory and conclusive.

In that case the parties were East Indians, and members of the Roman Catholic religion, one being the deceased wife's [192] sister of the other. The man was described as a bachelor in the Marriage Register, implying ignorance as to his real status on the part of the officiating priest, and yet it was presumed that a dispensation of the first degree had been granted.

In the present case it has been found that the Pro-Vicar Apostolic and the parties were well known to each other, and the District Judge pertinently remarks : " I cannot believe for a moment that the Pro-Vicar Apostolic granted a dispensation which he knew to be invalid, and performed the ceremony of marriage which he also knew to be invalid." The Register does not expressly say that a dispensation of the second degree was obtained and not one of the first degree. The statement that the impediment of affinity was in the second degree may, under the circumstances, be reasonably taken to be a slip of the pen. We think the Courts have rightly applied the presumption, and that the same has not been rebutted by anything contained in the extract from the Marriage Register.

The remaining contentions are that there was an absolute and irremoveable bar to the marriage, and that Lucas was not governed by the law of the Roman Catholic Church.

We may premise that there is no evidence on the record as to the law prevailing in the Armenian Church. There is an observation of the District Judge, which has been quoted as equivalent to a finding, that Lucas could not marry his deceased wife's sister according to the Tenets of the Armenian Church : but he seems to have only stated this as being involved in the contentions of the appellants, and we do not think he could have intended to accept it as law without proof.

However, upon the authorities, it would appear that the question we have to decide is not affected by the status of the wife if the husband possessed the necessary legal capacity for entering into a valid marriage. In the case of *Lopez* v. *Lopez* (1) it was held that the prohibited degrees for the parties to the marriage were not the degrees prohibited by the law of England but those prohibited by the customary law of the class to which they belong, that is to say, the law of the Roman Catholic Church as applied in [193] this country. In Dicey on the Conflict of Laws, Chapter XXVII, rule 169, it is laid down that provided certain conditions as to the form of celebration are complied with, a marriage is valid when each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other. In a footnote it is stated, " This rule is only affirmative. It is possible that a marriage may be valid, though the husband alone has capacity to marry according to his *lex domicilii* : *Sottomayer* v. *De Barros* (2)" and at page 646 (Edition of 1896) the following exception is set out : " A marriage celebrated in England is possibly not rendered invalid by the incapacity of the wife according to the law of her domicile to marry the husband, if the husband being domiciled in England is, by English law, under no incapacity to marry the

(1) (1885) I. L. R. 12 Cal. 706. (2) (1879) 5 P. D. 94.

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wife." And further at page 647,—" The suggested limitation has been acted upon in one case to the extent stated in the exception and must provisionally at least be assumed in spite of its illogical character to be good law."

The case in question was that of *Sottomayer* v. *De Barros* (1). The man and woman were Portuguese and related as first cousins, the former being domiciled in England. The woman was domiciled in Portugal and was under the law of her domicile incapable of marrying her first cousin. It was held that their marriage in England was valid.

Now, in India there is no legislative prohibition against persons who are not British subjects and of English domicile marrying, though they be within the prohibited degrees as understood in England. It thus follows from the case just cited, considered in conjunction with that of *Lopez* v. *Lopez* (2), that the courts in India will not disallow a Roman Catholic of Indian domicile, who has obtained the necessary dispensations, from marrying his deceased wife's sister, though by the law of her own church she may be incapable of contracting the marriage. The Armenian Church might possibly not recognize the marriage, but the husband's capacity renders the marriage valid in law ; and the courts in India will accordingly declare the issue of such marriage to be legitimate.

[194] In Rattigan's Law of Divorce the subject is summarised thus at p. 136:—" (*a*) If both parties are domiciled in India. There being no express law in British India which defines the prohibited degrees of consanguinity or affinity," each case must be decided by reference to the personal law of the parties to the marriage, *i.e.*, to the customary law of the class to which such persons belong. If both parties are subject to the same personal law, the marriage will be invalid if forbidden, valid if allowed, by that law. If on the other hand, they are not subject to the same personal law, the marriage, if allowed by the personal law of the husband, will (presumably) not be invalid by the law of British India simply because it may happen to be forbidden by the personal law of the woman."

In the next place, it is urged that Lucas's profession of the Roman Catholic faith was not genuine, and that he speedily reverted to his original faith, viz., that of the Greek Church and so remained until his death, the children of the marriage in question having been baptized in the Greek Church and brought up in that religion. Therefore it is contended that the law of the class to which Lucas belonged was the law of the Greek Church alone. It is not however the province of a Court to examine the sincerity of a man's religious convictions. A convert to Mahomedanism, for example, is permitted in this country to practise polygamy without being required to prove the sincerity of his conversion. In the present case, the fact of Lucas's embracing the Roman Catholic faith, of his being received into the Romish Church, is not open to question in second appeal; and as he was married while in full communion with that church, he must be regarded for the time being as governed by the law of the class known as Roman Catholics, and his subsequent apostacy will not affect the validity of that marriage.

In the result, we find no valid reason for declaring void the marriage which was duly solemnized in the year 1857, and we accordingly dismiss the appeal with costs.

MITRA, J. I agree with my learned brother and for the reasons given by him that this appeal fail. I would, however, add a few words.

(1) (1879) 5 P. D. 94. (2) (1885) I. L. R. 12 Cal. 706.

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[195] In this country, there is no enactment absolutely forbidding the marriage of a domiciled British Indian subject with his deceased wife's sister. A Hindu may marry his wife's sister even during the lifetime of his wife. A Mahomedan may marry his deceased wife's sister. There is no *lex domicilii*. Section 37 of Act XII of 1887, the Bengal North-Western Provinces and Assam Civil Courts Act, lays down that in questions relating to marriage, the personal laws of Hindus and Mahomedans will respectively regulate them. As regards the followers of other religions, the section says that the Courts in India should apply the rule most consonant with equity, justice and good conscience.

We have here the case of the marriage of a man of the Roman Catholic persuasion for at least the time being, and an Armenian woman, both domiciled inhabitants of British India. The rule to be applied is that of equity, justice and good conscience. It was so held in *Lopez* v. *Lopez* (1) on an interpretation of enactments similar to Act XII of 1887.

Now where is this rule of equity, justice and good conscience to be found ? The answer given in *Lopez* v. *Lopez* (1) is that we have to look to the usages of the class to which the parties belong. But the parties in that case belonged both to the class which was governed by the law of the Roman Catholic Church as applied to this country. Here the usage is difficult to ascertain if there was any. Nor is there any evidence of usage adduced by the parties which is especially applicable to a case like this. There is evidence that the Greek Church absolutely prohibits the marriage of a man with the sister of his deceased wife. There is also evidence that on a proper dispensation being granted such a marriage may be valid if the parties are Roman Catholics. There is, we are informed, no evidence on the record as to usage in India as regards the Armenian Christians. The rule laid down in *Lopez* v. *Lopez* (1) does not help us in the solution of the question raised in this case.

Brook v. *Brook* (2), *Sattomayer* v. *De Barros* (3) and *Mette* v. *Mette* (4) turn on the *lex domicilii* of one or both parties to the marriage or the place of the celebration of marriage and do [196] not touch a case where there is no *lex domicilii* or *lex situs* which may affect the contract.

There being no municipal law or well established usage prohibiting the marriage of a domiciled British Indian of the Christian religion with reference to consanguinity or affinity, I am disposed to test its validity by the rule laid down in Story's Conflict of Laws, section 113, as the rule of equity, justice and good conscience. "Christianity is understood to prohibit polygamy and incest and therefore no Christian country would recognise polygamy and incestuous marriages. But when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are declared incestuous. It is difficult to ascertain exactly the point at which the law of nature or the authority of Christianity ceases to prohibit marriages between kindred, and Christian nations are by no means generally agreed on this subject." In *Brook* v. *Brook* (2) Lord Cranworth approves of this passage saying that it is strictly consonant to the law of nations. He says, speaking of a marriage between a man and his deceased wife's sister,—" It was contended that, according to the argument of the respondent, such a marriage, even between two Danes celebrated in Denmark, must be contrary to the law of

(1) (1885) I. L. R. 12 Cal. 796.
(2) (1861) 9 H. L. C. 193.
(3) (1877) 3 P. D. 1; (1879) 5 P. D. 94.
(4) (1859) 1 Sw. & Tr. 416.

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God, and that, therefore, if the parties to it were to come to this country, we must consider them as living in incestuous intercourse, and that if any question were to arise here as to the succession to their property, we must hold the issue of the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our law which makes the marriage void, and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction." Referring to the opinion of Mr. Justice Story Lord Cranworth adds: "But suppose the case of a Christian country, in which there are no laws prohibiting marriages within any specified [197] degrees of consanguinity or affinity, or declaring or defining what is incest; still, even there, incestuous marriages would be held void, as polygamy would be held void, being forbidden by the Christain religion. But then, to ascertain what marriages are within that rule, incestuous, a rule not depending on municipal laws but extending generally to all Christian countries, recourse must be had to what is deemed incestuous by the general consent of Christendom. It could never be held that the subject of such a country were gulity of incest in contracting a marriage allowed and approved by a large portion of Christendom, merely because, in the contemplation of other Christian countries, it would be considered against God's law."

In the present case the marriage would be valid by the law of many Christian countries, and certainly cannot be regarded as incestuous by the general consent of Christendom.

In *Bozzelli's Settlement, In re, Husey-Hunt* v. *Bozzelli* (1), Swinfen Eady J. followed the opinion of Mr. Justice Story and held, that incestuous meant incestuous by the general consent of Christendom. The colonial statutes recognise the validity of the marriage of a man with a deceased wife's sister and they have received the sanction of the Crown. And I do not see on what principle except that of municipal law or well established usage may the marriage in this case be declared invalid. The marriage was celebrated in a Christian Church by a Christain clergyman and was recognized by the community to which the parties belonged. There is a presumption as to its validity and not being incestuous by the general consent of Christendom should be declared valid in our Courts.

Appeal dismissed.

32 C. 198 (=32 I. A. 1=9 C. W. N. 225=2 A. L. J. 190.)

[198] PRIVY COUNCIL.

CHATTERPUT SINGH *v.* MAHARAJ BAHADUR.*

[8th, 22nd and 28th, June, and 11th November, 1904.]

On appeal from the High Court at Fort William in Bengal.

Lis Pendens—Purchase from heir during administration suit—Rival Mortgagees—Priority of Title—Purchaser from Receiver in administration suit—Purchaser at sales in execution of mortgage decree—Transfer to Benamidar, pendente lite—Transfer of Property Act (IV of 1882), ss. 52, 53.)

* *Present*: LORD DAVEY, LORD ROBERTSON and SIR ARTHUR WILSON.

(1) (1902) 1 Ch. 751.