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POWERS OF PROVINCIAL LEGISLATURES AS TO MARRIAGE.

In the recent case of *Henderson* alias *Breen* v. *Breen,* reported in (1923)[1] Beck, J., enunciated the doctrine that a provincial legislature cannot legislate so as to invalidate a marriage entered into contrary to the rules framed by it with regard to the consent of parents; this expression of opinion by the learned judge was an *obiter dictum,* but the very fact that he deemed it expedient to pronounce such an opinion shows how indistinct at the present moment is the line of demarcation between the powers of legislation, as to marriage, of the Dominion and the Provinces of Canada.

The question arises in a practical form when a provincial legislature is asked to replace restrictions upon the right to marry, for instance, to prohibit the marriage of persons under a certain age, say sixteen or eighteen years, and to declare that failure to comply with the required conditions shall render the marriage ceremony void. The Dominion Parliament having confined its activities to a few sections authorizing marriage with a deceased wife's sister or sister's daughter, or a deceased husband's brother or brother's son, such requests are constantly made by representative bodies of women, and it is a matter of importance to determine whether and to what extent the provincial authorities can comply therewith.

The Province of Ontario has gone further in asserting provincial control of the subject. Thus, by amendments to The Marriage Act in 1919, after requiring the consent of parents or guardians to the marriage of a minor under the age of eighteen, it is declared that, with certain exceptions, "such consent shall be deemed an absolutely essential condition precedent to the formation or solemnization of a valid marriage, and the marriage if solemnized without such consent shall . . . be *absolutely null and void.*" How far is legislation of this kind supported by authority?

[1] 2 W. W. R. 480.

By section 91 of the B.N.A. Act the parliament of Canada has exclusive legislation over all matters coming within the subject "Marriage," and by section 92 the provincial legislatures may exclusively make laws in relation to the solemnization of marriage in the provinces. If, therefore, it is possible to affix a correct meaning to the word "solemnization" as used in the statute, it ought to be easy to determine the permitted spheres of activity of the Dominion and provincial legislatures respectively.

Reference to the Standard Dictionary tells us that to "solemnize" means to perform as ceremonies or solemn rites, or according to legal forms; "as to solemnize marriage." The Privy Council has told us in *Re Marriage Legislation in Canada*[2] that "solemnization" has the meaning that it ordinarily had in the system of law in the provinces of Canada at the time of Confederation, that is to say, in 1867. What, then, did it mean at that time?

From the mass of legislation as to marriage, it may suffice to set out a few specimens, which show clearly what the word ordinarily meant. The Civil Code of Lower Canada laid down as a condition of marriage that the "act" must be signed by the officer who solemnized the marriage. In Art. 128, it provided that marriage must be solemnized openly, by a competent officer recognized by law. In Upper Canada, 33 Geo. 3, cap. 5, as revised in 1843, section 3 runs in part as follows—"And if no valid objection shall have been made to such intended marriage, when three Sundays have intervened after the publication of the said notice, it shall and may be lawful for the said magistrate to proceed to solemnize the marriage."

The Imperial Consular Marriage Act of 1849 in section 9 provides that "Every such marriage shall be solemnized at the British Consulate, with open doors, between the hours of eight and twelve in the forenoon."

A glance at Bacon's Abridgement, Edition 1832, shows us that even then there was a well marked difference between the capacity to marry and the ceremony of marriage. Thus, he divides the subject matter of marriage and divorce into, *inter alia,* the following headings:—

A—What persons may marry, and particularly within the Levitical degrees?

and under this heading the very first thing that is dealt with is the question of consents.

The heading "C" begins as follows—"Of the solemnization and ceremonies requisite to a complete marriage; and herein of the

[2] [1912] A. C. 880.

offence of performing the ceremony without due authority or licence." From this it would appear to be clear that, in Bacon's opinion, the person performing the ceremony was a part of the act of solemnization.

The Privy Council, in the case which has just been quoted, seems to have thought so also. The real question involved in that case was whether it was within the legislative power of the Dominion Parliament to enable any person who had authority to perform any ceremony of marriage by the local law, to perform it validly, whatever was the religious faith of those married by him; or, to put it in another way, to which of the contending legislatures, Dominion or provincial, fell the authority to make the officiation of the proper person a condition of the validity of a marriage?

The Privy Council held that section 92 of the B.N.A. Act enables provincial legislatures to enact conditions as to solemnization which may affect the validity of the contract, the particular condition before them being the officiation of the proper person. In other words, the Privy Council, Bacon and the statutory provisions just quoted seem to have agreed that the person performing the ceremony was an integral portion of the act of solemnization.

It may also be safely premised that the word "solemnization" when used with regard to marriage has not undergone any change of meaning for many centuries, as we find that Murray's dictionary gives as the modern special meaning of the word "the celebration or performance of a marriage," and that in the Prayer Book of 1548 one of the offices is "The Forme of Solemnization of Matrimonie."

It is impossible then to extract anything more from the judgment of the Privy Council that a provincial legislature may, in legislating as to the solemnization of a marriage, legislate to the effect that the marriage must be, or need not be, solemnized by the member of any particular class, but cannot be read as a statement that a provincial legislature could make the consent of parents, or any one else, a condition of the validity of the marriage. They could, if parental consent can be considered part of the solemnization of marriage. They cannot, if it cannot be so considered.

The doctrine that parental consent is really a part of the solemnization of marriage has been frequently advanced. Thus, we find the late Professor Lefroy writing in 35 C.L.T., at p. 506, that "parental consent when required is to be considered part of the form or ceremony of marriage," apparently basing his opinion on the words of Cotton, L.J., in *Sottomayor* v. *de Barros*,[3] where he says, "In our opinion this consent (that is, of parents) must be considered a part

[3] (1877) 3 Prob. Div. C. A. 1.

of the ceremony of marriage and not a matter affecting the personal capacity of the parties to contract marriage."

Again, in an annotation to the case of *Peppiatt* v. *Peppiatt*,[4] Mr. Morine, in criticizing an expression of opinion on the part of Meredith, C.J.C.P., to the effect that provincial legislation requiring consents is *ultra vires*, seems to adopt Lefroy's opinion. It is quite possible, however, that for certain purposes and within certain domains of law, such consents may be treated as parts of the ceremony, but it does not at all follow, because parental consent may, in deciding what law is to govern the question of the validity of marriage in the domain of private international law, be treated as part of the ceremony, that therefore, for all purposes, including the purpose of construing a statute which seems to bear a plain meaning of its own, consent can be treated as belonging to the ceremony.

I would, however, suggest that the words of Cotton, L.J., cannot any longer, even in the domain of private international law, be accepted as finally disposing of the question.

The question of whether consents are a matter of form only, a mere part of solemnization, is inextricably mixed up with the contending claims of the *lex loci contractus* and the *lex domicilii* to govern the validity of marriage. A slight historical retrospect is necessary for the better understanding of the subject.

In *Simonin* v. *Mallac*,[5] a case of a marriage in England of domiciled French persons without the consent of the husband's father, Sir Cresswell Cresswell approves without qualification the words of Sir E. Simpson in *Scrimshire* v. *Scrimshire*.[6] In that case Sir E. Simpson says—"The question being in substance this—whether by the law of this country marriage contracts are not to be deemed good or bad according to the laws of the country in which they are formed, and whether they are not to be construed by that law," and replies to his own question—"These authorities fully shew that all contracts are to be considered according to the laws of the country where they are made, and the practice of civilised countries has been conformable to this doctrine, and by the common consent of nations has been so received."

Sir Cresswell Cresswell throughout his judgment shows that he is well aware that there might be a distinction between questions as to form and ceremony of marriage, and questions of capacity to marry, but yet his language is perfectly general. It was upon this principle that the Gretna Green marriages were held valid, although

[4] 30 D. L. R. 1.
[5] (1860) 2 Sw. & Tr. 67.
[6] (1752) Hagg. Con. 395.

they were purposely celebrated out of England in order to avoid the statutory requirements as to consent of parents.

The first case in which any doubt is thrown upon the supremacy of the *lex loci contractus* is *Brook* v. *Brook*.[7] It is worth while pointing out that the distinction drawn by Lord Campbell in this case is not between capacity for marriage and forms of marriage as suggested by A. V. Dicey at p. 665 of his "Conflict of Laws," 3rd Edition. The distinction is rather one between essentials and forms. It is not quite clear what Lord Campbell means by essentials, but it may be surmised that in using the term he was thinking of the *essentialia negotii* of the civil law, as opposed to the *naturalia* and *accidentalia negotii*, these latter being changeable at the will of the parties. The non-existence of the relationship of brother-in-law and sister-in-law between the man and woman intending to marry was then one of the *essentialia* of marriage. It was an *impedimentum dirimens*, as distinguished from an *impedimentum impediens*. They could not marry by gaining any consents or complying with any formalities. The marriage was absolutely prohibited. All other requirements seem to have been regarded by Lord Campbell as formalities, using that term as a convenient antithesis to the word "essentials."

In that case A and B, British subjects, intermarried. B died. A and C (sister of B), being both at the time domiciled British subjects, went to Denmark, where the marriage of a man with the sister of his deceased wife was valid, as it was not then in England, and they were duly married according to the laws of Denmark. The House of Lords held that the marriage in Denmark was void. Lord Campbell held that the marriage in essentials was contrary to the law of England, and that the essentials of the contract depended upon *lex domicilii*, "the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated," pointing out that the marriage was prohibited in England as contrary to God's law. The case has no reference to any consent or want of consent, and the decision is entirely given upon the fact that such a marriage as was in question had been declared by the legislature to be contrary to God's law and on that ground to be absolutely prohibited. Indeed, *Simonin v. Mallac* may be said to be expressly approved. Too much stress cannot be laid upon the fact that Lord Campbell in his judgment goes out of his way to say "My opinion does not rest upon the notion of any personal incapacity to contract such a marriage being impressed by

[7] (1861) 9 H. L. Cas. 193.

Lord Lyndhurst's Act on all Englishmen and carried about with them all over the world; but on the ground of the marriage being *prohibited* in England as contrary to God's law."

This case then, was a case of an English Court refusing to recognize a marriage between two persons domiciled in England, which was absolutely prohibited by English law.

The clear distinction between capacity for marriage and form of marriage does not emerge until the case of *Sottomayor* v. *de Barros.*[8] In that case two domiciled Portuguese persons, who were first cousins, went through a form of marriage before the registrar. Seven years later they returned to Portugal. By the law of Portugal marriage between first cousins is illegal, but may be celebrated under a Papal dispensation. The Court held that where both contracting parties were at the time of their marriage domiciled in a country, the laws of which prohibited their marriage, such marriage is invalid, inasmuch as the capacity of the persons must be decided by the laws of the domicile of the parties.

Cotton, L.J., in delivering judgment refers to *Simonin* v. *Mallac* and distinguishes it by pointing out that the consent there involved must be considered a part of the ceremony and not a matter affecting the personal capacity of the parties to contract marriage. With reference to this distinction, it must be confessed that it is quite clear, from the words used in the judgment in that case, that Sir Cresswell Cresswell did not base his judgment on any such ground. On the contrary, he clearly meant his words to be general.

This case, then, was a case of an English Court refusing to recognize a marriage between two persons domiciled in Portugal, which was absolutely forbidden by Portuguese law.

As has been seen, the Court based their judgment on the idea of capacity, and in so doing used the very general words, "It is a well recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile," words that certainly have not been approved by later English decisions. Cotton, L.J., refers to *Brook v. Brook, supra,* and holds that it was not a decision upon the question arising upon the petition before the Court.

When one calls to mind the language used by Lord Campbell in *Brook* v. *Brook,* it is not impossible to come to the conclusion that *Sottomayor* v *de Barros, supra,* might have been decided upon the same principle as *Brook* v. *Brook.* It surely was quite possible to disregard the question of capacity entirely and to follow Lord Camp-

[8] (1877) 3 Prob. Div.; C. A. 1.

bell where he says—"None of the cases cited can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous and which could not, by any forms or ceremonies, have been rendered valid in the country in which the parties were domiciled." That the Court was conscious of this, is apparent from the limiting words occurring near the end of the judgment—"Our opinion on this appeal is confined to the case when both the contracting parties are at the time of their marriage domiciled in a country, the laws of which prohibit their marriage."

It is suggested that the true explanation of the distinction drawn by Cotton, L.J., is that he felt bound on the one hand to give effect to the cases which held that Gretna Green marriages were valid notwithstanding want of consent, by holding that consent was a question of *lex loci contractus,* and that on the other hand he thought himself constrained by the case of *Brook* v. *Brook* to hold that capacity was a question for the decision of the *lex domicilii,* overlooking perhaps the point that *Brook* v. *Brook* was a question of absolute prohibition, rather than of capacity.

In the case of *Sottomayor* v. *de Barros, supra,* the law as to the validity of marriages was turned once more into its original current upon certain questions being raised by the Queen's Proctor. The case came before Sir James Hannen for determination of questions of fact. He found that the husband in the case was a domiciled Englishman, and proceeded to consider the question whether the marriage of a domiciled Englishman in England with a woman, subject by the law of her domicile to a personal incapacity not recognized by English law, must be declared invalid by the tribunals of England.

In his judgment, Sir James Hannen takes occasion to express his opinion that the statement, that in a question of marriage personal capacity must depend on the law of the domicile, contains a novel principle for which, up to then, there had been no English authority. He held that inasmuch as the husband in the case was a domiciled Englishman at the time of the marriage, the marriage was valid, as its validity was to be decided according to the law of England, which imposed no disability as to marriage of first cousins.

The question again appears in the case of *Ogden* v. *Ogden.*[9] In that case a marriage was celebrated in England between a domiciled Englishwoman and a domiciled Frenchman. The marriage was annulled by the French Courts on the ground that the consent of the Frenchman's parents had not been obtained. The Frenchman

[9] [1908] P. D. 46.

then re-married a Frenchwoman in France and the Englishwoman took a suit for the dissolution of her marriage, but the suit was dismissed for want of jurisdiction. A year afterwards the Englishwoman married a domiciled Englishman, describing herself as a widow. It was held that the law of England must prevail, and that the second marriage of the Englishwoman was bigamous and must be annulled.

Sir Gorell Barnes says in the course of his judgment—"It may be doubted where there is much substantial difference of opinion between foreign and English jurists as to the general rule that between persons *sui juris* the validity of a marriage is to be decided by the law of the place where it is celebrated."

He points out that where a disability has been imposed by foreign law upon one of the parties of a marriage in respect only of want of parental consent and compliance with certain formalities required by such foreign law, there has occurred no case in which it has been held that such a marriage was invalid, and that the recognition of *lex domicilii* has never been extended to the case of matrimonial engagements entered into between inhabitants of another country and inhabitants of England.

With reference to the case of *Sottomayor* v. *de Barros* and the statement made in it that it is a well recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile, Gorell Barnes expresses his opinion that the question of capacity is not really raised in such a case, namely a case where both parties are capable of entering into a marriage but may not marry each other because such a marriage would be illegal in their own country; that, he says, is rather a question of illegality than of incapacity.

In *Ogden* v. *Ogden*[10] Sir Gorell Barnes argues that the dependence of capacity upon the *lex domicilii* cannot be a well recognized principle of law, for if that were so, the decision in *Simonin* v. *Mallac* should have been over-ruled. Now, *Simonin* v. *Mallac* was merely a question of consent. It seems fair to deduce from this argument that Sir Gorell Barnes regarded questions of *consent* as questions of *capacity,* and therefore not questions of form.

Indeed, as Westlake (p. 62) points out, the judgment of the same judge in *Chetti* v. *Chetti* (see *infra*) denies the existence of any solid distinction between form and essentials.

It is interesting to note that Dicey, a stout proponent of the theory "that, as in other contracts, so in that of marriage, personal

[10] [1908] P. D. 46 at p. 73.

capacity must depend on the law of domicile" (see Conflict of Laws, 3rd Ed., p. 663), has the following to say on the subject of *Ogden* v. *Ogden:* "The Court of Appeal as then constituted, clearly leant towards the theory that personal capacity, as in other contracts, so in that of marriage, depends, at any rate when the marriage is celebrated in England, on the *lex loci contractus.*" (See p. 865.)

That Dicey could have gone good deal further is apparent when it is remembered that in no case was the *lex domicilii* applied except to justify a refusal by the Courts of a country to recognize a marriage contract in it between two persons by the laws whose domicile a marriage as between them was illegal.

The last case which it is necessary to deal with is the case of *Chetti* v. *Chetti.*[11] In this case, an Englishwoman was married in a registrar's office in London to a Hindu, who was temporarily resident in London, but was domiciled in Madras. The marriage was held valid simply on the ground suggested by Lord Hannen in *Sottomayor* v. *de Barros,* where he says—"Numerous examples may be suggested of the injustice which would be caused to our own subjects if marriage were declared invalid on the ground that it was forbidden by the law of the domicile of one of the parties."

One cannot but think that much of the confusion occasioned by the decisions and judgments in the cases mentioned in the preceding retrospect has arisen from the failure to observe the distinction between absolute prohibition and incapacity, or at any rate, the occasional tendency to use the term "capacity" without sufficient care to make clear its exact connotation.

Where a deprivation or prohibition is general in its effect, it imposes no incapacity upon anyone. (See Foote's Private International Jurisprudence, 3rd Ed., p. 73.)

To sum up, the law in England prior to *Brook* v. *Brook* seems to have been that all questions of validity of marriage were to be decided by the *lex loci contractus.* There was no distinction between capacity and form. *Brook* v. *Brook* laid down the principle that where the marriage was absolutely prohibited by the law of the domicile of both parties, they could not set that law at naught by celebrating the marriage outside the country of their domicile. The question here was not one of capacity, but of absolute prohibition.

Sottomayor v. *de Barros* No. 1 needlessly lays down the principle that capacity is to be decided by the *lex domicilii* and form by the *lex loci contractus,* and that consent is therefore necessarily a matter of form, not because it is really so, but because it has already been

[11] [1909] P. D. 677.

decided that consents depend upon the *lex loci contractus.* The case treats the question as one of capacity, but it was like *Brook* v. *Brook,* really one of prohibition, and could have been decided upon the same grounds.

Sottomayor v. *de Barros* No. 2, treats the question as one of capacity, but practically restores the older law save in the one case before the Court in *Sottomayor* v. *de Barros* No. 1.

Ogden v. *Ogden,* like *Simonin* v. *Mallac,* did raise a question of capacity and was decided by the same law, the *lex loci contractus. Ogden* v. *Ogden* and *Chetti* v. *Chetti* clearly show the leaning of the Court of Appeal to the older rule, and the latter case practically sets forth the question as one of prohibition and incapacity, and not as one of essentials or capacity and form.

In none of the cases is the *lex domicilii* followed save in the exceptional case where the marriage is absolutely prohibited by the law of the domicile of both parties. *Sottomayor* v. *de Barros* is not extended where the domiciles are different. Why should the local court favour one more than the other? And where the domicile of one and the *locus contractus* are the same, is there not a still stronger case for the *lex loci contractus?*

It is no longer necessary to support the validity of Gretna Green marriages by the explanation that consents are a matter of form. They were valid because they were not absolutely prohibited by the *lex domicilii* and therefore their validity was tested by the *lex loci contractus.*

The law appears to have veered around and tends to say that the *lex loci contractus* governs all questions; the substratum for the illogical position that consent is a question of form or a part of the solemnization of marriage disappears. If it be true that the position is now practically abandoned in the domain of conflict of laws, it is difficult to argue in favour of its existence in that of general law.

Most of the provincial statutes which require licences to marry and forbid the issue of such licences to persons under a certain age without the consent of some other person, seem to confound a pre-requisite of a marriage with the solemnization of a marriage. The difference between such pre-requisites and the actual solemnization is well marked in the Imperial Statute, 4 Geo. 14, c. 76, s. 19, which provides that "Whenever a marriage shall not be had within three months after the grant of a licence, by any archbishop, bishop, or any ordinary or person having authority to grant such licence, no minister shall proceed to the solemnization of such marriage until a new licence shall have been obtained, unless by banns duly published according to the provisions of this Act."

I know of no substratum for the argument that such pre-requisites are within the competency of a provincial legislature, other than that afforded by the case of *Sottomayor* v. *de Barros.* If that argument has been shown to be of little potency, it is perhaps not too foolhardy to hazard the suggestion that a provincial legislature may determine the time when, the place where, and the person by whom marriage may be celebrated; but, beyond the possible power of regulation by the issue of a licence to persons endowed with a capacity to marry by some other authority, has no power to say who shall or shall not intermarry, either with or without consents of other persons.

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THE NOTARIAL PROFESSION IN THE PROVINCE OF QUEBEC.

I.

The notarial profession is a profession by itself, a profession *sui generis,* little known and less understood in those countries where it has no existence. The purpose of this article is to make the profession known and appreciated by our legal confrères outside the Province of Quebec.

I need hardly make the preliminary observation that the profession in question, which is called in French "le notariat," owes its introduction into Canada to the early French colonists. A knowledge of the history of law is essential to enable one to properly understand and interpret the law itself. I have thought it advisable, therefore, to give briefly some historical facts set out in chronological order.

1302.—In the year 1302 an ordinance was passed by Philippe IV. of France, which contained several important dispositions relating to the profession, and it may be stated that at this period the profession had attained a considerable degree of development in France.

1597.—This is the date of an important ordinance of Henry IV. of France relating to the profession, and it may be stated to have then reached its most complete development. You will observe that this was in the time of Samuel de Champlain.

1608.—In this year Quebec was founded by Samuel de Champlain. There were then no notaries in Canada, although the profession, as being part and parcel of French law, may be said to have been, in a sense, introduced into the colony.