Privy Council Appeal No. 80 *of* 1913.

Malvina Despatie - - - - - - - *Appellant*

v.

Napoléon Tremblay - - - - - - *Respondent*

FROM

THE SUPERIOR COURT FOR THE PROVINCE OF QUEBEC SITTING IN REVIEW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH FEBRUARY, 1921.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD MOULTON.

[*Delivered by* LORD MOULTON.]

This is an appeal from a decision of the Superior Court of the Province of Quebec, sitting in Review, confirming with a slight modification the decision of the Superior Court, and it directly raises a point of great importance relating to the marriage laws of that Province.

The facts of the case are not in dispute and are as follows:— The appellant and the respondent were married on the 25th October, 1904, in the Roman Catholic Church of St. Victoire, Richelieu, Quebec. Both parties are and were at the time of the marriage members of the Roman Catholic Church. They were married by their own Curé, and all the formalities required by the laws of the Province of Quebec relating to the solemnization of marriage were observed. After the solemnization of the marriage the parties lived together as man and wife for some time and no question was raised as to the validity of the marriage until the year 1910, when the respondent, the husband, made an application to the Roman Catholic Bishop of the Diocese to have the marriage declared null and void on the ground of the relationship of the parties.

By that date it had been discovered that the parties are cousins in the fourth degree (ascertained in the ecclesiastical manner) through common ancestors who were married in the year 1781, and who were the great-great-grandparents of the parties. Neither party knew of the relationship at the time of the marriage, which was made in all good faith in the belief that no relationship existed

between the parties. In his application to the Roman Catholic Bishop of the Diocese to have the marriage declared null and void on the ground of the relationship of the parties, the respondent alleged a rule of the Roman Catholic Church enacted at the Council of Lateran in the year 1215 which forbade the marriage of Catholics related as cousins in the fourth degree unless a dispensation should be first obtained. It is admitted that no dispensation was in this case granted, or even applied for, by reason of the fact that the parties were entirely ignorant that the relationship existed until a considerable time after the marriage had been solemnized and consummated.

Such is the subject-matter of the suit and such are the essential facts. It is, however, advisable to state shortly the steps that have been taken in this litigation which are of a nature to raise important questions of procedure.

On the 11th February, 1910, the Roman Catholic Bishop of the Diocese issued on the application of the respondent what purported to be a decree declaring the marriage null and void because of the said relationship. In May of the same year the respondent took action in the Superior Court against the appellant claiming a declaration that the marriage was null and void. He based his action solely on the existence of the relationship and the decree of the Roman Catholic Bishop. On these materials Mr. Justice Bruneau, the Judge in the Superior Court, declared the marriage null and void.

On appeal by the present appellant the Court of Review set aside this judgment and remitted the case back to the Superior Court for proof of the facts and of the rules of the Roman Catholic Church. The case was accordingly re-heard by Mr. Justice Bruneau, who heard evidence on these points and gave a judgment to the same effect as his previous judgment. On appeal to the Court of Review that judgment was upheld by a majority, Tellier and De Lorimier J.J. being in favour of supporting the judgment of Mr. Justice Bruneau and Archibald J. being of a contrary opinion. From this judgment of the Court of Review the present appeal is brought by special leave granted on the 12th day of August, 1913.

The appeal first came before this Board in May, 1914. The judgment of the learned Judges of the Court below, in favour of the respondent, had been practically based on their interpretation of Article 127 of the Civil Code and the same remark applies to the authorities quoted in support of their contentions by either party in the argument before this Board.

The material part of Article 127 reads as follows :—

> The other impediments recognized according to the different religious persuasions as resulting from relationship, or affinity, or from other causes, remain subject (*restent soumis*) to the rules hitherto followed in the different Churches and religious communities.

This Article was treated by the Judges as laying down the law with regard to marriage in a positive form and therefore as being decisive of the question at issue in the

case. But on the 23rd January, 1915, this Board pointed out to the parties that there was a view of the proper interpretation of the language of Article 127 which required examination and decision before that Article could be treated as having the above effect. On that occasion their Lordships said :—

> It may well be argued that the intention of Article 127 was to make no change in the marriage law so far as the various religious communities are concerned, but to leave it in the same position as it was before the passing of the Code. In other words, that the effect of Article 127 is to leave the marriage law in these respects uncodified and not to create a new marriage law based entirely on the Code.

In view of the great importance to the community of the issues raised in the case, and of the fact that this question had not been substantially dealt with in the argument, their Lordships directed that the appeal should be re-argued, adding :—

> If it should be held that the intention and meaning of Article 127 is that the marriage law in these respects should be unchanged, the case will necessarily require to be decided as it would have been prior to the passing of the Code, and it will be necessary to discuss the law as it then existed.

In consequence of the above directions of their Lordships the case has been fully re-argued and it remains for their Lordships to give judgment on the whole question.

Further consideration of the language of Article 127 of the Civil Code has confirmed their Lordships in the view adumbrated by them as above mentioned, viz., that the intention and effect of this Article was to leave the law as to the effect of the impediments to which it refers entirely unchanged. It neither added to nor took away from the effect of these impediments. This is clearly indicated by the use of the word "remain" ("*restent*"). There is nothing in the Article which points to any alteration in the nature or effect of the impediments to which it refers. On the contrary everything is left in the same condition as it was before the codification.

Article 127 is an example of what frequently if not generally occurs in the process of forming into a code the laws of any country, either wholly or with regard to some specified subject matter. The essence of a code, whether it relates only to a particular subject or is of a more general character, is that it is a new departure. The codifiers have no doubt the task of examining the various authorities on each point in order to come to a right conclusion from the conflicting decisions as to what is the law upon the subject and their duty is to embody the result in the corresponding clause of the code they are framing. But when they have done this and the code has become a statute, the question whether they were right or wrong in their conclusion becomes immaterial. From thenceforth the law is determined by what is found in the code and not by a consideration of the conclusions which ought to have been drawn from the materials from which it has been framed. The language used by Lord Herschell in the case of the *Bank of England* v. *Vagliano Bros.*

(1891 A.C. 140) has always been accepted as expressing the object of codification. In speaking of the Bills of Exchange Act, which codified this particular branch of the law, he says :—

> The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities.

It will be noted that Lord Herschell confines his principle to those points which are specifically dealt with by the law. But it almost always happens that in codification there occur particular points where the codifiers find it impossible or for some reason undesirable to deal specifically with the matter, and they leave it to be decided by the law as it previously existed. They accordingly make no pronouncement on these points, so that there is no language in the code which can form a new departure which authoritatively replaces the law as it previously existed. Sometimes this may be done by mere omission to deal with the point, but it may also be done specifically, as for instance by saying that in that particular matter (or more generally that in matters not dealt with by the code) the previous law shall apply. But however it be done the essence is the same. It is a refusal to codify the law on the particular point, *i.e.*, a refusal to substitute for the law as it existed previously a new and authoritative pronouncement which expresses the law that is to operate in the future. Instead of formulating what the law should be in the future it says directly or by implication that it shall remain as it was in the past.

It is not necessary to refer to other cases of codification to substantiate these remarks. A remarkable instance of this mode of procedure occurs in the Code which their Lordships have here to consider. The Commissioners who were charged with the task of codification in dealing with the subject of "Civil Death" proposed that it should be a necessary consequence of perpetual religious vows as defined by them in the Article they suggested. But the Legislature would not accept their suggestion, and the only Article relating to the effect of religious vows stands in the Code as follows :—

> 34. The disabilities which result as regards persons professing the Catholic religion from religious profession by solemn and perpetual vows made by them in a religious community recognized at the time of the cession of Canada to England and subsequently approved *remain subject to the laws by which they were governed at that period.*

In other words, the Legislature refused to set out in the Code the disabilities arising from such vows, but left them to be ascertained by the law as it existed at a particular date. The disabilities must therefore be ascertained by a consideration of what was actually the law at that date, and cannot be ascertained from the Code itself. It happens that the date chosen is in this case the date of the cession, but the principle is the same whatever be the date chosen. It amounts to a refusal to codify on that particular point, *i.e.*, to declare in the Code itself what is to be

the law for the future, and leaves it to be decided by the law as it previously existed.

Their Lordships are of opinion that Article 127 of the Code is an example of a like procedure. In lieu of declaring specifically what is to be the law in the future as to the effect of the disabilities to which it refers, it simply expresses the intention to effect no change in the law as then existing on the matter and directs that it should remain unchanged. There is no word indicating an intention to define the impediments or to classify them or to give any new legal effect to any one of them. The dominant word in the Article is "remain," ("*restent*"), which indicates clearly that the codifiers intended while leaving the rules obtaining in the various religious communities to have their existing effect as rules of faith and conscience, to make no change in this portion of the law. "As they were so shall they remain" is its decision. The reason is not difficult to seek. By this date there were numerous religious communities of very various types in Quebec, and it would have been a thorny subject to deal with their religious tenets and give to them legal consequences by new and specific provisions. The only safe way was to leave the law as it stood, quite untouched.

If it were permissible to regard the intentions of the codifiers as expressed by their reports, their intention to leave the law unchanged would be equally evident, but this is a dangerous and doubtful proceeding and their Lordships decline to adopt it. The proper course is to look at the Article itself, and their Lordships are of opinion that the language used in Article 127 carries out this intention. It may well be that the Commissioners had each of them his own views as to what was the existing law, and it was open to them to express those views in the Code, so as to deal with the matter specifically and by so doing to invite the Legislature authoritatively to fix the law for the future according to those personal views, whether those views were right or wrong. But they did not elect to do this, and we cannot indulge in conjectures as to what would have been the result of such a course of action. We can only regard what is embodied in the language of the Article, and inasmuch as all that is there embodied is that the law in these matters should remain unchanged, that is the only effect of the Article.

It follows from the above considerations that Article 127 of the Code does not determine the case before their Lordships, and that so far as regards the matters with which that Article is concerned each case must be decided as it would have been had the question arisen immediately prior to the passing of the Code, so that the decision must depend on the laws as they then existed. But this does not affect the rest of the Code, which is positive law, and after examining the laws as they then existed it may be necessary to examine the other provisions of the Code in order to see whether they throw light on the case and whether they affect the conclusions to be drawn from Article 127 considered

by itself. The Code must be interpreted as a whole whatever be the form of a particular Article.

The immediate result of this is to remove the dominant question in this case from the domain of speculation, and personal views on matters of fact, to the domain of positive law ascertainable by recognized principles of jurisprudence. The laws governing Canada at the date of the formation of the Civil Code are not matters of mere conjecture, but result from the events which made it a British possession and the laws relating to it, which have since been duly passed. Nothing that occurred previously to the cession relative to the matters which are at issue in this case or even to the judicial opinion prevailing at any particular date can help their Lordships much, if at all. It must be remembered that before the cession Canada had been governed by the laws of a country which recognized no religion but the Roman Catholic. Protestants were allowed no civil rights; marriages performed by them were held invalid and the children accounted bastards. When Canada became the possession of a Protestant Power, which though it had permitted the practice of the Catholic religion, put Catholics under grave disabilities, all this was of necessity changed. The laws of England would have obtained in Canada unchanged had it not been that stipulations were made in the various Capitulations and in the Act of Cession to secure religious freedom for Catholics. It is from these alone and the subsequent Acts of Parliament relating to Canada that all the rights of Roman Catholics in Canada are derived. Full effect must be given to the engagements thus entered into and the provisions of the laws thus passed. They are definite and ample to secure to the individual full religious liberty, but it is idle and without any justification to attempt to qualify their effect by references to the ancient position of Protestants and Roman Catholics in France under a regime which from the nature of things automatically disappeared when Canada came under British rule.

The aim and effect of the special terms of the Capitulations of Quebec and Montreal, which are contemporary documents of great value, are perfectly clear. What the Catholics sought to secure was freedom to exercise their religion and they obtained it. The meaning attached to this phrase is clear from its use in Article 27 of the Capitulation of Montreal, which reads as follows :—

> The free exercise of the Catholic Apostolic and Roman Religion shall subsist entire in such manner that all the states and the people of the towns and country places and distant parts shall continue to assemble in the churches and to frequent the Sacraments as heretofore without being molested in any way directly or indirectly.

What was happening in France to Churches other than the Roman Catholic had taught them the need of formally securing these rights on passing under the dominion of a Power belonging to a different faith, and therefore they stipulated for and obtained the free exercise of their religion. This is plainly expressed in the Treaty of Paris in 1763 by which the cession of Canada to

the British Crown was ultimately accomplished. It is thus expressed in that Treaty :—

> His Britannic Majesty on his side agrees to grant the liberty of the Catholic Religion to the inhabitants of Canada. He will consequently give the most precise and most effectual orders that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish Church as far as the laws of Great Britain permit.

But it is not necessary to consider more fully these contemporary documents, because the effect of Canada passing under British sovereignty so far as the religious liberty of its Catholic inhabitants is concerned, is authoritatively expressed in the Quebec Act 14 Geo. III, c. 83, s. 5, which reads as follows :—

> And for the more perfect security and ease of the minds of the inhabitants of the said Province it is hereby declared that his Majesty's subjects professing the religion of the Church of Rome of and in the said Province of Quebec may have hold and enjoy the free exercise of the religion of the Church of Rome subject to the King's supremacy declared and established by an Act made in the first year of the reign of Queen Elizabeth over all the Dominions and Countries which then did or thereafter should belong to the Imperial Crown of this Realm, and that the clergy of the said Church may hold receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion.

The religious position in the Province of Quebec in 1774, was therefore that every individual had the right to profess and practise the Catholic religion without let or hindrance. But it must be borne in mind that this is a privilege granted to the individual. There is no legislative compulsion of any kind whatever. He may change his religion at will. If he remains in the Roman Catholic community he may, so far as the law is concerned, choose to be orthodox or not, subject to the inherent power of any voluntary community, such as the Roman Catholic Church, to decide the conditions on which he may remain a member of that community unless that power has been limited in some way by the past acts of the community itself. In other words, each member of the Roman Catholic community in Quebec possessed the same privileges as any other citizen so far as religious freedom is concerned, save that he was not subject to any of the disabilities which then and, for a long time after, attached to Protestant dissenters. The Legislature did not put over him as a citizen any ecclesiastical jurisdiction. The decisions of the ecclesiastical Courts that existed in the Roman Church bound him solely as a matter of conscience. The Legislature gave to their decrees no civil effect nor bound any of its subjects to obey them. Indeed, the Act in Article 17 expressly reserves to His Majesty the power to set up Courts of ecclesiastical jurisdiction in the Province and to appoint judges thereof although that power seems never to have been acted upon. But what has just been said must not be misunderstood. The law did not interfere in any way with the jurisdiction of any ecclesiastical courts of the Roman Catholic religion over the members of that communion so far as questions of conscience were concerned. But it gave

to them no civil operation. Whether the persons affected chose to recognize those decrees or not was a matter of individual choice which might, or might not, affect their continuance as members of that religious communion. But that was a matter which concerned themselves alone.

It is necessary now to pass in review a long series of legislative Acts relating to marriage, commencing with 35 George III, Ch. IV, and extending to the Consolidating Act of 1861, Ch. XX. They throw strong light on the principles of the marriage law in Canada during that period. They establish conclusively that the law concerned itself primarily with marriage as bearing on social status and only incidentally with any religious questions affecting it. They accordingly manifest the great importance that was attached to the keeping of proper registers of baptisms, marriages and burials, which should be recognized as legal evidence of the matters contained therein and thus be authoritative on these all-important facts of legal status.

To understand these Acts properly one must bear in mind that this was a case of the annexation of a province in which the Roman Catholic religion had been the established religion to a realm in which the Church of England was the established religion. Accordingly we find that the first of these Acts, viz., 35 George III, 1795, Ch. IV, provided for the keeping of registers in each parish church of the Roman Catholic communion and also in each of the Protestant churches or congregations within the province " by the rector, curate, vicar or other priest or minister doing the parochial or clerical duty thereof." These registers are to be kept in duplicate and one copy is to be deposited in the office of the clerk of the Civil Court of King's Bench or provincial Court of the district, there to remain and be preserved. The copies are to be of equal authority as evidence. There are strict regulations as to what is to be contained in these entries and they are to be considered as legal evidence in all Courts of justice.

The statutes above referred to which followed in the wake of the above statute extend the privilege of keeping similar registers to other religious communities than the Roman Catholic Church or the Established Church of England. It is unnecessary here to specify the names of these communities, which are very numerous. The Scotch Church, the Congregational Societies, the Methodists and the Methodists New Connexion are examples. In cases such as the Free Will Baptist Church, where infant baptism is not performed, the registrar, instead of recording baptisms, is authorised to record births. The form of these statutes indicates that the authority to keep these registers was taken to carry with it the authority to solemnize marriages, although in some cases the latter was specifically given. The effect of these statutes is finally expressed in the Consolidated Statutes of Lower Canada (1861) c. 20, s. 16, which enacts that " all regularly ordained priests and ministers " of all Protestant Churches in communion with the United Church of England and Ireland, or with the Church of Scotland, " and all regularly ordained priests and ministers of

either of the said churches have had and shall have authority validly to solemnize marriage in Lower Canada." It then goes on to enumerate the various religious communities to which the before-mentioned special Acts refer and confirms the powers of their ministers validly to solemnize marriages according to the provisions of those special Acts, and finally creates a universal obligation upon all the Protestant communities and all parish churches of the Roman Catholic communion to keep registers in the way described in the Act, which is in all material respects identical with the law previously existing. It re-enumerates the matters which are to be set out in the entries thus to be made in these registers.

The feature of all these Acts which is at once the most remarkable and the most material to the questions raised by this appeal, is that nowhere in this legislation (with the exception of the two Acts relating respectively to the Jews and the Society of Quakers, which will presently be considered specially) is there the slightest reference to the religious views of the persons to be married. The most minute directions are given as to the matters which are to be entered in the registers, and not one of these has any reference to the religious community to which the parties or either of them belonged or to the religious beliefs held by them or either of them. This point is so important that it is worth while to set out the specific provisions in the Consolidating Act which are mere repetitions of the provisions in the previous legislation.

> "6. In the entries of a marriage in the registers aforesaid, mention shall be made in words of the day, month and year on which the marriage was celebrated, with the names, quality of occupation and place of abode of the contracting parties, whether they are of age or minors, and whether married after publication of banns or by dispensation or licence, and whether with the consent of their fathers, mothers, tutors or curators—if any they have in the country—also the names of two or more persons present at the marriage, and who, if relations of the husband and wife or either of them, shall declare on what side and in what degree they are related."

It is an irresistible conclusion from the language of these Marriage Acts that the authority given to the Protestant ministers to solemnize marriages was a perfectly general one, and depended in no way upon the religious belief of either or both of the persons to be married. The same is true of the priests of the Roman Catholic communion. They were never under any legal disability as to their solemnizing marriage between persons one or both of whom did not belong to their faith. With regard to the priests of the Roman Catholic communion it is clear that even under their own ecclesiastical law they were permitted to solemnize marriage where one of the contracting parties was not a Roman Catholic. It does not appear whether or not their ecclesiastical law permitted them to solemnize marriage between persons neither of whom belonged to their own communion, but this question is irrelevant. The Catholics of Canada were individually given freedom to exer-

cise their religion, but they were not in any respect compelled to do so, and seeing that from the very first the ministers of the English Church and subsequently those of other Protestant communities, had authority to solemnize marriages without any restriction as to the religious views of the persons seeking to be married, it was open to Catholics as well as Protestants to avail themselves of the rights thus given them. Such was the position established in Canada by positive legislation, and even if French ordinances could be found bearing on this matter, they would not affect in any way the above conclusions. They were ordinances of a country where Protestant marriages were regarded as invalid. As has been already pointed out, this state of things ceased automatically when Quebec came under British rule. It needed no legislation to put an end to it.

The two exceptional cases of this class of Acts are 9 & 10 Geo. IV, c. 75, relating to the Jews, and 23 Vic. c. 11 (Canada) relating to Quakers, and although in some respects peculiar, they strongly confirm the conclusions to be drawn from the other legislation on these subjects. In the case of the Jews, power is given to every minister duly licensed to keep in duplicate a register " of all marriages and burials performed by him, and of all births which he may be required to record in such register by any person professing the Jewish religion." No other reference to the faith of the persons to whom the Act relates is contained in the Act, except a temporary provision that persons of the Jewish religion shall have the right to require the births and deaths of their children to be registered within a certain period after the election of the trustees. Even here there is no restriction on the faith of either or even of both of the persons so married. The second case relates to the marriages of Quakers, who, as is well known, do not recognize any ministers and have very special formalities with regard to marriages. Here there is a certain degree of limitation in the case of those who desired to be married according to the forms peculiar to Quakers. The law validates marriages solemnized " according to the rites, usages and customs of the Religious Society of Friends," both in the past and in future, " between persons professing the faith of the said Religious Society of Friends, commonly called Quakers, or of whom one may belong to that denomination " ; and it then proceeds to extend to that denomination the general legislation as to the keeping of registers " so far as the same is applicable." In no other Act authorizing any marriage to be solemnized is there any reference to or limitation in respect of the religious belief of the parties to be married, and the reason for this exception is evident.

Before leaving this subject and drawing the proper conclusions from the matters already dealt with, it is advisable to refer to the Act which recognized and formally confirmed the existence of religious liberty in Canada, viz., 14 & 15 Vic. c. 175. The preamble is as follows :

> " Whereas the recognition of legal equality among all religious denominations is an admitted principle of colonial legislation : And whereas in the state and condition of this province to which such a

> principle is peculiarly applicable it is desirable that the same should receive the sanction of direct legislative authority, recognizing and declaring the same as a fundamental principle of our civil polity; "

it declares and enacts

> "That the free exercise and enjoyment of religious profession and worship without discrimination or preference, so as the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of the province, is by the constitution and laws of this province allowed to all Her Majesty's subjects within the same."

The position of the law as to marriage at the time of the formation of the Civil Code in Quebec was, therefore, as follows: The Roman Catholic curés, Protestant clergymen and ministers of a large number of denominations of Protestants had an equal power to solemnize marriages and to keep registers of acts of civil status. In all cases alike the marriages must be preceded by banns unless they had been dispensed with by a competent authority or a licence had been granted. There was no restriction as to the religious faith of those whose marriages they were competent to solemnize. For example, a Protestant might be married to a Roman Catholic either by a Roman Catholic curé or a Protestant minister, or by any other person empowered to solemnize marriages. If the marriage was solemnized by a competent person an entry must be made of it in the register he was authorised to keep and that register was legal evidence of the fact of the marriage. With regard to the validity of the marriage, so far as affected by relationship between the parties, there was no legal restriction, excepting such as was imposed by the Statute 32 Henry VIII, c. 38, which enacts "that no reservation or prohibition, God's Law excepted, shall trouble or impeach any marriage without Levitical degrees." No doubt the Roman Catholic clergy could not be compelled to solemnize any marriage that was according to their religious belief forbidden, but this was by virtue of the liberty that was given to them to exercise and practise their religion uninterfered with, and it is evident from the declaration contained in the Act of 14 & 15 Vic. c. 175, that ministers of other denominations might have claimed an equal right to refuse to solemnize a marriage which was contrary to their religious belief. In this as in all other matters the rights of Protestants and Roman Catholics were the same so far as they were not directly affected by legislation. But so far as concerned the persons to be married relationship other than such as fell within the Levitical Degrees created no inherent impossiblity of marriage.

It is in the light of these existing rights established by statute and reigning as law in the province of Quebec that we must interpret the effect of Section 127 of the Code. Its object and effect were to leave the law as it then stood in those matters. It is, therefore, impossible to give to it the effect of prohibiting marriage between any two persons who were, according to English law, free to marry. It might prevent them having the act solemnized by ministers of a special denomination, but that would be solely in virtue

of the right of the minister to refuse to perform the marriage, and not from any legal incapacity to contract a valid marriage. Article 127, which preserves the consequences of the views of the different religious communities with regard to impediments, has therefore no bearing on any inherent incapacity of the parties to contract a valid marriage (which is regulated by the previous clauses of the chapter in which Article 127 appears) but only preserves the right of each religious communion to recognize the impediments which exist according to its faith, and justifies the refusal of a minister of that communion to solemnize any marriage which offended against its rules. This explains why there is no provision in the Code for annulling marriages which might have been objected to under Article 127, although specific provisions are inserted for this purpose in the case of marriages offending against Articles 124, 125 and 126.

In the Code, marriage is treated as an act of civil status, and although there are provisions limiting the persons between whom marriage can take place and providing for infractions of such provisions, yet the care of the Legislature has been mainly expended on providing for the proper solemnization of marriages and for the preparation of authentic registers of duly solemnized marriages which registers are kept in duplicate and are legal evidence of the marriage having taken place. In this respect the existing procedure is in substance retained. These registers are kept by the persons solemnizing the marriage, and one copy is deposited with the prothonotary of the district in which the marriage was celebrated. The matters to be entered in the register of marriages are specifically enumerated and, as previously, they contain nothing that relates to the religious faith of the parties. The importance of this is increased by the provisions of Section 39, which enacts that—

> "in acts of civil status nothing is to be inserted either by note or recital, but what it is the duty of the parties to declare."

The clauses which deal with the formalities relating to the solemnization of marriage show the same absence of any reference to the religious beliefs of the persons to be married. They are principally concerned with securing that they are performed by a proper public functionary, and that due publication of banns has been made or licences granted in lieu thereof. The vital clauses are :—

> "128. Marriage must be solemnized openly by a competent officer recognized by law.
>
> "129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

There is therefore a general power of all such competent officers to solemnize marriages of all kinds. There is, however, an addition of the nature of a proviso to Article 129, which is very instructive as showing the care exercised by the Legislature in preserving the religious freedom of the individual. But it shows itself (as ought to be the case) in protecting the religious freedom of the officers

solemnizing the marriages and not in restricting the freedom of the parties seeking to be married. It reads :—

> " But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the Church to which he belongs."

It contemplates therefore not only the possibility of valid marriages to which there are objections according to the creed of any particular religious denomination, but even that an officer holding that creed has authority to solemnize such a marriage though he is not compellable to do so.

The Code then proceeds to deal with the banns which in the absence of a dispensation or licence from a competent authority must be published before the marriage can be solemnized. The Code contemplates (as would naturally be the case) that they will generally be published at the churches to which the persons belong, but permits the exemption from such publication by licences of a competent authority. Such licences in the case of the solemnization of marriage by Protestant ministers of the Gospel are issued by the Provincial Secretary under the hand and seal of the Lieutenant-Governor, once more indicating that the Code is concerned with the position of the officer solemnizing the marriage and not with any question of the religious belief of the persons to be married.

There remain the two important chapters dealing respectively with " the qualities and conditions necessary for contracting marriage " and " actions for annulling marriage," which must be examined in detail. The first deals with several well-defined cases of parties between whom and the circumstances under which marriage is not permitted. The second deals with the cases in which, the persons at whose instance, and the circumstances under which a marriage which has taken place may be contested and annulled. In the former chapter we find express prohibition against marriage under age or without certain consents or within certain degrees of affinity corresponding with the Levitical degrees, followed as to affinity outside those degrees by an Article (Article 127), which is in very different terms ; and when we turn to the chapter on actions for annulling marriages we find specific provisions how, when and by whom marriages which are infractions of the rules laid down in the chapter which has just been considered can be contested, and it appears that each one of the rules (excepting, of course, Article 127) is considered in turn, and that the circumstances under which the marriage can be contested are specified. Taking them in order, a marriage contracted by a person under the legal age can no longer be contested six months after the legal age has been attained, or if, being a woman, she has conceived before that time. In Article 116, it is laid down that there is no marriage when there is no consent (which no doubt includes the case of there being error of person). Yet in Articles 148 and 149 it is provided that

the marriage can only be contested by the party whose consent was not free, or who was led into error, and then only before six months have passed after such person has acquired full liberty or become aware of the error. Impotency is by Article 117 declared to render the marriage null, but it is provided that such nullity can only be invoked by the party who has contracted with the impotent person, and in any case not at any time after three years after the marriage.

Articles 119 to 122 provide for the necessity of consent of parents or guardians in the case of minors. Yet in Articles 150 and 151 it is provided that marriages contracted without the proper consent can only be attacked by those whose consent was required, and then only within six months of their becoming aware that the marriage has taken place.

Articles 124, 125 and 126 expressly prohibit marriage between persons who are within what are known as the Levitical degrees. An example is Article 126 :—

> "126. Marriage is also prohibited between uncle and niece, aunt and nephew."

On turning to the chapter of "Actions for Annulling Marriages," we find it is provided that such a marriage may be contested either by the parties themselves or by any of those having an interest therein, but in Article 155 it is provided that that interest must be existing and actual to permit the exercise of the right of action by the grandparents, collateral relatives, children born of another marriage and third persons. In each of these cases, therefore, when the second chapter contains an express prohibition of marriage, provision is made by Chapter 4 for deferring and limiting the power to get the marriage annulled ; but in respect of marriages which are subject only to the impediments referred to in Article 127 no such provision is made.

Under these circumstances their Lordships are of opinion that it is impossible to resist the conclusion to be drawn from the omission of any reference to Article 127 in the chapter on " Actions for Annulling Marriages." They are of opinion that by deliberately omitting any provision for contesting marriages to which objection might be taken under that Article, it was intended that such marriages once solemnized should remain valid. This is in exact conformity with the standard of religious liberty of the individual already existing. The parties to whom such objections as those referred to in Article 127 would apply, possessed no inherent incompatibility for marriage in the eye of the law. Any such incompatibility was merely a question of conscience or orthodoxy, and would not have prevented their being married by other competent officials or with other rites. It would have been absolutely out of harmony with the other relevant provisions of the Code that marriages of this kind should be allowed to be contested, and accordingly we find that there is in the Code no provision for contesting them.

Accordingly they with all other duly solemnized marriages come under the provisions of Article 161 :—

> " 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. "

To prevent the application of so stringent a clause as this, there must be some equally explicit provision that in special cases the marriage can be annulled. Nothing less than this can get rid of the operation of its clear and precise provisions.

It remains to apply the law thus enunciated to the circumstances of this case. The marriage was contracted in all good faith. It was solemnized openly by a competent official and after due proclamation of the banns. It may be taken that if all the facts as to the relationship of the parties had been known the officiating priest would have required the parties to obtain a dispensation, seeing that at that date the Roman Catholic Church considered the extremely distant relationship sufficient to make a dispensation necessary, although their Lordships understand that such is no longer the case. Had he refused to solemnize the marriage without such a dispensation being obtained he would have been within his rights, and the law would have supported him in his refusal. But nothing of the sort took place. The marriage was performed with all legal formalities, and did not come within any provisions of the Code which deal with questions of nullity. The relationship of the parties was not within the provisions of Articles 124, 125 or 126, in respect of which actions contesting marriages on the ground of relationship can alone be brought. The marriage therefore falls under the absolute rule laid down in Article 185 :—

> " Marriage can only be dissolved by the natural death of one of the parties ; while both live it is indissoluble."

Their Lordships are therefore of opinion that this appeal should be allowed, and that the marriage between the parties should be declared valid and subsisting. They will humbly advise His Majesty accordingly. There will be no order as to costs.

In the Privy Council.

MALVINA DESPATIE

v.

NAPOLÉON TREMBLAY.

DELIVERED BY LORD MOULTON.

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