Dame Weinstock v. Blasenstein et le Procureur Général de la Province de Québec [1]

Charles E. Flam*

Introduction

The Civil Code of the Province of Quebec does not provide for divorce. Article 185 C.C. affirms the principle of the indissolubility of marriage. However, the law does permit actions to annul a marriage (Chapter IV in the Title *Of Marriage*). Some authors feel that the provisions of Chapter IV, especially art. 148 C.C., have been interpreted liberally because of the principle enunciated in article 185 C.C. [2] Perhaps, in this way, the institution of divorce is creeping into the civil law through the back door.

One notices a paradox in this area when the law of Quebec is compared with that of France. Professor Louis Baudouin points out that

> "on assiste alors à ce paradoxe d'un droit: le droit français, qui admet trop largement le divorce, mais restreint le champ d'application de l'action en nullité pour erreur; et d'un autre droit: le droit québecois, dont est banni le divorce, mais qui élargit considérablement la qualification de l'erreur en matière de mariage, augmentant ainsi d'une façon détournée les chances de dissolution du mariage." [3]

Much controversy has centered around one particular provision for annulling marriage, *viz.*, art. 148 C.C. which states:

> "A marriage contracted without the free consent of both parties, or of one of them, can only be attacked by such parties themselves, or by the one whose consent was not free.
>
> When there is error as to the person, the marriage can only be attacked by the party led into error."

The storm hovers around the meaning of "error as to the person" or "erreur dans la personne", in the French version. This comment will attempt to analyze the problems surrounding this phrase and to point to a possible solution.

---

* Of the Junior Board of Editors, McGill Law Journal; second year law student.

[1] C.S., Montréal, No. 607,011, 8 octobre 1964. (André Demers, J.).

[2] See : Baudouin, L., *Le Droit Civil de la Province de Québec*, Montréal, 1953, p. 156.

[3] *Ibid.*

Facts and Ratio decidendi

In a recent decision of the Superior Court, *Dame Weinstock v. Blasenstein*, this discussion arose. The facts are as follows: The defendant, under the name of Harold Green, was married to the plaintiff in Montreal. She believed that he resided permanently in Montreal and that he had an interest in a loan and construction company. Five days after the marriage, the defendant was arrested by the Montreal police and was subsequently convicted of fraud. The plaintiff discovered that the many gifts which the defendant had given her were paid for with n.s.f. cheques. She also found out that his real name was Jack Leon Blasenstein and that he had lived in the State of New York, where he had been convicted of a criminal offence in 1960.

The plaintiff instituted the present action to have the marriage annulled, alleging that there was, on her part, error as to the person. The defendant did not contest the action, but the Attorney-General for the Province of Quebec intervened.

There was a preliminary issue in this case as to whether the laws of the State of New York or the laws of the Province of Quebec should apply. The learned trial judge, Demers, J., held that those of Quebec were to be applied. This issue, however, will not be discussed in this comment.

It is submitted that the real issue in this case is the interpretation to be given to the phrase "erreur dans la personne". In this case, Demers, J. held that there was error as to the person and declared the marriage "nul et annulé à toutes fins que de droit". There was error as to the civil identity of the person of the defendant, *viz.*,

> "la demanderesse a cru épouser un nommé Harold Green, homme d'affaires de Chomedey, alors qu'en fait, elle se mariait avec Jack Leon Blasenstein, un repris de justice."

Demers, J. states that "erreur dans la personne" includes both error as to the physical person and error as to civil identity. He rejects the theory that only error as to the physical person is sufficient cause to annul a marriage under art. 148 C.C. According to this theory (which he states is not supported by the text of the law) there would be error as to the person only when Jacob, wishing to marry Rachel, marries Lia. He asserts that the law also allows the annulment of a marriage where the consent is viciated by an error as to the civil identity of the person, "lorsque cette erreur a été la cause déterminante du mariage."

The meaning of the phrase in question is ambiguous. It is susceptible of both a limited and an extended interpretation. In order to find out what application should be given to this phrase, it is necessary to look to the sources of art. 148 C.C. The Codifiers, in their report [4], cited Pothier, *Mariage*, 444, 308 and Merlin, *Rép.*, *Mariage*, s. 1, no. 2; s. 6, no. 2 as the sources for this provision.

Pothier states, in the portion of his works cited by Codifiers,[5] precisely the theory that is rejected by Demers, J. in the present case. "Erreur dans la personne", according to Pothier, bears only on the physical person. If I marry Jeanne, believing her to be Marie, another physical person, then, and only then, is there "error as to the person". Pothier continues,

> "si j'ai épousé Marie... la croyant de bonne renommé, quoiqu'elle ait été flétrie par justice... le mariage que j'ai contracté avec elle, ne laisse pas d'être valable nonobstant l'erreur dans laquelle j'ai été à son sujet." [6]

Merlin agrees with Pothier and also cites the example of Jeanne and Marie.

Demers, J. states that the theory expressed by Pothier, namely that only error as to the physical person can give rise to the annulment of the marriage, goes beyond the text of the law. It is submitted that Pothier's views on the matter *are* the text of the law on this subject.

It is possible that the rejection by Demers, J. of the strict Pothier theory is partly based on a line of jurisprudence which considerably widens the meaning of "error as to the person" to include error as to the essential qualities of the person. The courts have admitted as errors as to the person, the psychological inability to consumate the marriage, [7] broken promises, [8] religious misrepresentation, [9] false representations, [10] an undisclosed criminal record, [11] incurable disease, [12] etc. With all due respect, it is submitted that these judgments

---

[4] Codifiers' 2nd Report, p. 290.

[5] Pothier, *Mariage*, 308.

[6] *Ibid.*, 310.

[7] *Scholes v. Warlow*, (1927), 65 S.C. 6. *Lamothe v. Loyer*, [1944] R.L. 177. *Dame Hivon v. Gagnon*, [1962] S.C. 399.

[8] *Page v. Knott*, (1939), 77 S.C. 354.

[9] *Musgrave v. Covinesky*, (1923), 61 S.C. 221.

[10] *Dame Maguire v. Mooney*, (1941), 79 S.C. 172. *Dame Benditsky v. X.*, (1939), 77 S.C. 391.

[11] *D. v. J.*, [1947] S.C. 143.

[12] *N. v. E.*, [1945] S.C. 109.

were in error. They stem from the 1927 case of *Scholes* v. *Warlow*, where Martin, J. based his decision entirely upon common law jurisprudence and canon law. In the Province of Quebec, however, these two systems have no application. Surely it is the Civil law which must be applied. We must specifically look to the Civil Code and to the authors cited by the Codifiers. This point is stressed by Challies, J. in *Leibovitch* v. *Beane*.[13] The Codifiers have cited Pothier and Merlin as the authorities for art. 148 C.C. It is the views of these authors, therefore, which must be followed. It is interesting to note that most of the recent cases dealing with art. 148 C.C. have upheld the strict Pothier theory.[14]

An apparent compromise has been struck by St.-Jacques, J. in his notes in *Chisholm* v. *Starnes*.[15] He states that error as to the "individualité civile" is sufficient to constitute error as to the person. This appears to be the position taken by Demers, J. He states,

> "l'erreur portant sur l'individualité civile elle-même peut justifier l'annulation du mariage dans certains cas."

The plaintiff was mistaken as to the civil identity of the defendant. She believed him to be Harold Green. In reality, his name was Jack Blasenstein. There was, therefore, error as to "individualité civile", states Demers, J.

It is submitted that the name of the defendant was merely one of his essential qualities. The fact that the plaintiff believed her husband's name to be Harold Green was not the determining reason for marrying him. She undoubtedly would have married him had she known him as Jack Blasenstein, all other things remaining the same. His name was only one of his attributes. The plaintiff married the physical person she intended to marry, regardless of his name. The law, therefore, does not permit marriage to be annulled under art. 148 C.C. There was no error as to the physical person in the present case, and the marriage, therefore, should not have been annulled.

---

[13] [1952] S.C. 352, at p. 360.

[14] See: *Dame M. v. H.* et *Procureur général de Québec*, [1949] B.R. 235. *Procureur général de Québec v. K.* et *W.*, [1947] B.R. 566. *Yorksie v. Chalpin*, [1946] B.R. 51. *C. v. J.* et *Procureur général de Québec*, [1961] S.C. 672. *Bourbeau v. Belghersa*, [1960] S.C. 108. *Daigle v. Dame Benoit*, [1960] S.C. 45. *B. v. Dame D.*, [1949] S.C. 406. *Beaulne v. Thessereault*, [1947] S.C. 24. *C. v. Dame G.*, [1947] S.C. 298. *M. v. L.*, [1947] S.C. 138. *Whalley v. Kowalyck*, [1947] R.L. 228. *X. v. Z.*, [1947] S.C. 430. *V. v. V.*, [1946] S.C. 84. *Page v. Nantel*, [1945] R.L. 257.

[15] [1949] B.R. 577, at p. 580 ff.

Conclusion

It is suggested that Demers, J. has reintroduced the wide interpretation of "error as to the person" which allows error as to the qualities of the person to viciate the consent required for a valid marriage. The Codifiers manifestly did not wish that this interpretation be adopted, for they referred to Pothier and Merlin, both of whom allow only error as to the physical person as sufficient cause for annulling a marriage. This is the law, therefore, and it must be applied in the courts. Considerations of equity may lead one to the conclusion that a marriage such as the present one should be annulled. These considerations, however, should not lead one to disregard the law.

In the field of marriage, there is an old maxim which states, "en mariage il trompe qui peut". It would appear that the Codifiers have adopted this principle. As long as this is the law, therefore, should not the courts apply it ? It is within the powers of the Legislature, not the courts, to change this law. Proposals for a change in this area merit profound thought. It may well be that, in certain situations, it is just and equitable to annul the mariage. The solution adopted in article 1333 of the German Civil Code is a just one. A marriage may be annuled if there is error as to the essential qualities of the person, i.e., if the error bears on such qualities which are so essential that the other party would not have contracted the marriage if he had known of them. If this were the case in the Province of Quebec, the law would be the same for all, whereas at the present, it is not. Whether or not the marriage is annulled seems to depend upon which judge is deciding the case.[16] This is not equal justice for all.

In conclusion, it is submitted that the law as it exists, i.e., as expressed by Pothier and Merlin, should be applied in all cases. If a desire to be equitable and just directs one to wish such marriages annulled, the law should be altered by the Legislature. Even if the law is to remain the same, the Legislature should undertake some effort to so state. Uncertainty in this area is particularly objectionable. Until the law is changed or restated, however, only error as to the physical person constitutes "erreur dans la personne". *Dura lex, sed lex.*

---

[16] Compare these two cases: *C. v. J.* et *Procureur général de Québec,* [1961] S.C. 672, and *Dame Hivon v. Gagnon,* [1962] S.C. 399.