F. v. F.

HIGH COURT CIVIL CAUSE NO. 11 OF 1941.

Divorce—proof of marriage—Jewish marriage ceremony.

In certain cases a marriage can be proved by evidence of the ceremony having been performed in the manner usually observed by persons of a particular religious belief. This does not apply to the proof of marriage in proceedings for bigamy.

Robinson, J.: The husband, F., is petitioning for the dissolution of his marriage with the respondent, Mrs. F., on the ground of desertion. Desertion took place in 1936 and has been continuous since. There was no good cause for it. Her reason apparently was that she did not like living at Lusaka where the petitioner has his established business as well as many other business interests. It is clear law that the husband has the right to choose the place where the matrimonial home shall be. In making such a choice, the husband must not act unreasonably, but, subject to this, the refusal of the wife to live with him in the home chosen by him is desertion on her part. The latest authority establishing that proposition is *Mansey* v. *Mansey* (1940) 2 A.E.R. 424.[1]

The only point with which I want to deal is the *quantum* of proof of the marriage required by the Court in an undefended petition for dissolution.

In this case, the marriage took place in December, 1920, at Luoke, a place which was then in the independent Sovereign state of Lithuania, before a Jewish Rabbi (both parties being Jews) in the house of the respondent's parents. Lithuania is now re-absorbed into Soviet Russia, and communication with it by post is most precarious and uncertain, if not quite impossible so long as the war lasts.

The petitioner gave evidence and described the wedding ceremony, the canopy, the ring, the drinking of wine, the breaking of the glass, the congratulations of the fifty guests present, and the giving of a document of marriage by the Rabbi to the bride. He then described how they co-habited. He came to Northern Rhodesia in 1921 and his wife joined him in 1922 and ever since then until 1936 they had lived together in the matrimonial house and they had always been regarded by everybody as husband and wife. Another witness was called, a Mr. Bloomberg, who had lived for nine months in the matrimonial home, whilst he was working in the petitioner's store. He said he was introduced to the respondent by the petitioner as his wife and by common repute the petitioner and respondent were husband and wife.

I will deal with the position on those facts. It is true that, in response to a request from the petitioner's solicitors, the respondent sent by post a paper alleged to be the document of marriage given her by the Rabbi at Luoke, together with a translation made by the Rabbi

[1] But see also *King* v. *King* 1942 p. 1; 1941 2 A.E.R. 103.—*Editor.*

at Livingstone. It is true also that the petitioner identified the document as being the one handed to his wife, but, without a witness to prove the translation and its purpose the Court cannot place any reliance in it for further establishing the lawful marriage.

Even without that document I am of the opinion that there is sufficient evidence here to say that a lawful marriage can be presumed.

English law has for the last 200 years recognised Jewish marriage as an exceptional system of marriage. A Jewish marriage is attended by special ritual and, if the Court is satisfied on evidence that the ceremonies have been duly carried out and that it was the intention of the parties to contract a binding marriage, then I think the fundamental principle can be invoked, especially as Europe is to-day with constantly changing national boundaries and the Jewish community being subjected to many persecutions.

The principle is this, as stated by BARGRAVE DEANE, J. in a contribution to Halsbury's *Laws of England* under the topic Husband and Wife, and cited with approval by MERRIVALE, P. in *Spivack* v. *Spivack*, 46 T.L.R., 243, which was a maintenance case decided in 1930: "Where there is evidence of a ceremony having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary". That concise statement of the law is founded on the leading case of *Piers* v. *Piers*, 2 H.L. Cases 331.

In this case a *defacto* marriage has been established according to a familiar process, the everyday process among Hebrews, performed by a rabbi. The presumption, therefore, is that the marriage was a valid marriage. The burden of impeaching the marriage lies on the party impeaching it. It is valid unless it can be displaced. No effort has been made even to contest it.

I ought perhaps to say although it is not relevant in this case, that the authorities make it quite clear that in a criminal case, such as bigamy, where, to constitute the offence, proof of a marriage is required, very strict proof is necessary and the Court would not convict on the presumption *Semper praesimunter pro matrimonio*.

This judgment must not be taken as meaning that the Court will relax its scrutiny of the proof of marriage. Every effort should always be made to prove a lawful marriage strictly, and it is only when the circumstances are such that the usual evidence cannot be obtained, or the cost of obtaining it, or the time taken in obtaining it, would defeat justice, that the Court will waive best proof.

I grant a dissolution on the ground of desertion without cause for a period of three years and upwards immediately preceding the presentation of the petition.