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*Nov. 21.
*Dec. 21.

HYMAN GOLD (DEFENDANT).....APPELLANT;

AND

B. L. REINBLATT (PLAINTIFF).....RESPONDENT;

AND

ISAAC KERT (MIS-EN-CAUSE).

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Foreign law—Proof of—Competent and qualified witness—Art. 110 C.C.P.

In order to prove the law of a foreign country it is not necessary that the witness should be a lawyer actually practising his profession in that country; but, inasmuch as foreign law is a question of fact which must be proved as any other fact by a competent and qualified witness, any person whose occupation makes it necessary for him to have knowledge of the law of such foreign country may be a competent and qualified witness, the competency and qualification of such witness being a matter for the appreciation of the court.

Observations as to construction and effect of pleadings; surprise. (Art. 110 C.C.P.)

Judgment of the Court of King's Bench (Q.R. 45 K.B. 136) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Weir J. (2), and maintaining the respondent's action.

The respondent, in order to prove the law of Austria, called a witness described in the text of his deposition as an "insurance agent, of the city of Montreal, aged 39 years"; and the appellant's counsel objected that "the witness (was) not capable of making proof as to foreign law." This witness was born in Austria, where he lived until 1922,

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

(1) Q.R. 45 K.B. 136. (2) Q.R. 65 S.C. 17.

and at the time of the trial, he was a law student at McGill University, Montreal. He had already studied law at the University of Czerinowitz before the war, and, resuming his studies some time after, he received the degree of Doctor of Law. In 1919, he was admitted to the bar and began practice as a lawyer at Suczawa, in the province of Bucovina, in Roumania, where the law of Austria was in force. He produced a certificate of his degree from the dean of the University of Czernowitz and also a certificate from the President of the Lawyers of Bucovina that he had been admitted as a lawyer. After testifying as to the law of Austria as regards marriage and civil status, the witness cited some articles of the Austrian Civil Code which bore out his evidence.

The trial judge held that the witness was not competent to prove the law of Austria because he was not actually practising his profession there. The Court of King's Bench reversed that decision and the principal *considérants* of its judgment are the following:

" Considering that the said expert witness after having prosecuted his legal studies at an Austrian university, became a practising lawyer at the bar of Roumania because his native province was, by the Treaty of Versailles, transferred from Austria to Roumania;

" Considering that foreign law is a question of fact which must be proved as any other fact by a competent and qualified witness, and that, besides professional persons, any person whose occupation makes it necessary for him to give special attention to legal topics, may be a competent witness, the application of this test being left for decision to individual cases;

" Considering that, in the circumstances disclosed in the present action, the said witness was fully qualified to testify as to the laws of Austria, and that, moreover, his evidence is corroborated by the Austrian code to which he refers, and of which this court is, therefore, entitled to take cognizance;"

J. L. St. Jacques K.C. and *Louis Fitch K.C.* for the appellant.

Eug. Lafleur K.C. and *H. Weinfield K.C.* for the respondent.

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NewcombeJ

The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff (respondent) is endeavouring to enforce a contract for the sale to the defendant (appellant) of numbers 22 to 28 Duluth Avenue West, Montreal. The contract is in writing, dated 3rd March, 1925, and there is no dispute about its execution or validity. As the case is presented in this court, the difference between the parties relates to the matrimonial status of the plaintiff, and it is raised in this wise: By the notarial deed of sale and conveyance which the plaintiff caused to be tendered to the defendant on 30th April, 1925, the fifth of the vendor's declarations reads as follows:

> That he has been twice married, namely, first to Dame Chaia Sarah Weingost, from whom he was separate as to property in virtue of the laws of Austria, where he was domiciled at the time of his marriage, and who died in the month of May, 1921; and secondly, to Dame Chaia Spivack, who is alive.

The defendant rejected the deed, alleging community, by the law of Austria, between the plaintiff and his deceased wife, by whom the plaintiff had ten children. Of these, five died in childhood in Russia, and one son died in Canada, leaving four children of his own, who are living in Montreal. The defendant's answer to the notary, who tendered the deed, as recorded in the protest, was:

> Am ready to buy the property and pay the money, as soon as all the heirs sign the deed of sale and give clear titles to same.

The plaintiff claimed, by his declaration in the cause, dated 14th May, 1925, the execution of the deed and other relief, as therein particularly set out. The defence, dated 15th December, 1925, in so far as it relates to the matter now in controversy, consists of a single paragraph, no. 15, as follows:

> Plaintiff has at no time, although called upon to do so, produced a certificate of marriage, nor proof of the law of Austria, where the said marriage is purported to have taken place; and according to the laws of Austria, where plaintiff was married to his first wife, plaintiff and his wife were in community as to property; one-half of the immovable property belongs to the heirs of the plaintiff's first wife, who are still owners of a one-half interest in the said property, and who have not divested themselves thereof, and are not parties to the deed tendered to the defendant.

The plaintiff, by the ninth paragraph of his answer to the defendant's plea, alleges

> That as a matter of fact, according to the law of Austria, where plaintiff and his first wife were married, the consorts were separate as to property, which law provides that the consorts shall be separate unless an

ante-nuptial contract was entered into stipulating community, and as a matter of fact no such ante-nuptial contract had been entered into between plaintiff and his first wife.

And the defendant, by his replication, generally denied this paragraph, along with others.

At the trial, the plaintiff, in order to prove the law of Austria, called Milan Oxorn, described in the text of his deposition as "of the city of Montreal, insurance agent, aged thirty-nine years," and the defendant's counsel objected that "the witness is not capable of making proof as to foreign law." Subject to this objection, Mr. Oxorn testified that he was born in Austria, where he lived in the Austrian municipality of Bucovina (which subsequently became a Roumanian province) until the end of 1922, after which he came to Canada; and that he was, at the time of the trial, a law student at McGill University. He was studying at the University of Czernowitz before the war, but his course was then interrupted, and he became engaged in the Austrian military service. Then, after the war, he resumed his law studies, passed his remaining examinations at the university, and acquired the degree of Doctor of Law. In 1919, he was admitted and began practice as a lawyer at Suczawa, in the province of Bucovina, which had, by the terms of the peace, been added to Roumania, but where the law of Austria nevertheless continued to apply. Dr. Oxorn produces a certificate of his degree from the Dean of the University of Czernowitz, dated 4th August, 1919; also a certificate from the President of the Corporation of Lawyers of Bucovina, Roumania, dated 24th August, 1922, the English translation of which in evidence is suggestive of some imperfection; it reads as follows:

CORPORATION OF LAWYERS OF BUCOVINA

ROUMANIA

(Seal)

Certificate of Advocate

Seeing the application registered under no. 824/22 the Corporation of Lawyers of Bucovina, having examined the acts and diplomas of Dr. Milan Oxorn, stating that he was entered as a probationary advocate in the table of lawyers of Falticeni on the first day of August, 1922, as appears by his advocate's certificate no. 20 drawn up by the named corporation, as by resolution of August 24, 1922, admitted his transfer and

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entry as a definitive advocate in the list of the Corporation of Advocates of Bucovina, with domicile in Suczawa.

This certificate is drawn up to serve him in all judicial instances.

THE PRESIDENT OF THE CORPORATION,

DR. REUTZ.

Corporation of Lawyers of Bucovina.

(Seal)

No. 84/22. August 24th.

Dr. Oxorn testified that he has an intimate knowledge of the law of Austria as regards marriage and civil status; and he goes on to shew that, at the time of the plaintiff's marriage in 1877, and ever since, according to the law of Austria, marriage, in itself, does not carry with it any community of property between husband and wife; and that, in order that community should exist between them, there must be a special contract, which may be stipulated according to the will of the parties; and he read articles 1233, 1237 and 1238 of the Austrian Civil Code.

The witness was cross-examined upon his bar certificate, and explained:

Q. You were admitted to the bar in 1922, in August, 1922?

A. No, sir, I was admitted to the bar in 1919.

Q. I understood from your first certificate, which is in German, that you graduated in 1919?

A. Yes.

Q. At the University of Czernowitz?

A. Yes, but if you examine the wording you will see, a "definite" lawyer. I will explain to you. The first two years you are a candidate. As a candidate I could plead before courts, but not before the jury. After two years I was appointed definite advocate.

Q. You are finally called?

A. Yes.

Q. That was in 1922?

A. Yes.

It was brought out, in cross-examination and re-examination of the witness, subject to the plaintiff's objection to the introduction of this subject, that, according to the law of Austria, domicile was acquired by settlement in Austria with intention to remain permanently there; that ordinarily a minor could not, except by intervention of parents, curator or tutor, elect a domicile, but that he became emancipated by marriage; and the witness expressed himself, upon the hypothesis of the present case, in favour of

the acquisition of Austrian domicile. The defendant did not pursue the enquiry, nor produce any evidence as to the foreign law.

The uncontradicted facts shew that the plaintiff married his first wife in Skala, Austria, in 1877, when he was seventeen years of age, that he had been living there for six months before his marriage; that he continued to live there for a year and a half afterwards, and that his first child was born there. The plaintiff was cross-examined to shew that he was born in Komenitz Podolsk, a Russian province, where his parents resided; that when he left Russia, at the age of seventeen, he did not intend to return, and that when he married, he made up his mind to remain in Austria, where he was; but that, after a year and a half, when he could not get employment in Austria, he returned to Komenitz, and continued to reside there, and at Brechman, in Russia, until fifteen or sixteen years before the trial, when he migrated to Canada, where he has since lived with his family.

Weir J., the trial judge, pronounced his judgment on 22nd February, 1926. He dismissed the action upon two grounds: first, that Dr. Oxorn was not competent to prove the law of Austria, because he was not actually practising his profession there, and that his evidence was therefore inadmissible; and, secondly, that, since there was, in his view, no evidence of the Austrian law, it must be presumed to coincide with that of the province of Quebec, whereby there was, as the learned judge expresses it,

> legal community between man and wife, and legal or customary dower in favour of the wife and children born of their marriage;

and he held that the plaintiff

> has not proved that during his residence in Austria he made manifest his intention of abandoning his original domicile, and, as a consequence, the law of Russia applied to him at the time of his marriage.

In the Court of King's Bench, the appeal was heard by five learned judges, Greenshields, Tellier, Bernier, Hall and Cannon JJ., who held, in the circumstances disclosed, after considering the rule of evidence as to proof of foreign law, that Dr. Oxorn was fully qualified to testify as to the law of Austria; that his evidence, corroborated as it is by the Austrian Code, to which he had referred, should be accepted, and that there was, therefore, no community of

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property between the plaintiff and his wife. I am quite satisfied with the grounds upon which this conclusion is put.

The Court of King's Bench ignored, as a *ratio decidendi,* the question of Russian domicile, which was suggested on behalf of the defendant, although not pleaded, because the pleadings assumed Austrian domicile, and had put in issue only the law of Austria with regard to community of property. Greenshields, Hall and Cannon JJ., discussed this subject at some length, and Hall J., quotes paragraph 15 of the plea, pointing out that it is an affirmative allegation, importing a judicial admission that the marriage was governed by the laws of Austria, and Cannon J., introduces the following paragraph in his reasons:

> Le litige étant clairement délimité par les plaidoires écrites il semble inutile de se demander, comme le premier juge l'a fait, si l'appellant lors de son mariage, sujet russe mineur, était encore domicilé chez ses parents en Russie. La question ne se présente pas entre les parties qui, d'un commun accord, ont lié contestation sur l'effet que la loi autrichienne alors en vigueur pouvait avoir sur le régime matrimonial de l'appelant et de son épouse.

The construction and effect of the pleadings is a matter regulated by the provincial practice, with which this court is very reluctant to interfere, and particularly in a case such as this, where justice seems to require a strict application of the rules. Manifestly, having regard to the frame and substance of the pleadings, the plaintiff went to trial upon the question of the Austrian law of community, and he made an appropriate objection when, in the course of the cross-examination of his expert witness, the defendant attempted to introduce a question of Russian domicile. The defendant could, no doubt, have raised that question by an apt amendment, upon suitable terms, but he neither, at any time amended, nor asked for leave to amend. It is provided by the general rules of pleading, art. 110 of the Quebec Code of Civil Procedure, that

> Every fact which, if not alleged, is of a nature to take the opposite party by surprise, or to raise an issue not arising from the pleadings, must be expressly pleaded.

A litigant is not permitted to set up a new case of fact at the trial without consent or notice, unless upon reasonable terms; and this rule is very strictly applied when, in order to meet the new case, it becomes necessary for the party,

against whom it is brought forward, to obtain additional information, or to examine distant witnesses, or witnesses whose attendance cannot be readily obtained.

In these circumstances, it seems unnecessary to consider whether the evidence of domicile which the defendant elicited upon cross-examination would accord to the plaintiff the Austrian domicile which he claims, at the time of his marriage; and I shall not enter upon the enquiry, which was argued at some length before us, as to whether emancipation of a minor by marriage and his contemporaneous election of a new domicile, operates, at the time of the marriage, or must be deemed to take effect only subsequently, after the marriage relation or status has become complete.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Louis Fitch.*

Solicitor for the respondent: *Weinfield & Sperber.*