VOIDABLE MARRIAGES AND NULLITY JURISDICTION

Ross Smith v. *Ross Smith*

The decision of the Court of Appeal in *Ross Smith* v. *Ross Smith*[1] is significant not only because of the actual result achieved in relation to a given fact situation, but also because it clearly foreshadows the final extirpation of an unnecessary complication in the law relating to nullity jurisdiction which was introduced by the decision of Bateson J., in *Inverclyde* v. *Inverclyde*[2] on the authority of a *dictum* by Lord Phillimore in *Von Lorang* v. *Administrator of Austrian Property*.[3] In the former case Bateson J. held that the distinction between void and voidable marriages was relevant from the point of view of the nullity jurisdiction of the English courts, and that so far as voidable marriages were concerned, nullity jurisdiction belonged exclusively to the courts of the domicil.

It is worthwhile setting out the reasoning by which Bateson J. reached this conclusion:[4]

> The marriage being voidable and not void and the decree affecting and involving an alteration of status and being a judgment in rem binding on all the world, there can be no jurisdiction in this Court unless the parties are domiciled in this country. It seems to me that if the principle is sound that in a suit for dissolution of marriage in divorce jurisdiction depends on domicil it must equally so depend in a suit for dissolution of marriage on the ground of impotence. To call it a suit for nullity does not alter its essential and real character of a suit for dissolution. That is a mere difference in form.

His Lordship was thus equating annulment of a voidable marriage with the dissolution of a valid marriage and holding that the same principles for the purposes of jurisdiction applied to each. This view of the significance of the concept of voidable marriages for the purposes of nullity jurisdiction has not fared well in subsequent cases. In *Easterbrook* v. *Easterbrook*[5] Hodson J. (as he then was) and in *Hutter* v. *Hutter*[6] Pilcher J., declined to follow *Inverclyde* v. *Inverclyde* and held that the residence of both of the parties in the case of a voidable marriage was sufficient to found jurisdiction in the English court. In *Easterbrook* v. *Easterbrook* Hodson J. delivered a very short judgment having only heard argument on behalf of the petitioner, but in *Hutter* v. *Hutter* the point was fully argued and the reasoning of Pilcher J. is of great significance as it has been the model used in most of the subsequent cases.

His Lordship started from the proposition that the jurisdiction of the old ecclesiastical courts was exercised on the basis of residence not domicil:[7]

> It is quite clear that the jurisdiction of each particular ecclesiastical court to entertain any suit depended, in the first place, on the residence of the party against whom relief was sought within the territorial jurisdiction of the particular ecclesiastical court before whom he was cited to appear.

His Lordship then pointed out that the ecclesiastical courts drew no distinction, for this purpose, between either foreign and English marriages or between void and

1. [1961] 1 All E.R. 265.
2. [1931] P. 29.
3. [1927] A.C. 641.
4. At pp. 41-2.
5. [1944] P. 10.
6. [1944] P. 95.
7. At p. 99.

voidable marriages. He then referred to the provisions of the (English) Matrimonial Causes Act, 1857, section 22, by which the Divorce Court is required to follow the principles and rules of the ecclesiastical court as nearly as possible, and held that he was obliged to exercise jurisdiction in the case before him, since the ecclesiastical courts would have exercised jurisdiction in a like case.

The conflict between *Inverclyde* v. *Inverclyde* on the one hand, and *Easterbrook* v. *Easterbrook* and *Hutter* v. *Hutter* on the other set up uncertainty regarding the question of whether the residence of both parties was sufficient to found nullity jurisdiction which was only finally resolved by the decision of the Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [8] in which, arguing in a similar fashion to Pilcher J. in *Hutter* v. *Hutter,* they held, overruling *Inverclyde* v. *Inverclyde,* that residence of both parties to a voidable marriage was sufficient to found jurisdiction. Thus Denning L.J. (as he then was) stated: [9]

> However valid this distinction between void and voidable marriages may be for some purposes, it is not valid for our present purposes. Take the case of impotence itself, which has always made a marriage voidable. The old ecclesiastical courts would certainly assume jurisdiction on the ground of residence and not of domicile; and if they would assume jurisdiction, so should we also.

The significance of the decision in *Ramsay-Fairfax* v. *Ramsay-Fairfax* lies not merely in the fact that the Court of Appeal overruled *Inverclyde* v. *Inverclyde* but also in the fact that they denied the whole basis of the reasoning upon which *Inverclyde* v. *Inverclyde* had been based, namely that from the point of view of nullity jurisdiction the distinction between void and voidable marriages was significant.

It was this fact which impressed Collingwood J. in *Hill* v. *Hill.*[10] The essential point at issue was whether nullity jurisdiction could be exercised by the English court, in the case of a voidable marriage, simply on the basis that the marriage had been celebrated in England, the respondent being resident and domiciled elsewhere. Earlier in *Casey* v. *Casey*[11] Bucknill L.J. (as he then was) had refused jurisdiction in such a case, arguing in a similar fashion to Bateson J. in *Inverclyde* v. *Inverclyde* : [12]

> Why, then, should there be a distinction, on the ground of the place of celebration of marriage, between a petition for dissolution of a valid marriage and a petition to annul a marriage on the ground of wilful refusal to consummate it. I can see no good reason for such a distinction.

His Lordship thus denied what had always been accepted as a ground of nullity jurisdiction irrespective of whether the marriage was void or voidable. [12a]

In *Hill* v. *Hill,* however, Collingwood J. held that the overruling of *Inverclyde* v. *Inverclyde* in *Ramsay-Fairfax* v. *Ramsay-Fairfax* entitled him to restrictively interpreted *Casey* v. *Casey,* which his Lordship proceeded to do: [13]

8. [1956] P. 115.

9. At p. 133.

10. [1960] P. 130.

11. [1949] P. 420.

12. At p. 429.

12a. See *Linke* v. *Van Arden* (1894) 10 T.L.R. 426. In his first edition residence is the only ground of nullity jurisdiction recognised by Dicey who drew no distinction between void and voidable marriages.

13. At p. 144.

> The decision in *Casey* v. *Casey* is, of course, binding upon this court. But it was submitted by counsel for the wife, and by counsel for the Queen's Proctor, that the overruling of *Inverclyde* v. *Inverclyde* in *Ramsay-Fairfax* v. *Ramsay-Fairfax* necessitated careful view of the grounds upon which *Casey* v. *Casey* was decided, and that the decision in that case should be confined strictly to the facts which were before the court. In my opinion this submission is correct.

His Lordship, therefore, took as the point of distinction the fact that *Inverclyde* v. *Inverclyde* had been concerned with wilful refusal to consummate whereas the case before him was concerned with impotence. Having thus disposed of *Casey* v. *Casey* his Lordship assumed jurisdiction on the same argument as that used in *Hutter* v. *Hutter* and *Ramsay-Fairfax* v. *Ramsay-Fairfax,* namely, that the ecclesiastical court would have assumed jurisdiction in the like case.

We come finally to the decision in Ross *Smith* v. *Ross Smith* itself in which the problem was essentially that which had arisen in *Casey* v. *Casey* and *Hill* v. *Hill.* Karminski J., at first instance, declined jurisdiction holding that he was bound by *Casey* v. *Casey.* In the Court of Appeal (Omerod, Willmer and Upjohn L.JJ.) this decision was reversed, the Court preferring to follow *Ramsay-Fairfax* v. *Ramsay-Fairfax* than *Casey* v. *Casey.* Willmer L.J. adopted the argument which was essentially that employed in *Hutter* v. *Hutter* and *Ramsay-Fairfax* v. *Ramsay-Fairfax,* namely that the ecclesiastical courts would have had jurisdiction in such cases, and therefore, by virtue of the Matrimonial Causes Act, 1857, section 22, the High Court had such jurisdiction: [14]

> No case has been cited to us in which any ecclesiastical court assumed jurisdiction on the mere ground that the marriage was celebrated within the jurisdiction of the diocese. On the other hand, there is authority for the proposition that they recognised that the court of the place of celebration provided a natural forum for adjudicating on the validity of a marriage.

After citing *Scrimshire* v. *Scrimshire*[15] and *Dalrymple* v. *Dalrymple*[16] his Lordship continued:[17]

> We think that it may be inferred that, had they not been restricted by the provisions of the Ecclesiastical Jurisdiction Act, 1531, and had facilities existed, such as are now available, for service out of the jurisdiction, the ecclesiastical courts would not have been slow to assume jurisdiction to pronounce on the validity of any marriage celebrated within the diocese.

Having thus established that to accept jurisdiction would be to follow the principles followed by the ecclesiastical court his Lordship spoke as follows: [18]

> What is of vital significance in relation to the question now under consideration is that the ecclesiastical courts drew no distinction, from the point of view of jurisdiction, between marriages void *ab initio* and those which were merely voidable.

14. At p. 259.

15. (1762) 2 Hag Con. 263

16. (1811) 2 Hag Con. 54.

17. At p. 259.

18. At p. 259.

Further, after citing *Simonin* v. *Mallac,*[19] *Sottomayor* v. *De Barros,*[20] *Cooper* v. *Crane,*[21] *Linke* v. *Van Arden,*[22] *Hussein* v. *Hussein*[23] and *Galene* v. *Galene*[24] his Lordship continued: [25]

> In none of these cases were the parties domiciled in this country, nor was the party proceeded against resident here. We have ventured to cite them as showing that over the last hundred years the courts of this country, including the Court of Appeal, have from time to time assumed jurisdiction in nullity cases on the sole ground of the marriage having been celebrated here, and have done so in cases of both void and voidable marriages.

Regarding *Casey* v. *Casey* his Lordship remarked: [26]

> The decision is in striking conflict with the current of authority which apart from *Inverclyde* v. *Inverclyde,* since held to have been wrongly decided — had been steadily flowing in an opposite direction for a period of many years.

Finally, after discussing a number of alternative solutions his Lordship stated: [27]

> The only remaining alternative is to say that jurisdiction exists to entertain a suit for nullity of any class whenever it is shown that the marriage was celebrated in England. We can only take this course if we are free to hold that *Casey* v. *Casey* was wrongly decided; and this we can do only if satisfied that the present case is covered by one of the three exceptions to the rule binding this court to follow its own previous decisions which were mentioned by Lord Greene M.E. in *Young* v. *Bristol Aeroplane Co. Ltd.*
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> We have felt considerable difficulty in reaching a decision on this point, but, after careful consideration, we have come to the conclusion that the decision of the majority in *Casey* v. *Casey* cannot stand with the unanimous decision of this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax.* In the latter case, as we understand it, is was decided once and for all that no distinction is to be drawn, for jurisdictional purposes between marriages which are void *ab initio* and those which are merely voidable.

The Court of Appeal not merely decline to follow *Casey* v. *Casey* but they also, not surprisingly, criticised the distinction between wilful refusal and impotence which had been taken by Collingwood J. in *Hill* v. *Hill* so that jurisdiction in nullity in the case of a voidable marriage may now be exercised by the English courts as the *forum loci celebrationis* whatever the ground of voidability.

This leaves one final problem, for there is one other case in which it is alleged that nullity jurisdiction differs in the case of a voidable marriage from that in the

19. (1860) 2 Sw. & Tr. 67.

20. (1879) 5 P.D. 94.

21. [1891] P. 369.

22. (1894) 10 T.L.R. 426.

23. [1938] P. 159.

24. [1939] P. 236.

25. At p. 261.

26. At p. 262.

27. At pp. 263-4.

case of a void marriage. This is in the case in which there is an attempt to found jurisdiction, in the case of a voidable marriage, on the residence of the petitioner alone. This seems to be a sufficient basis in the case of a void marriage,[28] but most authorities hold that it is insufficient in the case of a voidable marriage relying on the authority of *De Reneville* v. *De Reneville* [29] which overruled the earlier contrary view taken by Barnard J. in *Robert* v. *Robert.*[30] In the latter case his Lordship exercised jurisdiction simply on the argument that the ecclesiastical courts would have exercised jurisdiction in the like case. In this he was overruled by the Court of Appeal in *De Reneville* v. *De Reneville.* The reasoning of the Court of Appeal in *De Reneville* v. *De Reneville* was, however, similar to that of Bateson J. in *Inverclyde* v. *Inverclyde* a decision which, in *De Reneville* v. *De Reneville,* the Court of Appeal expressly approved. Thus Lord Greene M.R. speaking of the distinction between void and voidable marriages — which he regarded as clear — stated : [31]

> In what for present purposes, does the distinction consist? It is argued that there is no real distinction by reason of the fact that in each case the form of the decree is the same and pronounces the marriage "to have been and to be absolutely null and void to all intents and purposes in the law whatsoever." It is perhaps unfortunate that a form of decree which was appropriate when a marriage was regarded as indissoluble and could only be got rid of by decreeing that it has never taken place is still used indiscriminately in cases of both void and voidable marriages. It is particularly anomalous in the case of the new grounds of nullity laid down the Act of 1937. In *Inverclyde* v. *Inverclyde* Bateson J., rightly in my opinion, insisted on the necessity of looking behind the form and regarding the substance of the matter.

Such reasoning, however, cannot stand with that of the Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax* and *Ross Smith* v. *Ross Smith* and it is submitted that the same submission may be made regarding *De Reneville* v. *De Reneville* as counsel made, and Collingwood J., in *Hill* v. *Hill,* accepted, namely, that the overruling of *Inverclyde* v. *Inverclyde* in *Ramsay-Fairfax* v. *Ramsay-Fairfax* necessitates a careful reconsideration of the grounds upon which *De Reneville* v. *De Reneville* was decided.

The reasoning used by Barnard J. in *Robert* v. *Robert,* although rejected by the Court of Appeal in *De Reneville* v. *De Reneville,* is in fact the same as that employed by that court in *Ramsay-Fairfax* v. *Ramsay-Fairfax,* and *Ross Smith* v. *Ross Smith* so that it can well be argued that the decision in *Robert* v. *Robert* in fact represents the better opinion.

It is thus submitted that there is no justification for dogmatically stating that, for the purposes of nullity jurisdiction, the law draws any distinction between void

28. *See* for example, *Mehta* v. *Mehta* [1945] 2 All E.R. 690 although admittedly the question of jurisdiction was not discussed. Since however a decree is not necessary in the case of a void marriage it seems rather pointless to refuse jurisdiction in such a case.

29. [1948] P. 100.

30. [1947] P. 164.

31. At p. 110.

and voidable marriages. The distinction was only introduced in *Inverclyde* v. *Inverclyde* and, at least when drawn for the purpose *of* nullity jurisdiction, it has now twice been disapproved by the Court of Appeal. It is therefore in the light of the decision of *Ramsay-Fairfax* v. *Ramsay-Fairfax* and *Ross Smith* v. *Ross Smith* that all these decisions must be reviewed. *Ross Smith* v. *Ross Smith* has shown, it is submitted, what is likely to be the trend for the future.

We are not here concerned with all the intricacies of nullity jurisdiction. Our only concern is to show that there is insufficient justification for the assertion that, in this context, the distinction between void and voidable marriages is relevant, and once this distinction can be removed the law relating to nullity jurisdiction will be considerably simplified.

G. W. BARTHOLOMEW.