NULLITY JURISDICTION — RECOGNITION OF FOREIGN DECREES

Abate v. *Abate*

The facts of *Abate* v. *Abate*[1] raise important questions in the difficult realms of nullity jurisdiction and declaratory decrees. Unfortunately the petition was undefended and the learned judge, Lloyd-Jacob J., did not see fit to call for the assistance of the Queen's Proctor so that the points could be fully argued. [2] The case thus provides a good illustration of how unsatisfactory it is to have important but difficult points decided without full argument.

The facts of the case were straight forward. The parties were married in London in 1952, the husband being domiciled in Italy; the wife, before her marriage, being domiciled in England. After the marriage the parties cohabited in Italy although the marriage was never consummated owing to the impotence of the husband. The parties separated in 1953 and the wife became resident in Castaneda in the Canton of Grisons in Switzerland. In 1959 the husband had his name removed from the population register of San Remo, where he had been resident, and had it

28. 115 So. 2d 697 (Supreme Court of Florida).

1. [1961] P. 29.

2. The authority for calling for the assistance of the Queen's Proctor is the Matrimonial Causes Act, 1950, 3.10 which provides that in any case the court may send the papers to the Queen's Proctor who shall under the directions of the Attorney-General instruct counsel to argue before the court any question which the court deems expedient to have fully argued.

inscribed in the population register of Castaneda. The husband then instituted nullity proceedings in Grisons on the ground of his own impotence. The Swiss court declared the marriage null and void.

The husband, having become resident in England, instituted the present proceedings for a declaration that the Swiss decree was valid and effective to annul his marriage. The case therefore raised two questions. First, had the English court jurisdiction to hear the petition; second, if it had jurisdiction, was a declaration available on the facts of the case.

The first question, as to jurisdiction, although raised by counsel was not referred to in judgment: Lloyd-Jacob J. simply assumed that he had jurisdiction. This is unfortunate since the question of jurisdiction to make a bare declaration in matrimonial causes is one upon which there is very little authority, and since cases in which this question is raised seem to be few and far between it is a pity that this opportunity of obtaining a pronouncement on this subject was missed.

Prior to *Har-Shefi* v. *Har-Shefi (No. 1)*[3] the general view seems to have been that a suit for a bare declaration was not maintainable. In *Schuck* v. *Schuck*[4] and *Igra* v. *Igra*[5] petitions for declarations were joined to proceedings for jactitation. In both cases the petitions for jactitation failed but the declarations were granted. In *Har-Shefi* v. *Har-Shefi* the Court of Appeal held, in effect, that there was no longer any need to make fictitious allegations of boasting. The view taken was that since O.25 r.5 of the Rules of the Supreme Court had been extended to matrimonial causes by the Matrimonial Causes Rules 1950 r.80 power to grant a bare declaration existed.

This decision raised the problem of the jurisdictional basis upon which this power was exercisable. The Court of Appeal, in *Har-Shefi* v. *Har-Shefi* were themselves divided. Denning and Hodson L.JJ. seemed to be of opinion that since the English court would have jurisdiction over the wife if she were domiciled in England and since the question whether she was domiciled in England or Israel depended upon the validity of the *Get* pronounced by the husband it was proper for an English court to hear her petition for a declaration. Denning L.J. (as he then was) stated the problem as follows:[6]

> The second question is whether this declaratory jurisdiction can be exercised in the present case. The couple are here both domiciled in Israel at the time of the divorce. If they had both remained domiciled in Israel after the divorce the English courts would clearly have had no jurisdiction to pronounce upon its validity. Even if the wife was resident in England, nevertheless if she had remained domiciled in Israel the English courts would have had no jurisdiction (see *De Reneville* v. *De Reneville* overruling *Robert* v. *Robert)* unless she could bring herself within section 18 of the Act of 1950, which is not the case here. But it is said that the wife has, since the divorce, resumed her English domicile, and that that is sufficient to give these courts jurisdiction to declare her status just as domicile gave jurisdiction in *White* v. *White* as explained in *De Reneville* v. *De Reneville.*

In this passage his Lordship seems to be equating jurisdiction to grant a declaration (at least in those cases in which the declaration turns upon the effect of a divorce decree) with jurisdiction in divorce. It is submitted that this identification cannot

3. [1953] P. 161.

4. [1950] W.N. 264.

5. [1951] P. 404.

6. At p. 170.

be supported. An exercise of divorce jurisdiction effects an alteration in a person's status, whereas an exercise of declaratory jurisdiction merely states what — in the eyes of the forum — a person's status is and there is surely the world of difference between these two.

This distinction is underlined by the following consideration. Suppose that Mrs. Har-Shefi even though remaining domiciled in Israel had come to England and there married again. If prosecuted for bigamy the court would have had to determine her status in the eyes of English law. The court could not have argued that it had no jurisdiction to determine her status according to English law simply because she was not domiciled here. If her status, for this purpose could be determined irrespective of her domicil then it is submitted that a declaratory decree would equally issue whether she was domiciled here or not.

A declaratory decree is in the nature of a decree of nullity when given in respect of a void marriage: it simply declares what the status of the person is. The tendency in respect of nullity jurisdiction is to remove jurisdictional restraints, and it is difficult to see the justification for imposing jurisdictional restraints upon petitions for declaratory decrees.

It is submitted that, in fact, the question of Mrs. Har-Shefi's domicil was irrelevant to the declaration proceedings. She was pleading that her marriage had been dissolved by the law of Israel, in which country she had been domiciled at the time of the dissolution. The question before the English court was whether that dissolution was effective so far as the law of England was concerned. This problem would be exactly the same whether it arose in a prosecution for bigamy, a petition for nullity on the ground of a bigamous marriage or a petition for a declaration. On the facts of the case the recognition of the divorce depended solely upon whether it was a valid divorce by the law of Israel, since both parties were domiciled in Israel at the time. The evidence was that the divorce was valid, it was therefore recognisable in England. That being so the only remaining question was whether the court had jurisdiction to declare that fact. Nevertheless the view taken by both Denning and Hodson L.JJ. seems to have been that declaratory jurisdiction could be exercised on the curious basis that the petitioner might have been domiciled in England.

No such difficulties were considered in the case of *Carr* v. *Carr*. [7] In this case the parties were domiciled in Northern Ireland at the time of their marriage which was celebrated in England. The husband deserted the wife and the wife petitioned the Northern Irish court for divorce on the ground of desertion. The Northern Irish court assumed jurisdiction on the ground that at that time the husband was still domiciled in Northern Ireland. The husband then petitioned the English court for a divorce to which the wife pleaded the Northern Irish decree and asked for a declaration that her marriage had been dissolved thereby. Barnard J. did not discuss the question whether he had jurisdiction to grant a declaration. He merely argued, on the principle of *Travers* v. *Holley*[8] that he should recognise the Northern Irish decree and he granted the declaration sought, but upon what jurisdictional basis does not appear very clearly. On the facts it was probable that the husband had acquired an English domicil at the time of the English proceedings. It could therefore be argued that the wife could possibly be domiciled in England, if, that is, the Northern Irish decree were not recognised in England, and that therefore his Lordship was relying on the same jurisdictional basis as in *Har-Shefi* v. *Har-Shefi*. Nevertheless Barnard J. did not attempt to discuss the question. His Lordship merely assumed that he had jurisdiction to hear the petition.

7. [1965] 2 All E.R. 61.

8. [1953] P. 246.

The situation, therefore, remained vague when *Abate* v. *Abate* came before Lloyd-Jacob J., but unfortunately it still remains vague since he was no more explicit on the question of the jurisdictional basis of declaratory decrees than his predecessors.

Counsel put forward two possible bases for jurisdiction. First that the marriage had been celebrated in England; second, that the wife had reverted to her domicil of origin. There is no clear authority to support the first argument, although in both *Har-Shefi* v. *Har-Shefi* and *Carr* v. *Carr* the marriages had in fact been celebrated in England. The second argument is of course that used in *Har-Shefi v. Har-Shefi.* In *Abate* v. *Abate,* however, the issue was one relating to the annulment of a voidable marriage, and not of divorce. In view of what appears to have been the basis of the decision in *Har-Shefi* v. *Har-Shefi* one might have expected some discussion of the question whether there was for this purpose any distinction to be drawn between annulment and dissolution, and if so whether any further distinction should be drawn between annulment of void and voidable marriages. Not only was there no discussion of these problems but the learned judge did not even find it necessary to decide between the two arguments put to him by counsel as he assumed jurisdiction without discussing the problem.

The problem therefore remains in a most unsatisfactory state. The only jurisdictional basis for which there is authority, that of the possible domicil of the petitioner is, it is submitted, based upon a confusion between declaratory jurisdiction and substantive jurisdiction, and its adoption is contrary to principle. No other jurisdictional principle has yet emerged from the cases.

On the point of substance, that is to say, granted that the court had jurisdiction did a declaration lie on the facts, the only point taken — the only point which could on the facts have been taken — was simply: was the decree granted by a foreign court which possessed a jurisdiction which would be recognised in England. On this point counsel presented the learned judge with two arguments both taken from the recognition of divorce decrees. The first was that the decree, although not granted by the court of the parties domicil, would have been recognised by the domiciliary court and therefore should be recognised in England under the principle of *Armitage* v. *Attorney-General.* [9] The second argument was that the decree was granted by the court of the residence of both of the parties, and since English courts exercise nullity jurisdiction on this basis the decree should be recognised in England under the principle of *Travers* v. *Holley.*

From these alternatives the learned judge chose the former. This, it is submitted, is to be regretted. The principle of *Armitage* v. *Attorney-General* has but little relevance in the field of nullity. It was developed in connection with divorces because of the exclusive control of the *lex domicilii.* Since the *lex domicilii* has exclusive control over status it was not unreasonable to extend recognition to decrees which although not granted by the courts of the domicil would be recognised by the domiciliary courts. The *lex domicilii* has not, however, exclusive control over the question as to whether a status has come into being. The law in the realm of nullity is so chaotic that it is not possible to say just which legal systems do control this issue, but it is however possible to say, and this is sufficient for our purpose, that the *lex domicilii* has no exclusive control. This fact alone is sufficient to make it unfortunate that *Armitage* v, *Attorney-General* should have been extended into the field of nullity. It is true that domicil confers nullity jurisdiction on foreign courts[10] but this, it is submitted, is an insufficient reason for invoking *Armitage v. Attorney-General* which in our submission depends upon the control of the *lex domicilii* rather than on the jurisdiction of the domiciliary courts.

9. [1906] P. 135.

10. Von Lorang v. Administrator of Austrian Property [1927] A.C. 641.

His Lordship's adoption of the principle of *Armitage* v. *Attorney-General* is the more regrettable in view of the fact that the alternative argument presented by counsel was so much more attractive. There is both principle and authority for saying that the residence of both parties will confer nullity jurisdiction upon a foreign court.[11] It is certainly a jurisdictional basis in England[12] and if claimed in England there is no good reason why a similar jurisdiction should not be conceded to a foreign court.

The only conclusion that can be drawn from a consideration of this case is that it is a great pity that wider use is not made of the services of the Queen's Proctor in undefended petitions which raise important but difficult points of law.

G. W. BARTHOLOMEW.

11. *Mitford v. Mitford* [1923] P. 130.

12. *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115.