NOTES OF CASES

RECOGNITION OF TALAQ

Russ v. *Russ (de Waele intervening)*

The decision of Scarman J. in *Russ* v. *Russ*[1] appears to push the earlier decision of the Court of Appeal in *R.* v. *The Superintendent Registrar of Marriages, Hammersmith, Ex p. Mir-Anwuraddin*[2] still further into the limbo of lost decisions. The *Hammersmith Marriage* case (as it is usually known) has only been followed once — in *Maher* v. *Maher*[3] — but it has been quoted with approval on a number of occasions and is mentioned without criticism by most writers. It has also, however, been ignored in a number of cases so that the reconciliation of this decision with many of the later decisions is a matter of some difficulty.

The facts of *Russ* v. *Russ* are of some complexity. The petitioner and the respondent were married in London in 1950, the latter having had a long and rather involved matrimonial history: he had been married twice before, and neither of these marriages had been dissolved at the time of his marriage to the petitioner.

The respondent's first marriage was to Esther May Rosser. This took place according to the rites of the Church of Scotland in Cairo in 1942. Although this was the respondent's first marriage it was Miss Rosser's third. Her first marriage to a domiciled Egyptian had been celebrated in an English registry office and had been dissolved, in Egypt, by a pronouncement of *talaq.* Miss Rosser then married another domiciled Egyptian according to Islamic rites and this marriage was also dissolved by a pronouncement of *talaq.* Both Miss Rosser's former husbands were alive in 1942 when she married Mr. Russ — the respondent.

The respondent's second marriage — his marriage to Miss Rosser not having been dissolved — was to the intervener Madame de Waele. This marriage was celebrated in Belgium and had also not been dissolved at the time of the respondent's third marriage to the petitioner.

The petitioner sought nullity on the ground that either the respondent's first or second marriages were valid and subsisting marriages at the time of her marriage to him. The intervener sought a declaration that her marriage to the respondent was void on the ground that at the date she married him his first marriage was valid and subsisting.

The respondent contended that his first marriage was void on the ground that Miss Rosser's first marriage had not been effectively dissolved by the *talaq* and that therefore she was a married woman when he purported to marry her.

The crucial point in unravelling this triangle concerned the validity of the respondent's first marriage which in turn depended upon whether his first wife's first marriage had been effectively dissolved by the pronouncement of *talaq.*

1. [1962] 1 All E.R. 649.
2. [1917] 1 K.B. 634.
3. [1961] 2 All E.R. 37.

Scarman J. commenced by enunciating the general principle which, in his view, applied to the case as follows: [4]

> I think that it is important to bear in mind that in the present case the court is concerned with a question of status — the status of Esther immediately before her Cairo marriage to the respondent. In general, the status of a person depends upon his personal law, which is the law of his domicil. Esther was domiciled in Egypt, having acquired that domicil on her marriage to Darweesh in 1913. By the law of her domicil her marriage to Darweesh was dissolved in 1932, when undoubtedly in the eyes of Egyptian law she became a single woman capable of entering into a contract of marriage. The Abdel union which followed, though a factual complication, calls for no separate legal consideration. If, therefore, the general principle is to be applied, Esther was an unmarried woman immediately before her marriage to the respondent in 1942.

His Lordship then referred to the *Hammersmith Marriage* case as an authority for the proposition that because Esther's first marriage had been celebrated in England it could not be validly dissolved by *talaq*. His Lordship admitted that he was bound by the decision if he could not distinguish it, but he held that it was his duty to consider the decision very carefully to see whether it was distinguishable or not. He decided that it was in fact distinguishable: [5]

> Clearly there are differences between the facts of the present case and of the *Hammersmith* case. Esther entered into marriage intending to follow her husband to Egypt, to go through a Mohammedan ceremony of marriage when she arrived there, and to live with him in Egypt. Furthermore she did all these things, living with him in Egypt for some eighteen years and bearing him three children. She seems to have been a consenting party to the Talak divorce in 1932. She was certainly present when it was pronounced, and thereafter she regulated her affairs in reliance on it. There would be no denial of justice to Esther if the English courts should recognise her Talak divorce. In the *Hammersmith* case Ruby Hudd lived with the applicant for less than two months, never went to India, and had no notice of the declaration of divorce until after the event. Again, Esther's divorce was in the presence of an authorised officer of the Egyptian court, was solemnly recorded in the records of the court, and has been the basis of legal proceedings in Egypt concerned with her right to support. In the *Hammersmith* case Talak was pronounced in London, no resort being had for record purposes or otherwise to the courts of India. One can well understand the comment of A. T. Lawrence, J., that to recognise Ruby Hudd's divorce was contrary to natural justice. But if it were for me to determine the requirements of natural justice, in Esther's case, I would have no hesitation in affirming that natural justice, so far from being offended by recognition of Esther's Talak divorce, required it.

The above recital of the distinguishing facts is interesting for, in the event, his Lordship relied upon only one of them. The interest lies in the fact that they were used by his Lordship to come to a conclusion as to the requirements of natural justice upon which he did not subsequently rely but which, it may be assumed, affected his approach to his subsequent argument (or rationalisation?).

In fact, at least two points may be made in connection with the use of the concept of natural justice in this type of case. First, the suggestion of Lawrence J. in the *Hammersmith Marriage* case was expressly rejected by Barnard J. in *Maher* v. *Maher*. Counsel for the wife in that case had argued that the divorce was contrary

4. At p. 652.

5. At p. 653.

to natural justice on the ground that the wife had had no notice of the proceedings, and he referred to *Shaw* v. *A.-G.*[6] and *Rudd* v. *Rudd.*[7] Dealing with this point Barnard J. stated: [8]

> I am of opinion that the true *ratio decidendi* of both cases was want of jurisdiction. In the present case there were no divorce proceedings and no amount of notice would have enabled the wife to contest the husband's unilateral declaration of divorce. I therefore reject this argument.

A second point which may be made is that if the facts of the *Hammersmith Marriage* case are carefully considered there seems to be slight justification for claiming that "natural justice", in any meaning of that term, demanded the refusal to recognise the pronouncement of *talaq* by Dr. Mir-Anwaruddin. Ruby Hudd deserted Dr. Mir-Anwaruddin after only two months of marriage and she refused to obey an order for the restitution of conjugal rights decreed by the City Civil Court of Madras. She commenced proceedings in England for a divorce on the ground of alleged cruelty but discontinued the proceedings as soon as Dr. Mir-Anwaruddin withdrew his objection as to jurisdiction and himself came to England to obtain a decision on the merits.

Even after pronouncing the *talaq* Dr. Mir-Anwaruddin resorted to the English courts for the purpose of obtaining either a declaration that his marriage was dissolved by his pronouncement of *talaq* or, alternatively, a decree of divorce on the ground of the misconduct of his wife. This petition was not admitted on the ground that he was domiciled in India but Bargrave Deane J. upholding the decision of the Registrar added that as the marriage had already been dissolved there was no subsisting marriage.

Far, therefore, from attempting to divorce his wife behind her back by an unilateral declaration of divorce, Dr. Mir-Anwaruddin provided her, by means of his petition for a declaration, with an opportunity to contest his right to divorce her by *talaq.* Whatever, therefore, the phrase "natural justice" means it would seem that — on any meaning of the phrase — it would support Dr. Mir-Anwaruddin's claim at least as strongly as it is suggested by Scarman J. it supported Miss Rosser's claim.

Scarman J., having attempted to distinguish the *Hammersmith Marriage* case on its facts, proceeded to consider just what in fact was the basis of the decision. His Lordship's analysis of that decision appears in the following extract from his Lordship's judgment: [9]

> The decision in the *Hammersmith* case was, I think, based on two grounds, though on analysis they may prove to have been two ways of saying the same thing: (i) the absence of any judicial proceeding in the courts of the domicil; (ii) that Talak divorce is not applicable to a marriage celebrated in England. In the present case there was a judicial proceeding, namely, the declaration before the court and the enrolment of the divorce in the records of the court. There has been, as Dr. Nasir emphasised, a solemn act of judicial recognition. It is true that Egyptian law would recognise a Talak divorce if pronounced in the presence of two witnesses even without this proceeding, and that there was no judicial investigation and no decree. Nevertheless the Egyptian courts make available a process of judicial recognition and record appropriate to such an

6. (1870) L.R. 2 P. & D. 156.

7. [1924] P. 72.

8. At P. 38.

9. At p. 653.

> important matter as a change of status, and the parties in the present case availed themselves of the process. Though there is much to commend the proposition that Talak pronounced without notice in a room off the Strand and never recorded in the judicial records of the courts of the domicil is inoperative to dissolve according to English law the marriage of the woman concerned, that is not the present case. In my opinion, therefore, the *Hammersmith* decision is distinguishable in that on its facts there was no judicial process at all, whereas in the present case there was the judicial process in the courts of the domicil of recognition and accord.

It is perhaps significant that his Lordship did not cite any passages from the judgments delivered in the *Hammersmith Marriage* case to support his interpretation. We would submit that in fact he would have found it very difficult to find any such passage. In our submission the *ratio decidendi* of the *Hammersmith Marriage* case is not too difficult to ascertain. In the Divisional Court it appears perfectly clearly in the judgments of both Viscount Reading C.J. and Bray J. The former stated: [10]

> Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted in England is dissolved by mere operation of the laws of the religion of the husband and without a decree of a court of law.

Bray J. stated: [11]

> These cases (*i.e.,* those reviewed in *Harvey* v. *Farnie*) do not decide that the courts here will act on the law of the domicil. They decide that if there is a decree of a foreign court, these courts will regard that decree and act upon it. There has been no such decree here.

The judgments delivered in the Court of Appeal are rather more diffuse but it is submitted that the same idea underlies them. Thus Swinfen Eady L.J. stated: [12]

> Now under these circumstances the marriage which was celebrated between the appellant and Ruby Hudd on March 18, 1913, has not been dissolved by any court of competent jurisdiction

and again both Swinfen Eady L.J. and Bankes L.J. relied upon the pronouncement of Lord Brougham in *Warrender* v. *Warrender*[13] to the effect that: [14]

> if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in pais to separate, every other country ought to sanction a separation had in pais there and uphold a second marriage contracted after such a separation. It may safely be asserted that so absurd a proposition never could for a moment be entertained.

It is reasonable to suggest, therefore, that the *ratio decidendi* of the *Hammersmith Marriage* case was in fact that a marriage which had been contracted in England could not be dissolved save by a court of law, and that therefore Scarman J. in *Russ* v. *Russ* was not putting the position quite accurately.

Having put forward his own interpretation of the *Hammersmith Marriage* case his Lordship proceeded to deal with two other suggested interpretations. The

10. At pp. 642-3.
11. At p. 653.
12. At p. 657.
13. (1835) 2 Cl. & F. 488.
14. At p. 534.

first of these was that the *talaq* was not recognised in the *Hammersmith Marriage* case because of the absence of any decree or judicial investigation. This in fact, as we have indicated above, was very strongly suggested in the judgments delivered in that case. Nevertheless Scarman J. rejected this interpretation on that the ground that it would be inconsistent with *Har-Shefi* v. *Har-Shefi (No. 2)* [15] and *Sasson* v. *Sasson.*[16] This seems a rather strange point. *Har-Shefi* v. *Har-Shefi (No. 2)* was a decision of a single judge sitting in the Probate, Divorce and Admiralty Division; the *Hammersmith Marriage* case was a decision of the Court of Appeal, which was not even cited in *Har-Shefi* v. *Har-Shefi (No. 2).* The ratio of a Court of Appeal decision can hardly be controlled by a subsequent decision at first instance in which the Court of Appeal decision was not even cited. *Sasson* v. *Sasson.* is scarcely a relevant case in this context. The decision was that of the Judicial Committee of the Privy Council sitting on appeal from Palestine. The decision is therefore a decision of Palestinian law and not of English law. Whether the Palestinian courts recognise a Jewish divorce or not is hardly relevant to the question of whether the English courts should do so.

It may be admitted that it is difficult to reconcile the *Hammersmith Marriage* case with *Har-Shefi* v. *Har-Shefi* and indeed with several later English cases but it may be questioned whether the method of reconciliation adopted by Scarman J. is wholly satisfactory. In effect his Lordship's argument is based upon drawing a distinction between a judicial proceeding and a judicial investigation, and extending the former term to include something which amounts to no more than registration of a unilateral proceeding at a court. It involves further drawing a distinction between the case of an Egyptian divorce which is registered at the Cairo Court of Personal Status and one which is not. It seems rather difficult to justify the conclusion that the former should be recognised by the English courts but not the latter, where, as Scarman J. himself admitted, both would be recognised by the Egyptian courts.

The second interpretation of the *Hammersmith Marriage* case which was rejected by Scarman J. was that "a pronouncement of Talak is not apt to dissolve a marriage celebrated in England". His Lordship rejected this interpretation as follows: [17]

> I find myself unable to determine the exact limits of the proposition. If it be no more than a way of saying that a pronouncement of Talak in the absence of a judicial proceeding in the courts of the domicil is not effective to dissolve a marriage celebrated in England, it adds nothing to the ground of decision which I have already considered. But if the proposition is quite general and is intended to obtain whether or not there exists a judicial proceeding in the courts of the domicil, I think it was unnecessary to the decision and indeed went beyond the scope of the argument for the Crown. For it is clear from Lord Reading's judgment in the Divisional Court that the Solicitor-General desired the question of the effect of a judicial proceeding to be left open.

It may be noted here that it seems quite clear from the wording of Lord Reading's judgment that he was not using the term "judicial proceeding" in the extraordinarily wide sense in which it is being employed by Scarman J. What Lord Reading said was: [18]

> If in the present case it could be established that according to the law of India, which is the matrimonial domicil, a decree dissolving the marriage had

15. [1953] 2 All E.R. 373.

16. [1924] A.C. 1007.

17. At p. 654.

18. At p. 642.

> been made by a Court of competent jurisdiction, it would raise the question whether a decree founded upon the husband's right to pronounce Talak would be recognised by our Courts as an effective divorce according to English law, entitling the applicant to marry again in this country. It must certainly not be inferred that such a decree of a foreign Court would be accepted by our Courts as dissolving the marriage contracted here. The Solicitor-General indicated that he desired that this point should be left open.

What, therefore, the Solicitor-General desired should be left open was the position of a decree founded upon the husband's right to pronounce *talaq,* and not, as Scarman J. implied, the question of whether the occurrence of a "judicial proceeding" in the sense of a mere act of registration would affect the recognition of the divorce.

Scarman J. continued, however, as follows: [19]

> The basis of any such general proposition would be that Talak, being an incident of polygamous marriage, cannot dissolve a marriage celebrated in England. It is plain on principle as well as on a consideration of the *Hammersmith* case that circumstances can arise, and have arisen, in which the English courts refuse to recognise a pronouncement of Talak as changing a woman's status. It is, after all, only a general rule that English law looks to the law of domicil to determine status. But am I driven to the conclusion that English law can never recognise a Talak divorce? In the light of the *Sinha (Peerage) Case* and *Baindail* (*otherwise Lawson*) v. *Baindail,* I do not think that English law must always refuse to have regard to polygamous marriage in matters of status. If, therefore, English law may recognise as a married person one who has entered a polygamous marriage, how can it be said that English law will never recognise as unmarried one who, being domiciled in a country where polygamy is recognised by his or her personal law has been validly divorced under that law? I doubt, as I have mentioned above, if any such proposition can really be extracted from the judgments in the *Hammersmith* case. If it can, it was obiter and I am not bound to follow it. It seems to me to be inconsistent with principle and since in my judgment I am not bound to accept it, I reject it.

This interpretation is that which appears first to have been put forward by Dr. Cheshire [20] and has been followed by most English writers. It had, nevertheless, always seemed an interpretation which was extraordinarily difficult to reconcile with the judgments actually delivered in that case and also with general principles. It is to be hoped that it will now disappear from the textbooks.

Having thus dealt with the *Hammersmith Marriage* case Scarman J. granted the petitioner the decree of nullity she sought and also granted the intervener the declaration she sought. In pronouncing the obituary upon the *Hammersmith Marriage* case his Lordship stated: "the *Hammersmith* decision may properly be considered as turning upon its special facts". Unfortunately, however, although the decision in *Russ* v. *Russ* helps to remove the confusion caused in this branch of the law by the *Hammersmith Marriage* case, it contributes new confusion as a result of his Lordship's failure to consider decisions subsequent to that in the *Hammersmith Marriage* case.

19. At p. 654.

20. *Private International Law,* 1st ed. (1935), p. 279.

His Lordship seems completely to have overlooked that the point upon which he distinguished the *Hammersmith Marriage* case is inconsistent with *Maher* v. *Maher.* In that case the pronouncement of *talaq* was also registered at the Cairo Court of Personal Status, and yet following the *Hammersmith Marriage* case Barnard J. refused to recognise its efficacy in England. In therefore distinguishing the *Hammersmith Marriage* case on the ground on which he did his Lordship was refusing to follow *Maher* v. *Maher* although no such suggestion appears from the judgment.

The confusion is increased by the fact that in *Yousef* v. *Yousef* [21] the *Hammersmith Marriage* case was distinguished, but on a different ground from that adopted by Scarman J. in *Russ* v. *Russ.* In *Yousef* v. *Yousef* Mr. Commissioner Grazebrook Q.C. distinguished the *Hammersmith Marriage* case on the ground that:

> A distinction had been drawn between a divorce obtained by a husband merely according to the law of his religion and a. divorce according to the law of the religion and the domicile.

Yet again, in *El-Riyami* v. *El-Riyami*[22] Mr. Commissioner Latey Q.C., following *Yousef* v. *Yousef* accorded recognition to a *talaq* pronounced in Zanzibar which appears not to have been registered before any court as in *Russ* v. *Russ.* This is also, therefore, a decision which runs counter to the point of distinction taken by Scarman J. in *Russ* v. *Russ.*

It seems quite impossible, therefore, to say just what is the present position in relation to the recognition of *talaq* pronounced in respect of a marriage which has been celebrated in England. The position was sufficiently confused before *Russ* v. *Russ* but the decision in that case has only added to the confusion.

One final point which may be made is that there was no reference at all to one possible way in which the same decision could have been reached. On the facts as given by Scarman J. Miss Rosser when she went to Egypt went through a second Muslim ceremony of marriage with her first husband. Since the decision of the Court of Appeal in *Sowa* v. *Sowa*[23] the possibility of the mutability of marriage has entered English law. Dicta in that case suggested that an African native marriage could be subsequently converted into a Christian marriage. It is therefore presumably possible for a Christian marriage to be converted into a Muslim marriage. If this line had been followed it would have been possible to reach the same result without even considering the *Hammersmith Marriage* case for if Miss Rosser's marriage had ceased to be a Christian marriage then a very strong argument could be mounted for suggesting that this fact alone took the case out of any possible interpretation of the *ratio decidendi* of the *Hammersmith Marriage* case.

Yet a further aspect of the case which was not canvassed at all was the possible implication of *Ohochuku* v. *Ohochuku.*[24] If the reasoning in that case had been pursued then, since Miss Rosser had gone through two ceremonies of marriage, one English and one Muslim, the *talaq,* it could have been argued, was only effective to

21. (1957) *The Times,* 1st August.

22. (1958) *The Times,* 1st April.

23. [I960] 3 W.L.R. 733.

24. [I960] 1 All E.U. 253.

dissolve the Muslim marriage and that therefore her English marriage still remained as a valid and subsisting marriage. Such an argument would not have affected the result so far as the petitioner was concerned since she would have been able to claim her decree on the ground of the respondent's marriage to the intervener, but it would have deprived the intervener of her declaration since the respondent's marriage to her would have then been a valid marriage.

It is therefore not possible to contemplate this decision with much enthusiasm. On the facts the decision reached is doubtless admirable but the method by which it was reached is hardly a credit to legal reasoning. It avoids the *Hammersmith Marriage* case but only at the cost of drawing what it is submitted is a quite untenable distinction between a judicial process and a judicial investigation and extending the former term to include what is no more than an act of registration. It fails to consider relevant cases that were decided after the *Hammersmith Marriage* case; cases which are inconsistent with the point of distinction taken by Scarman J. Finally, it ignores completely the possibility of the application of concepts other than that associated with the *Hammersmith Marriage* case.

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