NOTES

The Validity of "Sham Marriages" and Marriages Procured by Fraud: Johnson (falsely called Smith) v. Smith

The decision of the Ontario High Court (Stewart, J.) in *Johnson (falsely called Smith)* v. *Smith*,[1] raises questions concerning the validity of "sham marriages" and marriages procured by fraud about the answers to which there is little agreement in the common law jurisdictions. The plaintiff and defendant had met in Jamaica and had agreed that the defendant (who was presumably a Jamaican citizen) should come to Canada and there marry the plaintiff. This he did. The plaintiff assumed that she was entering into a true marriage based on love and affection, but immediately after the wedding the defendant told her that he no longer loved her and it became clear that his real object in going through the ceremony was to obtain a permanent residence in Canada. Although they spent their marriage night in the same house, the marriage was never consummated, and on the following day they parted. The plaintiff then brought the present action for a declaration that the marriage was null and void.

In giving judgment for the plaintiff Stewart, J., based his opinion on the following findings of fact:

> It is quite obvious that the plaintiff was tricked into a marriage by the fraudulent intention of the defendant. It is equally obvious that the defendant at no time had an intention truly to marry the plaintiff. It is also, it seems clear, equally obvious that the plaintiff would not have entered into a marriage had she been aware of the fraud which was being perpetrated upon her.[2]

It will be seen that this passage raises two separate but inter-related questions. Is the validity of a marriage affected if one party has no intention whatever of cohabiting with the other? Is the validity of the marriage affected if one party would not have gone through the ceremony but for the other's fraud?

The first of these questions — that of the "sham marriage" — had been considered in two English decisions. In the first of them,

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[1] [1968] 2 O.R. 699, (1968), 70 D.L.R. (2d) 374.
[2] (1968), 70 D.L.R. (2d) 374, at p. 375.

H. (otherwise D.) v. *H.*,[3] the petitioner, a Hungarian girl of 18, had gone through a ceremony of marriage in Budapest in 1949 with her second cousin, a French citizen of the same age, in order to obtain a French passport so that she could get out of the country. Her reason for wishing to do so was that, as she came from a wealthy family and was therefore likely to be *persona non grata* with the Communist Government of Hungary, there was a grave danger that she might be sent to prison or a concentration camp from which she might never come out alive. The respondent was aware of her plans, and they had agreed that they should not live together but that the marriage should be terminated as soon as possible after she had made her escape. They separated immediately after the ceremony and the marriage was never consummated. In these circumstances it was argued *inter alia* that the marriage was a complete sham and therefore void. Karminski, J., refused to accept this argument. He held that mental reservations cannot avoid a marriage and that, as the parties intended that the petitioner should become the respondent's wife, it was not now open to her to argue that the marriage was a nullity on this ground. In other words, he looked solely at their intention at the time of the ceremony and declined to pay attention either to their motives or to their subsequent intentions. His decision was followed a year later by Collingwood, J., in *Silver (otherwise Kraft)* v. *Silver*,[4] where he refused to grant a decree of nullity to a German woman who had married an Englishman in pursuance of a similar agreement in order that she might come to England to live with another man who was already married.

Karminski, J., followed two earlier decisions. The first was the English case of *Brodie* v. *Brodie*.[5] The respondent husband had consented to marry the petitioner, who was pregnant by him, only if she signed an agreement not to live with him after the marriage. Horridge, J., held that such an agreement was contrary to public policy and therefore void and consequently was no defence to a subsequent petition by the wife for restitution of conjugal rights. The second was the South African case of *Martens* v. *Martens*.[6] The facts bear a strong resemblance to those of *Silver* v. *Silver*. A Greek woman had married a man resident in South Africa in order to live there with another man. She deserted the husband immediately after the ceremony. Clayden, J., dismissed the husband's action for a declaration of nullity for the following reason:

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[3] [1954] P. 258, [1953] 3 W.L.R. 849, [1953] 2 All E.R. 1229.
[4] [1955] 1 W.L.R. 728, [1955] 2 All E.R. 614.
[5] [1917] P. 271, (1917), 86 L.J.P. 140, 117 L.T. 542.

> (I)t seems to me that the facts show that the parties did intend that the defendant should become the wife of the plaintiff. That was the very object of the ceremony, so that she could remain in the country, and that object was brought about with a realization of both contracting parties that there would be need for divorce to end the marriage.[7]

Karminski, J., refused to follow the American case of *U.S.* v. *Rubenstein,*[8] a criminal prosecution for conspiracy to defraud the United States. An alien woman arranged to marry a U.S. citizen in order to facilitate her entry into the country. It was understood that the marriage was not to be consummated and that it should be dissolved within six months. The marriage was held to be a nullity. Judge Learned Hand gave his reason for coming to this conclusion in the following words:

> Mutual consent is necessary to every contract; and no matter what forms or ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent... Marriage is no exception to this rule: a marriage in jest is no marriage at all ... [I]f the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others.[9]

Faced with this conflict of authority, Stewart, J., in *Johnson* v. *Smith* preferred to follow Judge Learned Hand rather than the English cases. He did not expressly state his reason for doing so except to say: "In the interpretation of contracts of marriage, the days of Lord Penzance have passed, when one eye was always fixed on ecclesiastical dogma."[10] With respect, it is not clear what particular piece of dogma is meant. From the purely contractual point of view, Judge Learned Hand's views are obviously more in line with the established common law. If A and B enter into an agreement on the understanding that the terms are not to be enforced, the courts will give effect to this and hold that there is no legally binding contract.[11] Although the analogy with all the other cases mentioned is clear, it will be seen that this argument cannot be applied to the facts of *Johnson* v. *Smith* at all, because the plaintiff believed that she was entering into a normal marriage in which the parties would

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[6] [1952] 3 S.A.L.R. 771.

[7] *Ibid.*, at p. 775.

[8] (1945), 151 F. 2d 915.

[9] *Ibid.*, at pp. 918-919.

[10] (1968), 70 D.L.R. (2d) 374, at p. 375.

[11] See, for example, *Rose & Frank Co.* v. *J. R. Crompton & Bros. Ltd.*, [1925] A.C. 445.

perform the normal incidents. In a comparable commercial contract the court would undoubtedly hold the defendant liable despite his mental reservations by applying the principle expressed by Williston that "a deliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability".[12]

It is submitted that the problem must be answered not by reference to ecclesiastical dogma or the law relating to commercial contracts but by reference to social policy. It is very much in the public interest that persons should not be permitted to abuse the marriage laws of the state by entering into a marriage purely to obtain some collateral advantage and with no intention of fulfilling the purpose for which marriage exists. The English judges have sought to control this by refusing to look at the parties' motives: in other words, if two people take advantage of the opportunity to marry that the law provides, they will saddled with all the legal consequences of their act. To the present writer this seems to be the only satisfactory solution and letting in the doctrine of mental reservation seems to be fraught with dangers. Although the point was not expressly made in *Johnson* v. *Smith,* the marriage was presumably void and not voidable. It therefore follows that it cannot be subsequently ratified[13] and its invalidity can be put in issue by anyone, including the "husband" himself.[14] Had the defendant in *Johnson* v. *Smith* decided to take advantage of the situation, he might have had sexual intercourse with the plaintiff before indicating his true intentions and departing, perhaps leaving her pregnant; she would then have had no defence to an action for nullity brought by him (assuming, of course, that the court would still have been prepared to infer that, at the time of the ceremony, he had had no intention of cohabiting with her). Similarly, even if neither of them had taken any steps to bring an action for nullity, no subsequent change of mind and cohabitation would have approbated the marriage and it would have been possible for anyone else to have put the validity of it in issue years later, for example on a succession claim after the death of one of them. Such consequences are highly undesirable when both parties agree that the marriage shall be nothing but a sham; they are intolerable when one of them is wholly ignorant that this is the other's intention, as in *Johnson* v. *Smith.*

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[12] *Williston on Contracts,* 3rd. ed., W.H.E. Jaeger ed., vol. 1, (Mount Kisko, N. Y., 1957), § 21, p. 39.

[13] *Power on Divorce,* 2nd. ed., J.D. Payne ed., (Calgary and Toronto, 1964), p. 348.

[14] See *De Reneville (otherwise Sheridan)* v. *De Reneville,* [1948] P. 100, (1947), 177 L.T. 408, [1948] 1 All E.R. 56.

Even if one were to assume that this case was rightly decided on its facts, it is difficult to foresee how far the principle could and ultimately would be pushed. All the cases reported have had one element in common — the intention to circumvent immigration laws — and one can understand the court's anxiety in *U.S.* v. *Rubenstein* and *Johnson* v. *Smith* to see these laws enforced by the punishment or deportation of an alien who had entered the country by fraud. But the law of marriage does not exist to serve the criminal law and it is both dangerous and improper to manipulate it with this end in view. The passage cited from Judge Learned Hand's judgment suggests that, so long as the parties have no real intention of living together, their precise motive is irrelevant. It follows from this that, if the parties in the following hypothetical cases propose to put an end to their relationship as soon as their purpose is served, each of the marriages will be void. (i) A man marries a woman in order to prevent her from being able to give evidence against him in a criminal prosecution (as in Graham Greene's *Brighton Rock*); (ii) a woman marries an old and failing man purely for the purpose of acquiring his wealth and the social standing of being his widow; (iii) two young people planning to go on a cruise together get married in order to share a double cabin and give a veneer of respectability to their relationship. In the first case one might argue that, as in the fraudulent immigrant cases, public policy would be best served by declaring the marriage void so as to make the woman a compellable witness; in the second, nullity might work to the advantage of the man's next of kin, but one wonders why they should be protected if he himself was satisfied with the arrangement; in the third, to hold the marriage void might merely encourage like minded people to enter into similar arrangements and public policy would best be served by saddling them with the legal consequences of their deceptive conduct. Not only is the logic of Clayden J.'s argument in *Martens* v. *Martens* unassailable, but social policy on balance demands that a marriage should not be void simply because it is a sham. If there is a real danger that immigration laws will be abused, let them be amended.

On the other hand, however, as Collingwood, J., said in *Silver* v. *Silver*: "I can see no social advantage in insisting upon the maintenance of a union which has been a mere travesty from the beginning".[15] It is significant that he granted the wife a decree of divorce on the ground of her husband's adultery and that Karminski, J., found the marriage void (or perhaps voidable) for duress in

[15] [1955] 1 W.L.R. 728, at p. 731.

H. v. *H.* This brings us to the second question raised by this case: is the validity of the marriage affected if one party would not have entered into it but for the other's fraud? English ecclesiastical law adhered strictly to the principle that fraud *of itself* would not make a marriage void. The *locus classicus* is the case of *Swift* v. *Kelly*,[16] in which the Judicial Committee of the Privy Council laid down the rule that

> (N)o marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained.[17]

If the fraudulent misrepresentation leads to a mistake, the marriage might be void on that ground, but (statutory provisions apart) this will occur only when one party is mistaken as to the other's identity or as to the nature of the ceremony. If A marries B believing him to be C, the marriage will be void only if A goes through the ceremony with a completely different human being from that whom she intends to marry (as might occur in the case of identical twins). If A marries the individual she intends to marry, it is immaterial that he has fraudulently led her to believe that he is someone else, as happened in *C.* v. *C.*,[18] where the petitioner was held to be validly married to a rogue called Coley who had passed himself off as a well known boxer called Miller. Similarly, the marriage will be void if one party does not realise that the ceremony is one of marriage at all, as in *Kelly (otherwise Hyams)* v. *Kelly*,[19] where the petitioner thought that it was a betrothal ceremony; but it will not be void if the mistake merely goes to the quality of the marriage, for example if one party wrongly believes that he is contracting a polygamous union[20] or a union that will be recognised by the religious denomination of which he is a member.[21]

The justification for the rule that fraud of itself is not to invalidate a marriage is that any other solution would lead to great uncertainty and enable the parties to have the marriage annulled on the flimsiest of pretexts. Despite the sympathy one must feel for a person in the position of the plaintiff in *Johnson* v. *Smith*, it is submitted that the principle in *Swift* v. *Kelly* is correct and socially desirable. Otherwise a marriage could be declared void on the ground that one party had been deceived about the other's fortune, social

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[16] (1835), 3 Knapp 257, 12 E.R. 648.

[17] *Ibid.*, at p. 293, at p. 661.

[18] [1942] N.Z.L.R. 356.

[19] (1932), 49 T.L.R. 99.

[20] *Kassim (otherwise Widmann)* v. *Kassim (otherwise Hassim)*, [1962] P. 224, [1962] 3 All E.R. 426, [1962] 3 W.L.R. 865.

[21] *Ussher* v. *Ussher (otherwise Caulfield)*, [1912] 2 I.R. 445.

position or chastity. A suitor should be encouraged to make enquiries about the first two qualities before the event if they are of importance to him, and one can only question whether it would be right to permit a man to throw up a marriage on discovering months or even years after the ceremony that his wife had fraudulently led him to believe that she was a virgin. (One can only speculate in passing how many marriages might be void for this reason.)

Swift v. *Kelly* has been faithfully followed in England, Australia and New Zealand. It was also followed by Sirois, J., in the Saskatchewan Court of Queen's Bench in *Kokkalas (otherwise Rokana)* v. *Kokkalas*.[22] The facts were indistinguishable from those of *Johnson* v. *Smith*: a man, having achieved his object by completing immigration formalities after the ceremony of marriage, immediately left his wife, and the marriage was never consummated. The wife's claim for nullity was based on fraud and was dismissed on the ground that she had freely consented to the marriage. The case was cited to Stewart, J., in *Johnson* v. *Smith* but he declined to follow it saying that, in his opinion, Sirois, J., had stated the principle too broadly. For the reasons stated above, the present writer, with the greatest respect to the learned judge, feels compelled to disagree with him on both the grounds on which he based his decision. Neither the fact that the marriage was a sham nor the fact that it was celebrated only in consequence of the defendant's fraud is a sufficient ground for declaring it void, and for the same reasons both facts in combination cannot entitle a party to relief which they do not offer him in isolation.

The real justification for the decision in *Johnson* v. *Smith* is that it released the plaintiff from a union which was a marriage in name only. The new Federal *Divorce Act*[23] now ensures that she would not be tied to the defendant against her will for all time. Under section 4 (1) (e) she could now get a divorce after three years' separation; she might in fact be successful after one year under section 4 (1) (d) on the ground of the husband's wilful refusal to consummate the marriage. It is submitted that this is the proper remedy and that the wife should seek relief in divorce; now that this *Act* is on the statute book, there is no justification for straining the law of nullity so far that the whole concept of marriage as a legal institution might be threatened.

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[22] (1965), 50 D.L.R. (2d) 193, 51 W.W.R. 511.

[23] 16-17 Eliz. II, S.C. 1967-68, c. 24.

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