[1999–00 Gib LR 136]

S v. S

SUPREME COURT (Schofield, C.J.): March 22nd, 1999

Family Law—nullity—non-disclosure in statutory declaration—marriage not invalid under Marriage Ordinance, s.26(1) by reason of failure, in statutory declaration under s.13, to disclose legal impediment—annulment not to be based on non-compliance with preliminary formalities unless expressly provided by statute

Conflict of Laws—forum conveniens—nullity—petition for annulment of Gibraltar marriage on ground of incapacity to be heard in England if parties and witnesses resident there, since Gibraltar decree unrecognized in England under Family Law Act 1986, s.46

The petitioner applied for a declaration of nullity in respect of his marriage to the respondent.

The petitioner, by his next friend, sought the annulment of his marriage in Gibraltar on the ground that he lacked the mental capacity to marry. The respondent applied for a stay of the proceedings on the ground that under s.46 of the Family Law Act 1986, an annulment granted here would not be recognized in England where both parties were resident and domiciled. The petitioner then alleged that in obtaining a special licence to marry here, the respondent had failed to comply with the formal requirements of s.13(1) and Schedule 2 to the Marriage Ordinance, by omitting to declare that the petitioner had been found by English doctors to be lacking the mental capacity to marry and that a caveat had been entered in England to prevent the marriage there. Consequently, the petitioner sought a declaration under s.26 of the Ordinance that the marriage was invalid.

He submitted that (a) the formal validity of the marriage was a matter of Gibraltar law, to be determined by the Supreme Court, and would obviate the need for the issue of incapacity to be resolved elsewhere; and (b) s.26(1) expressly provided that a marriage contracted otherwise than in accordance with the Ordinance was null and void, and the exception provided in s.28 in relation to statements about the parties' religion supported this view.

The respondent submitted in reply that (a) both the petitioner's complaints should be heard by the English courts, since a declaration of nullity granted here on either issue would not be recognized in England, and it was therefore pointless to sever the issue of formal validity; (b)

under s.26(2), her non-compliance with the statutory declaration requirements of s.13(1) and Schedule 2 did not invalidate the marriage, in the absence of an express statutory provision to that effect; and (c) unless otherwise stated in the relevant statute, the courts would annul marriages only if the ceremonial aspects had not been properly performed and uphold those in respect of which the alleged defect was in the preliminary formalities.

Held, staying the proceedings:

(1) Although the Supreme Court could properly decide on the formal validity of the parties' marriage as a matter of Gibraltar law, and would otherwise be willing to do so in the interests of a speedy disposal, a full hearing of that issue was unnecessary, since the plaintiff's application relied on a ground which would not result in a declaration of nullity. A material non-disclosure in the statutory declaration made by the respondent regarding the petitioner's capacity to marry could not invalidate the marriage under s.26(1) of the Ordinance. The courts would not, in the absence of express provision, hold a marriage null and void because of failure to comply with statutory requirements preceding the ceremony, provided that the ceremonial aspects of the marriage had been properly performed (paras. 4–12).

(2) Furthermore, since under s.46 of the Family Law Act 1986 a decree of nullity granted in Gibraltar would not be recognized as effective in England, the issue of the petitioner's mental capacity should be tried in England, where the parties and the majority of witnesses were resident. Any question of Gibraltar law arising could easily be determined there. The Gibraltar proceedings would therefore be stayed (para. 13).

Case cited:

(1) *Collett (orse. Sakazova)* v. *Collett,* [1968] P. 482; [1967] 2 All E.R. 426, followed.

Legislation construed:

Marriage Ordinance (1984 Edition), s.13(1): The relevant terms of this sub-section are set out at para. 7.

s.13(2): The relevant terms of this sub-section are set out at para. 7.

s.26(1): The relevant terms of this sub-section are set out at para. 9.

(2): The relevant terms of this sub-section are set out at para. 9.

s.28: The relevant terms of this section are set out at para. 10.

Schedule 2: "Particulars to be set out in an affidavit for statutory declaration for the issue of . . . a special licence under section 13.

. . .

3. That there is no impediment of kindred or alliance or other lawful cause, nor any suit in any court of law to bar or hinder the proceeding of the proposed marriage."

Family Law Act 1986 (c.55), s.46(1):

"The validity of an overseas . . . annulment . . . obtained by means of proceedings shall be recognised if—

(a) the . . . annulment . . . is effective under the law of the country in which it was obtained; and

(b) at the relevant date either party to the marriage—

(i) was habitually resident in the country in which the . . . annulment . . . was obtained; or

(ii) was domiciled in that country; or

(iii) was a national of that country."

s.46(3): "In this section 'the relevant date' means—

(a) in the case of an overseas . . . annulment . . . obtained by means of proceedings, the date of the commencement of the proceedings. . ."

G.C. Stagnetto for the petitioner;
J.E. Triay, Q.C. and *J.R. Triay* for the respondent;
G. Licudi as *amicus curiae*.

1 **SCHOFIELD, C.J.:** The petitioner, suing by his next friend, has filed a petition for a declaration of nullity of his marriage to the respondent, celebrated on April 18th, 1997, on the grounds that he lacked the mental capacity to enter into a contract of marriage.

2 Before me is a summons filed on behalf of the respondent for a stay of proceedings. Both parties to the marriage are resident and domiciled in England and it is argued by the respondent that any decree which this court could order would not be recognized in England by virtue of the provisions of the English Family Law Act 1986, s.46, and so it would be an abuse of this court's process to continue with proceedings in this jurisdiction. A further argument is that as the petitioner is approaching 100 years of age, the respondent is elderly, and the majority of the witnesses are resident in the United Kingdom, the English court is the *forum conveniens*.

3 The petitioner has answered that summons by a summons of his own seeking an amendment to the petition. The amendment adds a further ground in that it alleges that the respondent failed to make material disclosures on the application for a special licence to marry and that these non-disclosures amounted to non-compliance with the Marriage Ordinance, thereby rendering the marriage null and void. In short, the amendment seeks to add a prayer attacking the formal validity of the marriage to the existing prayer attacking its essential validity.

4 I must say my instant reaction to the knowledge that any decree I make is not recognized in the country where this extremely elderly petitioner and his elderly wife are resident was that it is most inappropriate to continue with proceedings in this jurisdiction. However, the

amicus curiae has obtained an opinion from English counsel which caused me to reflect more closely on this immediate reaction. His view is that whilst any decree this court makes would not be recognized in England, a declaration of nullity merely records an existing state of facts, and it would then put the onus on the respondent, should she wish to do so, to prove the validity of the marriage in her own jurisdiction.

5 Counsel also points to certain advantages to be gained from severing the discrete issue of formal validity from the issue of essential validity and trying that single issue, which is essentially a matter of Gibraltar law for the Gibraltar courts. Not least among these advantages is that there could be an early trial of a matter affecting a very old man out of the glare of English publicity.

6 There are attractions to this argument, although at the end of the day one doubts the appropriateness of dealing with one issue which, even if successfully proved by the petitioner, would leave him with a decree in his hands which would not be recognized by the jurisdiction where he is resident and domiciled. However, what the argument did not address was the question of whether, if I allowed the amendment to the petition and proceeded to hear the parties on the issue of whether the respondent did fail to make material disclosures, a finding against her could result in a decree of nullity. The argument presupposed that a finding on the one issue would result in a decree of nullity being pronounced.

7 The petitioner would be relying on ss. 13 and 26 of the Marriage Ordinance. Section 13(1) reads:

> "Notwithstanding the other provisions of this Ordinance, in the case of persons intending that a marriage shall be solemnized or contracted in Gibraltar between them, it shall be lawful for one of the authorities hereinafter specified, if he shall think fit and upon the payment of the proper fee, and upon presentation to him of an affidavit or statutory declaration containing the particulars set out in Schedule 2, and upon receiving such other information as the authority shall in his discretion require, to dispense with the giving of notice, and with the issue of any certificate of the Registrar or a minister, and to grant a special licence, in the prescribed or the like form, authorizing the solemnization or contraction of marriage between the parties named in such licence at the place therein stated within a period of three months from the date of issue of such licence."

One of the authorities specified in s.13(2) is "the Governor" and it was to him that the parties applied for a special licence, which was duly granted.

8 Schedule 2 required the respondent to depose that there was no impediment or other lawful cause to bar or hinder the proceeding of the marriage. She so deposed and it is alleged that she did so knowing that

two doctors had previously examined the petitioner to decide whether he had the capacity to marry and had decided he did not, and that a caveat had been lodged with the Registrar of Marriages in England to prevent her proposed marriage to the petitioner.

9 Section 26 of the Marriage Ordinance reads:

> "(1) Subject to the provisions of section 27, if any persons knowingly and wilfully intermarry in Gibraltar otherwise than in accordance with the provisions of this Ordinance, or if the parties to any marriage are within the prohibited degrees of consanguinity or affinity according to the law for the time being in force in England, the marriage of such persons is null and void.
>
> (2) Where a marriage is solemnized or contracted in Gibraltar in pursuance of the provisions of this Ordinance but those provisions are not complied with in all respects, then, except as otherwise expressly provided in this Ordinance, the marriage is not invalid by reason only of such non-compliance."

10 The petitioner would have me declare that pursuant to s.26(1), the parties intermarried otherwise than in accordance with the provisions of this Ordinance in that the respondent went outside the provisions of the Ordinance in failing to declare the impediment to her marriage. This view is fortified by reference to s.28 of the Ordinance, which provides that a marriage is not invalidated by reason of a "false statement as to the religious community of any party." From this, one may conclude that a marriage may be invalidated if a false statement is made as to any other matter required to be declared by the Ordinance.

11 Not so, says the respondent. Even if a party to a marriage makes a declaration which is false for the purpose of entering into the marriage, the courts will not declare the marriage null and void. The party exposes himself to penalties for perjury but the marriage remains valid. Mr. Triay, for the respondent, has referred me to a number of authorities which, whilst they refer to Marriage Acts which are not worded in precisely the same way as our own Marriage Ordinance, give guidance on how the courts approach the question of false declarations made with the intention of procuring a marriage. The authorities are reviewed, and the principle extracted therefrom is contained, in the following passage from the judgment of Ormrod, J. in *Collett (orse. Sakazova)* v. *Collett* (1) ([1967] 2 All E.R. at 430–431):

> "The control of the formation of marriage in this country has a long statutory history, much of it intended to prevent clandestine marriages. The general tendency has been to preserve marriages where the ceremonial aspects were in order, rather than to invalidate them for failure to comply with the statutory provisions leading up

to the ceremony. This is illustrated by the Marriage Act, 1823, s.22, which . . . provided expressly that a marriage should be void for undue publication of banns or for a defective licence if the parties 'shall knowingly and wilfully intermarry' without due publication of banns, etc. In *Wright* v. *Elwood* . . . it was held that a marriage would not be held void under this section unless both parties were cognizant of the undue publication or other defect. The Marriage Act, 1836, s.42, contained . . . a similar provision extending to marriages before a registrar. In *Holmes* v. *Simmons (falsely called Holmes)* . . . LORD PENZANCE held that a notice of an intended marriage which omitted certain of the husband's christian names and suppressed the fact that he was only fifteen years of age did not affect the validity of the marriage. In *Plummer* v. *Plummer* . . . the Court of Appeal held that, in a case of marriage by licence, a notice in an entirely false name did not affect the validity of the marriage. WARRINGTON, L.J., referred . . . to the Marriage and Registration Act, 1856, s.19, which . . . provided certain penalties if any 'valid marriage' should be had by any wilfully false notice, declaration or certificate, and pointed out that the legislature there expressly accepted that a valid marriage could be had in such circumstances. He expressed the principle in the concluding sentence of his judgment, where he observed that the consequences [*sic*] of a false notice was not to invalidate the marriage but to expose the parties to the penalties for perjury. In *Greaves* v. *Greaves* . . . LORD PENZANCE held that a marriage in the parish church, intended to be by licence, was valid, notwithstanding the fact that the licence was not issued until the day after the ceremony. He said. . . :

> 'I understand the meaning of this provision [s.22 of the Marriage Act, 1823] to be that the marriage is only to be annulled if it is established affirmatively to the satisfaction of the court, that at the time when the ceremony was solemnized both parties were cognizant of the fact that a licence had not issued, and being cognizant of that fact wilfully inter-married.'

In my judgment, the principle which emerges from the corpus of legislation regulating the formation of marriages in England and from the reported cases arising therefrom is that, if a ceremony of marriage has actually taken place which, as a ceremony, would be sufficient to constitute a valid marriage, the courts will hold the marriage valid unless constrained by express statutory enactment to hold otherwise. This is consistent with the traditional concept, both of the common law and of the canon law, that the essence of marriage is the formal exchange of voluntary consents to take one another for husband and wife."

12 Applying that principle to s.26 of the Marriage Ordinance, I am unable to say that a material non-disclosure or false representation made in an affidavit or statutory declaration made pursuant to Schedule 2 and for the purposes of s.13 takes the marriage outside the provisions of the Ordinance. A lack of capacity to marry in one of the parties may render the marriage null and void; a failure to disclose that lack of capacity by the other party does not render it null and void. The formality of marriage was completed and any non-disclosure or false representation may be a matter for the criminal courts but would not render the marriage null and void.

13 The question of capacity has to be the subject of a full hearing of the court. Because a decree pronounced by the Gibraltar court would not be recognized in England, whereas, of course, a decree pronounced in England would be, and because the majority of the witnesses, including the two elderly parties, are in England, the most appropriate forum is the English court. The questions of Gibraltar law are as easily determined in England as in Gibraltar. I must say I come to this conclusion with some reluctance, especially as this application comes after the action in this jurisdiction has been proceeding at a slow pace for almost two years. If it were not for the peculiar provisions of s.46 of the English Family Law Act of 1986, I would have held otherwise. As it is, I order a stay of these proceedings.

Proceedings stayed.
