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APP. 30 FLR. 486

[HIGH COURT OF AUSTRALIA.]

BRENNAN . . . . . APPELLANT;
PETITIONER,

AND

BRENNAN . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1953.

SYDNEY. *April* 20, 21; ADELAIDE, *May*, 18.

Williams A.C.J., Webb and Kitto JJ.

Matrimonial Causes—Dissolution of marriage—Petitions by wife and husband—Hearing of petitions—Oral evidence completed—Death of presiding judge—Evidence read by another judge in private chambers, not in court—Two witnesses recalled and questioned by that judge in court—Husband's petition granted—Wife's petition dismissed—Proceedings—Regularity—Decree absolute for divorce—Statutory provisions—Compliance—Decree—Ability to set aside—Matrimonial Causes Act 1899-1951 (*N.S.W.*) (*No.* 14 *of* 1899—*No.* 43 *of* 1951), *ss.* 28, 77.

Section 77 of the *Matrimonial Causes Act* 1899-1951 (N.S.W.) requires that, subject to certain immaterial exceptions, the witnesses in all proceedings before the court where their attendance can be had shall be sworn and examined orally in open court.

In a consolidated suit in which the wife petitioned for a dissolution of marriage on the ground of her husband's desertion, and the husband, denying the desertion, petitioned for a decree for restitution of conjugal rights, and, later, for a dissolution of the marriage on the ground of his wife's misconduct, the whole of the oral evidence had been taken when the trial judge died. At the further hearing of the suit the transcript of the evidence was, by consent of the parties, read by the second judge and he having read the transcript in his private chambers, recalled two of the witnesses and asked them a number of questions. After hearing counsels' addresses the judge granted the husband a decree nisi for dissolution of the marriage on the ground of his wife's adultery and dismissed the other petitions. On appeal by the wife to the High Court,

Held, that the fact that the evidence given before the deceased judge was read by the second judge in his private chambers instead of it being read in open court was not a breach of s. 77 of the *Matrimonial Causes Act* 1899-1951 (N.S.W.).

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Section 28 of the *Matrimonial Causes Act* 1899-1951 (N.S.W.) provides that the respective parties to a suit for dissolution of marriage may marry again as if the marriage had been dissolved by death when but not before—(a) the time limited for appealing against a decree absolute has expired and no appeal has been presented; or (b) any such appeal is dismissed; or (c) in the result of any appeal the marriage is declared to be dissolved.

Held, that when the conditions of s. 28 have been fulfilled a decree absolute for divorce, however irregularly it may have been obtained, is valid and effective to dissolve the marriage and cannot be set aside.

APPEAL from the Supreme Court of New South Wales.

Nina Florence Brennan filed in the matrimonial causes jurisdiction of the Supreme Court of New South Wales a petition, dated 27th October 1948, in which she sought a dissolution of her marriage with Raymond Lorraine Brennan on the ground of desertion for three years and upwards. Brennan denied the desertion on his part and, on 28th January 1949, petitioned for a decree for restitution of conjugal rights.

In her answer, dated 17th March 1949, the wife-petitioner denied that since 9th October 1946 she had withdrawn from cohabitation with Brennan and that without any just cause had refused and still refused to render to him conjugal rights as alleged.

By a supplemental answer, filed on 22nd November 1950, Brennan alleged that on the 17th day of that month the wife-petitioner had committed adultery with one Reginald H. Baker, who was added as a co-respondent, and he asked that his marriage with the wife-petitioner be dissolved.

The wife-petitioner and the co-respondent each denied that they had committed adultery as alleged.

The suits, duly consolidated, came on for hearing before *Edwards* J. and after all the evidence had been taken his Honour died. The consolidated suit came on to be further heard before *Clancy* J. on 9th October 1952. The wife-petitioner was then seriously ill, and for that reason and also to save expense all parties requested *Clancy* J. not to hear the oral evidence *de novo* but to have the transcript of the evidence already taken before *Edwards* J. tendered as an exhibit and either to have it read in open court or to read it himself, if he so preferred, and to dispose of the suit on that basis. His Honour decided to allow the transcript to be tendered by consent and then to read it, reserving the right to recall any of the witnesses whom he wished to question. Two witnesses were so recalled by his Honour, one being a female witness who gave evidence for the husband on the issue of adultery, and the other being the co-respondent. Each of these two witnesses was asked a number of

questions. Counsel for the parties then addressed his Honour who then dismissed the petition of the wife-petitioner and the petition of the husband for restitution of conjugal rights, and granted the husband a decree nisi for the dissolution of the marriage on the ground of the wife-petitioner's adultery with the co-respondent.

From that decision the wife-petitioner appealed to the High Court on the grounds that the findings (a) that the respondent had not been guilty of desertion, and (b) that she had committed adultery, were erroneous.

Although served with notice thereof the co-respondent neither appeared nor was represented on the hearing of the appeal.

Facts on the merits, and the relevant statutory provisions, are sufficiently set forth in the judgment hereunder.

P. B. Toose, for the appellant. The judge before whom the evidence was given having died without delivering judgment the parties consented to the matter proceeding before another judge. The latter judge, by consent of the parties, read, in his chambers, the evidence given before the deceased judge. He saw two only of the witnesses. There exists a doubt whether irrespective of consent the Court had power to do what it did : see *Coleshill* v. *Manchester Corporation* (1) ; *In re Application of British Reinforced Concrete Engineering Co. Ltd.* (2) ; *Bolton* v. *Bolton* (3). In the two first-mentioned cases the question of status was not involved. In *Scott* v. *Scott* (4) it was held that the court had no jurisdiction to make such an order. The sections under consideration in that case are similar to the relevant sections in the *Matrimonial Causes Act* 1899-1951 (N.S.W.). The principles in that case were applied in *McPherson* v. *McPherson* (5) and the order under review was held to be voidable only and not void. If the subject order be not void then this Court is in as good a position to decide the issue on the facts as was the trial judge. The decree should be rescinded and a new decree granted in favour of the appellant. In *Stone* v. *Stone* (6) the hearing was in open court but the decision was given in the judge's private room, and it was held that the decree was not a valid decree but was voidable. In this case the evidence was heard and the decision announced in open court. The original evidence was tendered by consent, and all parties agreed that the course pursued would save time. It would appear that what was done was not in accordance with s. 77 of the *Matrimonial Causes Act*

(1) (1928) 1 K.B. 776, at pp. 785-786.
(2) (1929) 45 T.L.R. 186, at p. 187.
(3) (1949) 2 All E.R. 908.
(4) (1913) A.C. 417, at p. 434.
(5) (1936) A.C. 177.
(6) (1949) P. 165, at p. 168.

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1899-1951. The matter does not come under s. 4 of the *Witnesses Examination Act* 1900 (N.S.W.). Having regard to ss. 19 and 77 of the *Matrimonial Causes Act* the Court may be of opinion that the evidence so tendered was not evidence within the meaning of the Act. The original transcript was not proved before the second judge: it was merely tendered by consent. Onus of proof was dealt with in *Preston-Jones* v. *Preston-Jones* (1); *Briginshaw* v. *Briginshaw* (2) and *Wright* v. *Wright* (3).

[WILLIAMS A.C.J. We would like to hear Mr. *Perrignon* on the preliminary point.]

W. B. Perrignon, for the respondent. If the Court finds anything based on this point it should be on terms. It is now too late to raise the point. The procedure followed was not wrong. The evidence was evidence taken within the scope of s. 77 of the *Matrimonial Causes Act* 1899-1951 (N.S.W.). It is always open to the court to allow evidence on affidavit.

[WILLIAMS A.C.J. There is not any affidavit in this case.]

There were statements on oath. It is not necessary that a deponent to an affidavit should be cross-examined. The parties waived their rights to cross-examination on the transcript of evidence. It is a point of wide effect and interest, and affects other jurisdictions. It is open to the parties in divorce proceedings to tender by consent letters written by one or other of the parties, and nothing else. The second judge said that if he required any of the witnesses he would recall them. There was a complete conflict on the issue between the parties. Documents which are admitted by consent become evidence. True it is that formalities under the Act were not complied with but all those matters were dispensed with by the parties upon their consent.

[WILLIAMS A.C.J. The court will reserve its decision on the preliminary point until arguments relating to the matters under appeal have been presented.]

[Counsel for the parties then addressed the Court on the merits.]

Cur. adv. vult.

May 18.

THE COURT delivered the following written judgment:—

This is an appeal by the wife from a decree nisi made on 9th October 1952 by *Clancy* J. sitting as the Supreme Court of New South Wales in its matrimonial causes jurisdiction on the

(1) (1951) A.C. 391.
(2) (1938) 60 C.L.R. 336.
(3) (1948) 77 C.L.R. 191.

petition of the husband for the dissolution of their marriage on the ground of her adultery with the co-respondent Baker. The decree was made in a consolidated suit originally commenced by the wife who petitioned for a dissolution of the marriage on the ground that her husband had without just cause or excuse wilfully deserted her and without any just cause or excuse left her continuously so deserted during three years and upwards. This petition was filed on 27th October 1948. To this petition the husband filed an answer on 28th January 1949, denying the desertion and petitioning for a decree for restitution of conjugal rights on the ground that his wife had since 9th October 1946 withdrawn from cohabitation with him and had since refused to render to him conjugal rights. On 22nd November 1950 the husband filed a supplemental answer petitioning for the dissolution of the marriage on the ground that succeeded before his Honour, final particulars of the misconduct being that the adultery occurred about a quarter to twelve on the night of Friday, 17th November 1950. The suit first came on for hearing in February 1952 before *Edwards* J. The whole of the oral evidence had been taken when his Honour unfortunately died. The further hearing of the suit came on before *Clancy* J. in October 1952. At that time the wife was seriously ill and for this reason and to save expense his Honour was requested by all parties not to hear the oral evidence *de novo* but to have the transcript of the evidence already taken before *Edwards* J. tendered as an exhibit, and have it read in open court or read it himself as he preferred and dispose of the suit on this basis. His Honour decided to allow the transcript to be tendered by consent and then to read it, reserving the right to recall any of the witnesses whom he wished to question. In the end his Honour had two of the witnesses recalled, a widow Mrs. S. J. Goodwin who gave evidence for the husband on the issue of adultery and the co-respondent Baker, and asked them a number of questions. His Honour then heard the addresses of counsel and dismissed the wife's petition and the husband's petition for restitution of conjugal rights and granted the husband the decree nisi already mentioned.

When the appeal first came on for hearing before us counsel for the appellant rightly called our attention to certain authorities and to ss. 28 and 77 of the *Matrimonial Causes Act* 1899-1951 (N.S.W.), to which we shall refer, and raised the question whether there had been a proper hearing before *Clancy* J. and, if there had not, whether the decree nisi he had pronounced was void or voidable and if void whether if it was followed by a decree absolute the

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decree absolute would be void also and the marriage would not be dissolved. Section 77 of the Act requires that, subject to certain immaterial exceptions, the witnesses in all proceedings before the court where their attendance can be had shall be sworn and examined orally in open court. It was suggested that there might have been a breach of this section because *Clancy* J. had read the transcript of the evidence given before *Edwards* J. in his private chambers instead of having it read in open court. The section gives effect to what has always been a fundamental conception of a trial in English law, quite apart from statute, that every court of law is open to every subject of the Crown: *Scott* v. *Scott* (1). A trial that is not conducted in open court, apart from some exceptional circumstances, is not a proper trial at all. But a judgment or order of a superior court having authority to determine its own jurisdiction, however fundamentally impeachable it may be, is not void but voidable and is valid and effective unless and until it is set aside. In a superior court the question is not whether the judgment or order is void or voidable but whether the flaw complained of is a mere irregularity which leaves the court with a discretion whether to set aside the judgment or order or not or is a fundamental miscarriage which prevents the trial being a real trial at all so that the person prejudiced is entitled *ex debito justitiae* to have the judgment or order set aside. A judgment or order effected by a fundamental miscarriage is often referred to as a nullity, but if it is a judgment or order of a superior court that does not mean that it is void but only that it can be disregarded by the person against whom it operates in the sense that if the person in whose favour it has been made seeks to enforce it the former is entitled, as we have said, to have it set aside *ex debito justitiae*: *Ex parte Williams* (2); *Cameron* v. *Cole* (3). A decree absolute for divorce is a judgment *in rem*. It affects the status of the parties. Since the decree is at most voidable and not void subsequent events may make it unassailable. Apart from s. 28 of the *Matrimonial Causes Act* the remarriage of one of the parties would have this effect: *McPherson* v. *McPherson* (4); *Marsh* v. *Marsh* (5). Section 28 provides that the respective parties to a suit for dissolution of marriage may marry again as if the marriage had been dissolved by death where but not before—(a) the time limited for appealing against a decree absolute has expired and no appeal has been presented; or, (b) any such appeal is dismissed;

(1) (1913) A.C. 417.
(2) (1934) 51 C.L.R. 545, at p. 550.
(3) (1944) 68 C.L.R. 571, at pp. 585, 590-591, 598, 604, 605.
(4) (1936) A.C. 177.
(5) (1945) A.C. 271.

or, (c) in the result of any appeal the marriage is declared to be dissolved. In view of the very explicit terms of this section it is, in our opinion, beyond doubt that when the conditions of the section have been fulfilled a decree absolute for divorce, however irregularly it may have been obtained, is valid and effective to dissolve the marriage and cannot be set aside. We were referred to certain English authorities that would seem to conflict with our opinion: *Woolfenden* v. *Woolfenden* (1); *Everitt* v. *Everitt* (2); *Wiseman* v. *Wiseman* (3). The most important of these authorities is *Wiseman* v. *Wiseman* (3) as this is a decision of the Court of Appeal and it is the practice of this Court, though not bound by decisions of the Court of Appeal, to follow them where possible so as to achieve uniformity of law with the English courts: *Waghorn* v. *Waghorn* (4); *Piro* v. *W. Foster & Co. Ltd.* (5). In *Wiseman* v. *Wiseman* (3) the husband had been granted first a decree nisi and then a decree absolute after an order for substituted service of the petition on the wife had been made and she had not appeared. The husband then remarried and a child was born of the second marriage. The Court of Appeal in the exercise of its discretion gave the wife leave to appeal under s. 31 (e) of the *Supreme Court of Judicature (Consolidation) Act* 1925, held that the order for substituted service had been improperly obtained and set aside the decree absolute and ordered a new trial. The Court of Appeal thought that the remarriage was not an absolute bar to granting leave to appeal but was only a matter to be taken into serious consideration in exercising its discretion. Two of their Lordships *Somervell* L.J. and *Hodgson* L.J. distinguished *McPherson* v. *McPherson* (6) as a case in which the Privy Council in the exercise of its discretion had refused to set aside the decree absolute after the remarriage of one of the parties. *Denning* L.J. said that if the Privy Council thought the effect of the remarriage was a complete bar to setting aside the decree absolute he could not agree with them. We do not read the decision of the Privy Council as a decision not to set aside the decree absolute in the exercise of their discretion. In that case Lord *Blanesburgh*, delivering the judgment of the Privy Council, after stating that their Lordships were dealing with a decree pronounced after a serious trial free from every other defect in procedure and one entered and remaining on the court files as regular in every respect said: "To say that such a decree is void would seem to be out of the question. If the law were so to

(1) (1948) P. 27.
(2) (1948) 2 All E.R. 545.
(3) (1953) P. 79.
(4) (1942) 65 C.L.R. 289.
(5) (1943) 68 C.L.R. 313.
(6) (1936) A.C. 177.

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treat it, the remedy would be far worse than the disease it was designed to cure" (1). He said that any intervention "had to be made before time for appeal had expired, or before the rights of third parties had intervened . . . the order absolute cannot be touched after the time for appeal therefrom has passed, and a new status has been acquired, or in this case, after the respondent, having remarried, is entitled, as is also his wife, to the protection afforded by s. 57 of *The Matrimonial Causes Act*, 1857 ((Imp.) (20 & 21 Vict. c. 85) (s. 28 of the New South Wales Act)) . . . the order absolute, although originally voidable, having become unassailable by the time the appellant's claim was made" (2). With respect, no other view could be taken of the express provisions of these sections. We are of opinion that s. 28 applies to every decree absolute of the Supreme Court of New South Wales in its matrimonial causes jurisdiction however irregularly it may have been obtained. After the conditions of the section have been satisfied the decree, however fundamentally impeachable it may theretofore have been, becomes unassailable.

But the present proceedings were not in breach of s. 77. The oral evidence was taken before *Edwards* J. in open court and the subsequent proceedings before *Clancy* J. were also held in open court. It was not a breach of the section that he chose to read the evidence that had already been taken in open court in private chambers. It was necesssary that he should read this evidence to familiarize himself with it and it was immaterial where he read it. Everything that he did pursuant to the request of all parties to continue the hearing from the stage it had already reached before *Edwards* J. was done in open court. The further evidence that was taken, the addresses of counsel and the making of the decree all took place there. The real objection to the further proceedings before *Clancy* J. was that, in a case which raised important issues of fact, as to which conflicting evidence had been given before *Edwards* J., his Honour decided to proceed from the stage the hearing had reached before *Edwards* J. and not to hear the whole suit *de novo*. There are cases in which such a course has been pursued: *Coleshill* v. *Manchester Corporation* (3); *In re Application of British Reinforced Concrete Engineering Co. Ltd.* (4); *Bolton* v. *Bolton* (5). In all these cases the Court on appeal criticized the course that had been followed but accepted what had been done and did not order a new trial. There are, we think, in most cases grave objections to such a course and the objection becomes

(1) (1936) A.C., at p. 204.
(2) (1936) A.C., at p. 205.
(3) (1928) 1 K.B. 776.
(4) (1929) 45 T.L.R. 186.
(5) (1949) 2 All E.R. 908.

graver when there is, as in the present case, a serious conflict of evidence. But the parties were all represented by counsel or solicitors and they all requested his Honour to take the course he did. It was open to any of the parties to apply to his Honour for leave to recall any of the witnesses for examination if they thought fit, but they all elected not to do so and the two witnesses who were further examined were recalled at his Honour's request. "If a litigant has himself induced, acquiesced in or waived the irregularity he cannot afterwards complain of it": *Marsh* v. *Marsh* (1). In these circumstances it appears to us that we should, if we can, consistently with the public interests which are involved in divorce proceedings, dispose of the appeal on the materials before us. To order a new trial at this stage would involve a great deal more expense than would have been incurred if the hearing before his Honour had proceeded *de novo*. After much consideration we have decided to proceed on the materials before us.

[Their Honours then considered the evidence in respects that do not call for report, and reached the conclusion that the appeal should be allowed.]

Appeal allowed with costs. Decree nisi below varied as follows. Findings of the court below on the second fourth and fifth issues set aside. In lieu thereof second issue found in the affirmative and fourth and fifth issues in the negative. Set aside the order that the marriage be dissolved by reason that since the celebration thereof the appellant has been guilty of adultery with the co-respondent. In lieu thereof order that the marriage in question be dissolved by reason that since the celebration thereof the husband has without just cause or excuse wilfully deserted the appellant and without any just cause or excuse left her continuously so deserted during three years and upwards unless sufficient cause to the contrary be shown within six months from the date of the decree. Set aside the order that the co-respondent should pay the respondent's costs in so far as they relate to the charge of adultery against the petitioner. In lieu thereof order that the respondent pay the co-respondent's costs of this issue. The decree nisi as so varied to bear date as of the day this judgment is pronounced.

Solicitors for the appellant, *R. W. Fraser & Parkinson.*
Solicitor for the respondent, *W. C. Moseley.*
Solicitors for the co-respondent, *Harold Munro & Serio.*

J. B.

(1) ((1945) A.C., at p. 285.