KENWARD v. KENWARD: 2 A.E.R. 1950, p. 297

The Second Great War was so extensive and of such intensity that it did not fail to influence our Modern Society in every phase of its existence. The field of Law was no exception to this influence. An interesting example of the War's impact in the field of Conflicts of Law may be found in the case of Kenward v. Kenward (supra). This case dealt with a domiciled British subject, who while in the armed services met a domiciled Russian, the subsequent marriage taking place in Russia. Since the husband could not be re-united with his Russian wife he sought a decree of nullity.

This action was instituted along with three others of similar nature; they all sought decrees of nullity of their Russian marriages with their Russian wives, contending that the marriages were invalid for want of form, or alternatively, were void for want of consent. The wives were not represented by counsel, and as Joseph Jackson pointed out in his article (1951 Modern Law Review Vol. 14 No. 1 p. 84), "Cases of public concern should be dealt with by Acts of Parliament. This would be fairer to the wives, as someone would have argued their case, and the result would have been more conclusive." Of the four cases Kenward v. Kenward was the only one that was definitely dismissed by the Court of first instance.

The principle facts of this case are as follows: Kenward was serving with the Royal Navy at Archangel in 1945. In September of that year he met his wife, Nina Nikolaevna, a Russian girl, who after a short while suggested marriage to which he agreed. After many attempts, Nina finally got an appointment with the local registrar, and through an interpreter the marriage was effected October 16, 1945. Kenward did not remember signing the register (but the Court concluded that he had). His passport was not stamped nor was he asked for a certificate relating to his health and previous marital status. Two days after the marriage the husband was recalled to his ship, and never again saw his wife.

The first ground for the petition of nullity was that the formalities of the lex loci contractus were not adhered to. Hodson J. in the lower Court held that these infractions of form, such as the failing to stamp the appellant's passport, and his not having a certificate stating his previous marital status and the condition of his health as outlined by the Russian code, did not render the marriage invalid. Sir Raymond Evershed M.R. concurred with Hodson J. that the infraction of the form did not go to the root of the contract. The determining factor for Hodson J. was section 2 of the Russian Code 1926, which stated that registration was sufficient proof of a valid marriage, despite the formalities not being complied with, and this marriage had to be tested by Russian Law.

The Master of the Rolls, Lord Evershed, disagreed with Hodson J. on the interpretation of section 2 of the Russian Code. He thought that the registration of the marriage was not indisputable as to its validity. Wolff, the expert witness, had testified that this section would be set aside if the omissions went to the root of the contract. Lord Evershed held this as the main question—to decide the validity of the marriage, did the lack of form in this case go to the root of the contract? From the evidence he contended that it was clear that the Russian officials tried to discourage the Russian girl Nina from her marriage with Kenward, and that it was only after repeated efforts on her part that the officials finally relented. Even so, they did not comply with all the forms. Another unusual fact was that the marriage ceremony was held at night at Archangel.. Joseph Jackson in his article (supra) believes that the Russian officials never intended this to be a valid marriage – that they purposely left out part of the required forms of a valid marriage. These officials more than likely realized that Kenward's ship was sailing the next day.

Lord Evershed looked to the intention of the Soviet authorities and concluded that the subsequent legislation by the Soviet Government in 1947—forbidding Russian spouses to leave Russia and forbidding their foreign spouses coming to Russia to join them – clearly illustrated the intention of the Soviet officials. But what if we look to the intention of the parties themselves? Would this not tend to support the view of a valid marriage?

A point which was stressed more strenuously in the Court of Appeal concerned the invalidity of the marriage on the ground that it was not Christian. Section 9 of the Russian Code stated that it was not necessary for both parties to live to-gether, they could choose their own profession. Living to-gether is not a duty, but is based upon mutual arrangement or agreement of the parties. Nachimson v. Nachimson (1930) p. 217 did not support this view; Lord Evershed held it dealt with the simplicity of dissolution, and not the invalidity of a Russian marriage because of its lack of consortium. English law stresses consortium, but basically a Russian marriage is no different from an English marriage and thus this argument was rejected. Russian marriages are not polygamous and thus do not violate the Christian principal of "the union of one man and woman...."

Lack of Consent was another ground raised to dissolve the marriage. Consent is based upon the personal law of the parties and not the personal law of the place where the marriage is performed; this doctrine was laid down in Apt v. Apt (1947) 2 A.E.R. 677. Evershed M.R. Hodson J. and Bucknill L.J. all agreed that on English law the husband's consent was present.

It was further contended that there was a fundamental mistake which voided the contract. The belief that Russian authorities would continue to allow wives to leave Russia or permit their husbands to

join them was a fundamental belief when the marriage was celebrated. The subsequent Russian legislation removed this contention and the appellant's counsel held that this mistake should void the contract. It was pointed out that this was a subsequent mistake and was not in existence at the time the contract was made. It is a fundamental rule of contracts that a subsequent mistake cannot void a previously made contract. A mistake of law will not void a contract, but a mistake of fact will. This opens up an arbitrary point as it is difficult at times to distinguish law and fact.

The point of Frustration was also raised by the appellant's counsel as a further basis for voiding the marital contract. The contract was void through no fault of either party but as a consequence of subsequent Russian legislation. Lord Evershed who had already concluded the contract invalid on formality did not officially deal with this point, deciding to leave it open for later judicial decisions dealing directly with the point. He did however comment that this was a relatively new doctrine (Taylor v. Caldwell (1863) 3 B & S. 826) and had never been applied to marriage before. Hodson J. in the court of first instance, briefly dealt with this point as it was not raised at the trial (but it was left open in the Court of Appeal). He said the contract of marriage creates a status and the doctrine of frustration has no application.

Perhaps the judgment of Lord Justice Denning is the most interesting in the case. He must be admired for meeting the problem head on rather than evading issues and leaving them for future decisions. Although he uses the term frustration, he doesn't mean to apply it in the strict sense of the doctrine. He assumed that if the marriage was formally valid, then it was voidable by English law by reason of a condition which failed. Frustration implies the contract is voided at the moment the frustrating event occurs and not merely voidable as stated by Denning L.J. Various statutes describe the conditions for a valid marriage and new ideas such as Frustration cannot be applied. The Personal law of other countries may differ, and thus a condition attached to the law of one party may not apply to that of the other. If they have married accepting the particular condition as being fundamental, the marriage is then voidable if this condition is broken. In Re Bethell (1888) Ch. D. 220 supports the view that marriage depends on conditions attached to one party. If a person entering into a foreign marriage voluntarily adheres to its conditions it should be a binding marriage. The present marriage is voidable for failure of a condition that was fundamental and applicable; the belief that they would enjoy subsequent consortium, but Russian legislation thwarted this condition, thus the contract is voidable.

This case has been criticised on the grounds that it is an example of English law-makers bending backwards to stretch the law into giving a just decision. I am of the contrary opinion that this is a strict interpretation of the law. Hodson J. illustrates the attitude adopted by the judiciary in interpreting this case. He had great sympathy for the petitioner. Many lawyers will appreciate his refusal to stretch the law to a point where its extension becomes difficult or impossible to justify on existing provisions and principles. The Court of Appeal however developed the case a little more extensively than the court of first instance. I feel certain that the admirers of Hodson J. will hold equal admiration for the Court of Appeal in the manner in which they arrived at their decision.

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