

Ross-Smith vs. Ross-Smith

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Commentary

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ROSS-SMITH VS. ROSS-SMITH—CONFLICT OF LAWS—ANNULMENT—
JURISDICTION—VOID AND VOIDABLE MARRIAGES—Recently the majority
of the House of Lords in *Ross-Smith v. Ross-Smith*¹ held that the
fact that a marriage is celebrated in England does not confer juris-
diction on an English court in nullity actions, if the marriage is
voidable and the respondent is neither domiciled nor resident in
England.

In the *Ross-Smith* case the petitioner-wife was resident in Eng-
land, the husband being domiciled in Scotland and resident in the
Middle East. The wife prayed for annulment on the ground of non-
consummation owing to either the impotence or wilful refusal of the
appellant husband. At trial² Karminski, J., stated that there was a
distinction between void and voidable marriages as regards juris-
diction and following *Casey v. Casey*³ he held that the place of cele-
bration was not sufficient to found jurisdiction in an action for annul-
ment of a voidable marriage. The Court of Appeal⁴ reversed this
decision on the ground that *Simonin v. Mallac*⁵ (a void marriage
situation) held that the court had jurisdiction on the sole ground
that the marriage was celebrated in England; and there being no
distinction between a void and voidable marriage for jurisdictional
purposes, the rule in *Simonin v. Mallac* applied:

The question of jurisdiction of the English court was fully argued and
it was held by the full court that jurisdiction existed on the ground that
the marriage had been celebrated in England . . . the decision has
stood for 100 years and, though frequently cited, has never been questioned.
It (*Ramsay-Fairfax v. Ramsay-Fairfax*)⁶ decided once and for all that
no distinction is to be drawn, for jurisdictional purposes, between mar-
riages void ab initio and those which are merely voidable. . . . The
decision in *Ramsay-Fairfax v. Ramsay-Fairfax* is to be preferred and
is to be followed.⁷

¹² *Supra*, footnote (2).

¹³ [1945] O.R. 540.

¹⁴ *Supra*, footnote (5).

¹⁵ *Supra*, footnote (1).

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¹ [1962] 1 All E.R. 344.

² [1960] 3 All E.R. 70.

³ [1949] 2 All E.R. 110.

⁴ [1961] 1 All E.R. 255.

⁵ (1860), 2 Sw & Tr. 67.

⁶ [1955] 2 All E.R. 709.

⁷ Per Wilmer L. J., *supra*, footnote 4 at p. 260.

The two issues that were before the House of Lords were firstly, the validity of *Simonin v. Mallac*⁸ and secondly, whether or not there was a distinction between void and voidable marriages for the purposes of jurisdiction.

The majority of the House of Lords (Lord Merriman and Lord Hodson dissenting) found that *Simonin v. Mallac*⁹ was wrongly decided. In *Simonin v. Mallac* the parties were both domiciled and resident in France and being unable to get parental consent required by French law they came to England and were married in London. The parties thereafter returned to Paris but never co-habited and the plan to regularize the marriage by French law miscarried. The wife subsequently acquired a decree of nullity in the French Courts. After taking up residence in England, the wife then brought an action for annulment in the English Court. The English court assumed jurisdiction on the basis that "the parties by professing to enter into a contract in England mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal".¹⁰ The majority of the House of Lords held this reasoning to be erroneous¹¹ and further stated that *Simonin's Case* could not be supported on the basis of jurisdiction being previously possessed by the ecclesiastical courts.¹²

Simonin v. Mallac having been found to have been wrongly decided, the question arose as to whether or not it should be expressly overruled. Their Lordships resolved the case by drawing a distinction between void and voidable marriages and held that the anomalous "rule" in *Simonin's Case* would not extend to voidable marriages. Their Lordships did not arrive at any conclusive and final answer with respect to the future applicability of the "rule" in cases involving a void marriage.¹³ An examination of the attitudes expressed by the various judges towards overruling *Simonin's Case* reveals that three judges¹⁴ were inclined to overrule it but it was not necessary to do so; two judges¹⁵ said they would not overrule it; Lord Morris¹⁶ was reluctant to overrule it; and Lord Hodson¹⁷ said that the decision could be overruled, but only with hesitation. In order to determine whether or not the House of Lords would overrule *Simonin's Case*, if called upon to do so, it is necessary to examine the reasoning of the House of Lords more carefully.

⁸ *Supra*, footnote 5.

⁹ *Ibid.*

¹⁰ *Ibid.* at p. 74.

¹¹ *Supra*, footnote 1 at p. 349.

¹² *Ibid.*, at p. 350.

¹³ Since no final answer was given by the House of Lords, the "rule" in *Simonin's case* is still being applied in cases involving void marriages: *Merker v. Merker* [1962] 3 All E.R., 928, *infra*, footnote 33.

¹⁴ Lord Reid, Lord Morton, *supra*, footnote 1 at p. 355 and Lord Cohen, *ibid.*, at p. 383.

¹⁵ Lord Cohen, *ibid.*, 358 and Lord Merriman, *ibid.*, 380.

¹⁶ *Ibid.*, at p. 366.

¹⁷ *Ibid.*, at p. 371.

Both Lord Cohen and Lord Merriman were against overruling the "rule" in *Simonin's* case on the basis that "the decision has stood for over a hundred years and it has been followed or applied in a very large number of cases."¹⁸ This argument was countered by Lord Cohen who said, "if the Court has not jurisdiction, it cannot confer jurisdiction on itself by wrongly assuming it."¹⁹ Lord Cohen in expressing his view that the "rule" in *Simonin's Case* should not be overruled stated that:

... a number of statutes have been passed affecting the jurisdiction of the High Court in Matrimonial matters and the legislature may be presumed to have proceeded on the basis that the jurisdiction in nullity matters was that assumed by the court in *Simonin v. Mallac*.²⁰

The argument that *Simonin v. Mallac* ought not to be overruled because someone has regulated his affairs in reliance of its validity was turned down by both Lord Reid²¹ and Lord Cohen.²² Lord Morris said that the:

Particular place where the ceremony of marriage takes place may have no relevance as between the parties so far as their marriage status is concerned assuming that the ceremony did bring about such marriage status.²³

Lord Hodson, however, points out that "the courts of the country of celebration will often be the most convenient and given a particular set of facts, hardship cases will arise whatever the basis of jurisdiction may be."²⁴

With respect, it is submitted that if convenience were held to be a ground for jurisdiction, it would lead to a great deal more confusion in the field of private international law since it would almost invariably be open to dispute as to whether or not it was convenient for a particular court to have assumed jurisdiction in the particular case.

After pointing out that the "rule" in *Simonin's* case is, from the strictly legal point of view, in conflict with the principle finally settled in the *Le Mesurier*²⁵ and *Salvesen*²⁶ cases Lord Reid gives very convincing practical reasons against the existence of the rule. His Lordship points out that such grounds for jurisdiction are unnecessary where the parties are domiciled within the jurisdiction or where the respondent is resident within the jurisdiction. He states that:

... it enables a foreigner who happens to have been married in England to come here and raise proceedings against a spouse who may never have had any other connection with England than the fact that the parties

¹⁸ *Ibid.*, 357.

¹⁹ *Ibid.*, 382.

²⁰ *Ibid.*, 357.

²¹ *Ibid.*, 354.

²² *Ibid.*, 357.

²³ *Ibid.*, 367.

²⁴ *Ibid.*, 371.

²⁵ [1895] A.C. 517.

²⁶ [1927] A.C. 671.

came here to be married: the respondent is then faced with the choice of incurring great expense and trouble in coming here to defend the case or allowing it to go by default.²⁷

Where jurisdiction is confined to the domicile or residence of the parties it is unlikely that any such expense would fall upon a respondent who is obliged to defend a suit for nullity of a void marriage when he is already domiciled or resident within the jurisdiction. Although it would seem possible that when a court assumes jurisdiction on the basis of domicile, inconvenience may be forced upon a respondent who does not reside in that jurisdiction though he may be domiciled there. However, there would seem to be no merit in multiplying cases of inconvenience by assuming jurisdiction on grounds of celebration within the jurisdiction.

Lord Reid further points out that, in the case of foreigners having the same domicile, the assumption of jurisdiction by the English courts on the basis of celebration in England would enable the English court to grant a petition for nullity, "but a decree of the English court would not then prevent the court of the domicile from reaching a contrary decision".²⁸

It may be argued that the same difficulty would arise where the English court assumed jurisdiction on the grounds of residence of the parties who were domiciled elsewhere²⁹ but it is less probable, where the parties are resident in England, that they would be domiciled elsewhere. Whereas, there is a greater probability that parties who have merely celebrated a marriage in England could be domiciled elsewhere there being a close correlation between domicile and residence than between domicile and place of celebration. In any event if these probabilities are not valid, there is still no reason for compounding an already existing difficulty.

Whether or not the House of Lords will overrule *Simonin's* case is uncertain. However, the pronouncements given by the House of Lords suggest a tendency against the existence of the rule in

²⁷ *Supra*, footnote 1, at p. 355.

²⁸ *Ibid.*, at p. 355. This difficulty is illustrated by *Simonin v. Mallac* where the French court, the court of the parties domicile, granted a decree of nullity, whereas the English court, which assumed jurisdiction on the basis of celebration within the jurisdiction, held the marriage to be valid.

²⁹ This difficulty might be eliminated if the court of the domicile of the parties recognized the decree of the English court on the grounds that the English court properly assumed jurisdiction. The difficulty might also be eliminated if the English court applied the law of the domicile of the parties to determine post-nuptial grounds for annulment with the result that the court of the parties' domicile would almost always arrive at the same conclusion though there may be cases where the court of the parties' domicile would arrive at a different result as in *Simonin v. Mallac*. In that case, the English and French courts characterized a pre-nuptial impediment differently. The English court applied the law of the place of celebration (England) to the impediment because they characterized it as going to the formal validity of the marriage. The French court applied French law to the impediment because the parties were French. By English law, the marriage was valid; by French law the marriage was invalid.

Simonin v. Mallac. There is nevertheless, a possibility that the House of Lords may subsequently refuse to overrule it in relation to void marriages by applying the reasoning of Lord Cohen where he states:

... the decision has stood for over a hundred years and it has been followed or applied in a very large number of cases not only in this country but in many other parts of the Commonwealth.³⁰

The reasoning of Lord Cohen may also be applicable to voidable marriages since the rule in *Simonin's* case has also been relied on in cases of voidable marriages; *Hill v. Hill*,³¹ *Addison v. Addison*.³² Now, this avenue of approach has been closed by the House of Lords by their having drawn a distinction between void and voidable marriages for purposes of jurisdiction and overruling the latter two cases. In drawing this distinction and merely holding that the rule in *Simonin's* case does not apply to voidable marriages, the decision in *Simonin v. Mallac* still stands with respect to void marriages.³³ This raises the next issue discussed by the House of Lords, namely, the distinction between void and voidable marriages.

As to the second problem dealt with by the House of Lords, Lord Reid discusses the distinction between void and voidable marriages saying, "I think it very important to see what practical differences there are in this connection."³⁴ He deals first with the fact that the wife in a void marriage is capable of acquiring a domicile separate from that of her husband, whereas with a voidable marriage she cannot. He goes on to say that in a void marriage there may be no court whose decision is paramount (as there would be in a voidable marriage) and "there is, therefore, something to be said for recognizing the jurisdiction of the court of the *locus celebrationis*."³⁵ Secondly, he reiterates the well accepted principle that in regard to a void marriage, anyone may raise the invalidity at any time, whereas with a voidable marriage only a spouse may question it, and only during the lifetime of the other spouse. The third difference pointed out is where the *lex loci celebrationis* has to be applied to determine the issue. His Lordship states that it is against public policy for a party in a voidable marriage to be able to come to England and get relief for wilful refusal to consummate when his or her own domicile would hold the marriage valid, not recognizing such a ground for annulment.

It is submitted that Lord Reid has dealt, as he himself has said, with the practical differences existing and not, except perhaps vaguely in his first distinction, with the importance of the distinction for jurisdictional purposes.

³⁰ *Supra*, footnote 1 at p. 357.

³¹ [1959] 3 All E.R. 354.

³² [1955] N. Ir. 1.

³³ The rule in *Simonin's* case was recently followed in an action for annulment of a void marriage, *Merker v. Merker*, *supra*, footnote 13. Whether or not the "rule" will continue to be followed in Canadian cases is discussed *infra*, pp. 529, 560.

³⁴ [1962] 1 All E.R. 345, at p. 356.

³⁵ *Ibid.*

Lord Cohen, in his judgment referred to *Casey v. Casey*³⁶ which held that the fact a marriage was celebrated in England does not confer jurisdiction on the High Court in a voidable marriage. He agrees with the decision and cites a passage, with approval, that analogizes divorce and annulment of a voidable marriage. Perhaps Lord Cohen erroneously agreed with the purported analogy, in view of the fact that the Court of Appeal³⁷ had overruled *Inverclyde v. Inverclyde*³⁸ on which *Casey v. Casey* was based. It should be pointed out that *Bateson J.* in *Inverclyde* was the first judge to draw a distinction between void and voidable marriages as regards jurisdiction. His Lordship asserted that there was a distinction between void and voidable marriages and he refused to extend *Simonin v. Mallac*³⁹ to voidable marriages.⁴⁰

This may be the very question to be answered, namely, whether or not there should be any difference between void and voidable marriages for jurisdictional purposes. The ecclesiastical courts drew no such distinction as regards jurisdiction and the jurisdiction of the High Court is derived from that exercised by the ecclesiastical courts. The Matrimonial Causes Act of 1857, s. 22, was re-enacted by the Supreme Court of Judicature (Consolidation) Act 1925, s. 32. Sections 22 and 32 state the jurisdiction of the High Court to be "as nearly as may be conformable to the principles and rules of the court which previously exercised the jurisdiction."

It should also be noted that Lord MacDermott in *Addison v. Addison*⁴¹ refused to follow *Casey* on grounds that there was no justification for "splitting the nullity jurisdiction as between void and voidable marriages."

Lord Hodson, in his dissenting judgment, dealt with the views of Lord Cohen and Lord Reid. His Lordship did not agree with the decision in *Casey v. Casey*⁴² because it was "based on the misconception that in the case of voidable marriages there is some affinity between nullity and divorce."⁴³ As to the distinctions set out by Lord Reid, he asserted that they did not touch the question of jurisdiction. He stated:

³⁶ [1949] P. 420.

³⁷ *Ramsay-Fairfax v. Ramsay-Fairfax* [1955] 3 All E.R., 695. see Denning L.J. (as he then was) at p. 697.

³⁸ [1931] P. 29.

³⁹ (1860) 2 Sw. & Tr. 67.

⁴⁰ [1962] 1 All E.R. 344, at p. 360.

⁴¹ [1955] N. Ir. 1 at p. 30. The Royal Commission on Marriage and Divorce Cmd 9678 section 872 states that the Scottish Court has had no occasion in the past to draw a distinction between void and voidable marriages in deciding whether it has jurisdiction in nullity actions.

⁴² [1949] P. 420.

⁴³ [1962] 2 All E.R. 344 at p. 372. Compare with Dicey, *Conflict of Laws*, 7th ed., at p. 361 and the English Royal Commission on Marriage and Divorce, Cmd. 9678, section 892, where the contrary views are expressed.

I remain convinced that the line of cleavage for jurisdictional purposes is between divorce and nullity and not between different kinds of nullity proceedings.⁴⁴

He added that such a distinction for the purposes of jurisdiction is no more satisfactory than a distinction between one kind of void marriage and another.⁴⁵ Lord Hodson asserts that the courts have disregarded any distinction where jurisdiction has been founded on common domicile⁴⁶ and on residence. As to the latter, his Lordship pointed out that the jurisdiction of the ecclesiastical courts in nullity actions was based on residence only and this was so regardless of the ground that the suit may have been instituted on. The courts now are justified in substituting residence in England for the equivalent residence in the ecclesiastical diocese, Lord Hodson states:

The appellant accepts this adaptation or extension of the former ecclesiastical jurisdiction from residence in the diocese not only to residence in England but also to domicile and draws no distinction between marriages void and voidable. . . . The appellant, however, while accepting residence and domicile as the proper foundations for jurisdiction says that the supposed rule that the place of celebration gives jurisdiction ought not to be accepted.⁴⁷

Dicey states that there is no logic in maintaining a distinction between void and voidable marriages when jurisdiction is exercised on the ground that the marriage is celebrated in England and the rejection of the distinction when jurisdiction is exercised on the ground of residence.⁴⁸

If the House of Lords does subsequently overrule *Simonin's* case, then all grounds upon which the court assumes jurisdiction in a void marriage will be proper grounds for assuming jurisdiction in a voidable marriage.⁴⁹ The result would be that for all practical purposes there would be no distinction between void and voidable marriages with respect to jurisdiction. If the House of Lords subsequently refuses to overrule the "rule" in *Simonin's* case then the only situation where there would be any distinction between a void and voidable marriage for purposes of jurisdiction would be its foundation on the grounds of celebration within the jurisdiction. This distinction

⁴⁴ *Ibid.* The Royal Commission on Marriage and Divorce, Cmd. 9678, section 881 reads as follows: ". . . we think that for the purpose of defining the jurisdiction of the court, a distinction must be drawn between void and voidable marriages."

⁴⁵ The Court of Appeal in *Ross-Smith*, [1961] 1 All E.R. 255 criticized the decision of Collingwood J. in *Hill v. Hill*, [1960] P. 130 insofar as it suggested that a petition on the ground of wilful refusal to consummate might be distinguishable from one alleging impotence.

⁴⁶ *Salvesen v. Austrian Property Administrator*, [1927] A.C. 641.

⁴⁷ [1962] 1 All E.R., 344 at p. 369. Dicey also asserts that in the ecclesiastical courts, the distinction was irrelevant for jurisdictional purposes: see Dicey, *Conflict of Laws*, 7th ed., at p. 360.

⁴⁸ Dicey, *supra*, footnote 47. See also similar views in Castel: *Private International Law* p. 114. and Falconbridge: *Conflict of Laws*, 2nd ed. p. 689, footnote 5. For a concise view of the recommendations of the Royal Commission on Marriage and Divorce on the whole question of jurisdiction in nullity actions, regard should be had to the Draft Code in Appendix IV of the Royal Commission Report.

⁴⁹ See Castel, *supra*, footnote 48.

would rest upon an anomalous decision which was wrongly decided; not on any inherent difference between void and voidable marriages with respect to jurisdiction. Therefore, it is respectfully submitted that the House of Lords ought not to have determined the dispute before them by drawing a distinction between void and voidable marriages in relation to jurisdiction. A more logical approach would have been to either refuse to overrule the rule in *Simonin's* case and extend the anomaly to voidable marriages, or, more preferably, to have overruled the rule in *Simonin's* case in relation to both void and voidable marriages and held that a place of celebration is not ground for jurisdiction in either case.

It is now necessary to deal with the significance of the *Ross-Smith* decision in relation to Canadian decisions.

In *Spencer v. Ladd*⁵⁰ a decision of the Supreme Court of Alberta, Boyd McBride J., held that he had jurisdiction to try an action for annulment of a void marriage where jurisdiction is founded on the marriage having been celebrated in Alberta. The court here followed the rule in *Simonin's* case. In *Gower v. Starrett*,⁵¹ a decision of the Supreme Court of British Columbia, Farris C.J.S.C. held that the elements giving jurisdiction in a nullity action are the same whether the marriage is void ab initio or voidable only. In *Reid v. Francis*,⁵² a decision of the Saskatchewan Court of Appeal, Martin J.A. held that a marriage having been celebrated in Saskatchewan conferred jurisdiction on the Saskatchewan court to entertain a suit for a declaration of nullity of a voidable marriage. The Court of Appeal applied the "rule" in *Simonin's* case to voidable marriages. *Fleming v. Fleming*⁵³ a decision of a single judge in the High Court of Justice of Ontario, followed the decision of *Inverclyde v. Inverclyde*⁵⁴ and decided that the court of the parties domicile had *exclusive* jurisdiction in a suit for annulment of a voidable marriage. The House of Lords overruled *Inverclyde v. Inverclyde*⁵⁵ in so far as it refused to recognize residence as a ground of jurisdiction⁵⁶ and their Lordships approved of the dicta in *DeReneville v. DeReneville*⁵⁷ and the decision in *Ramsay-Fairfax v. Ramsay-Fairfax*⁵⁸ to the effect that residence was a proper ground upon which a court may assume jurisdiction in an action for annulment.

In view of the differences between the earlier Canadian decisions and the recent decision of the House of Lords in *Ross-Smith v. Ross-Smith*, the questions now arise as to what approach will be taken in subsequent Canadian decisions on the issue of jurisdiction in nullity

50 [1948] 1 D.L.R. 39.

51 [1948] 2 D.L.R. 853.

52 [1929] 4 D.L.R. 311.

53 [1934] O.R. 588.

54 [1931] P. 29.

55 *Ibid.*

56 [1962] 1 All E.R. 344, at p. 354.

57 [1947] 2 All E.R. 112.

58 [1955] 3 All E.R. 695.

actions. Will the Canadian Courts express the view that since *Simonin v. Mallac* was wrongly decided, when there is no foundation for jurisdiction in either a void or voidable marriage based on celebration within the jurisdiction thus overruling *Spencer v. Ladd*⁵⁹ and *Reid v. Francis*?⁶⁰ Will the Canadian courts overrule the decision in *Gower v. Starrett*⁶¹ and draw a distinction between void and voidable marriages and hold, as did the House of Lords, that there is no jurisdiction on the basis of celebration within the jurisdiction in the case of a voidable marriage? Or will subsequent Canadian decisions adopt the reasoning in *Gower v. Starrett*⁶² and find no distinction between void and voidable marriages and further hold that though the "rule" in *Simonin's* case, though wrongly decided, is to be applied in both void and voidable marriages? The final question raised is whether or not the Ontario courts will reverse their earlier position⁶³ and subsequently assume jurisdiction on the basis of residence or even celebration within the province or whether they will continue to limit their jurisdiction in voidable marriages to the sole ground of domicile within the province? It is submitted that in view of the fact that the analogy between divorce and voidable marriages expressed in *Inverclyde v. Inverclyde*⁶⁴ and followed in *Fleming v. Fleming*⁶⁵ was disapproved of in *Ramsay-Fairfax v. Ramsay-Fairfax*⁶⁶ the Ontario courts will be less reluctant to extend their jurisdiction in nullity actions especially since the House of Lords has held *Inverclyde v. Inverclyde*⁶⁷ to be wrong insofar as it refused to recognize residence as a grounds for jurisdiction.⁶⁸ The approach to be eventually taken by the Canadian courts and the effect of the *Ross-Smith* decision on this approach must be patiently awaited until the issues are raised before them.

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