CASE NOTES

R. v. CHAPMAN[1]

Criminal Law — Abduction of girl under 18 with the intention that she shall have unlawful carnal intercourse — Meaning of 'unlawful' held to be 'illicit', i.e., outside the bond of marriage.

The appellant was convicted at Assizes[2] of abduction of an unmarried girl under the age of 18 contrary to s. 19 (1) of the Sexual Offences Act, 1956.[3] The appellant, a married man, had taken an unmarried girl aged 16 years from her parents' home to another town and there had intercourse with her. The trial judge directed the jury that the word 'unlawful' as used in the relevant provision meant 'illicit', *i.e.*, outside the bond of marriage. The accused appealed against conviction.

The Court of Criminal Appeal, in a judgment delivered by Donovan J., dismissed the appeal and affirmed the interpretation of the trial judge as according 'with the common sense of the matter, and with what we think was the obvious intention of Parliament'.[4] The court found that the 'plain purpose' of s. 19 was 'to protect young unmarried girls'.[5]

The court opined, and search has confirmed, that 'the point had not apparently arisen before'.[6] The matter is therefore one of the interpretation, by use of the normal aids, of the provision in question.

The use of the term 'unlawful sexual intercourse' is not peculiar to s. 19 of the Sexual Offences Act, but, on the contrary, appears in seventeen of the sections of that statute.[7] The proper course, however, is to endeavour to find out the meaning of the words from the section itself

---

[1] [1958] 3 All E.R. 134; 42 Cr. App. R. 257 (References are to the latter report). Court of Criminal Appeal comprising Devlin, Donovan and Ashworth JJ.

[2] Stable J.

[3] 'It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of eighteen out of the possession of her parents or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man'.

[4] 42 Cr. App. R. 257 p. 261.

[5] Ibid. It is to be doubted (a) whether these are legitimate aids to interpretation and (b) whether mere mortals (at whom, after all, the enactment is directed) blessed with nothing more than sense experience and reason would find the intention of Parliament in this matter 'obvious'. The Act, strangely, affords no protection against the clean young man on the front room sofa.

[6] 42 Cr. App. R. 257, p. 259.

[7] Ss. 2-9, 17-19, 23-28.

and, only in the event of failure of that source, to have resort to the statute as a whole.[8] The terms of s. 19 would seem to admit of the following interpretations of 'unlawful':

1. Contrary to enacted criminal law.[9] The Court of Criminal Appeal rejected the argument that in s. 19 of the 1956 Act the word 'unlawful' connotes 'intercourse contrary to some positive enactment' since that argument at once prompted the question 'why, if the intercourse in question is already positively forbidden, section 19 should do it again'.[10] It is respectfully submitted that this rejection was unwarranted and that the court did not effectively answer the argument of counsel for the defence that 'under section 19 the law can step in before unlawful intercourse actually occurs and so prevent the mischief'.[11] Merely to assert that 'this is perhaps a little imaginative when one considers the circumstances of most abductions'[12] is an argument which could be applied with equal force to any of the inchoate crimes. The court's visionary discernment of 'the plain purpose of s. 19' (the protection of unmarried girls) was not only arbitrary but also unhelpful in that it begged the question of the extent of protection.

   There are, in addition, other reasons why section 19 should be inserted in the statute even though the sexual intercourse referred to is already prohibited. Two may be suggested:

   (a) because, although prohibited, the sexual intercourse is not otherwise punishable. This would apply in the case of intercourse induced (or intended to be induced) by threats, false pretences or the administration of drugs where the evidentiary

---

[8] Spencer v. Metropolitan Board of Works (1882) 22 Ch. D. 142, per Jessel, M.R. at p. 162: 'The first observation to be made . . . is that we ought to find out its meaning if we can from the section itself. If we can do that we need not have recourse to the use of the word "take" in the other sections of the Act. If we cannot, then I agree with the principle which was laid down by Mr. Justice Chitty that as a general rule a word is to be considered as used throughout an Act of Parliament in the same sense, and that therefore we may look through the other sections to see in what sense the word is there used'.

[9] See the choice of Ridley J. in Threkeld v. Smith [1901] 2 K.B. 531, 536 et seq., 'The first question is whether the appellant did "unlawfully" kill the deer. What does "unlawfully" there mean? For the respondent it is contended that unlawfully there means in such a way as to violate the private rights of an individual, and that the appellant in killing this deer did violate the private rights of Lord Lonsdale. I will assume that he did so but in my opinion, that does not make his act unlawful within the meaning of s. 12. What does s. 12 mean? It means that, if any person violates the criminal law by doing this act, he shall then be liable to the prescribed punishment. I interpret the adverb "unlawfully". . . to mean, not in contravention of the rights of a private individual but in contravention of the criminal law of the land'.

[10] 42 Cr. App. R. 257 pp. 260-261.

[11] Ibid. p. 261.

[12] Ibid.

requirement of corroboration contained in the provisos to ss. 2, 3 and 4, but not in s. 19, could not be satisfied.[13]

(b) because abduction is an aggravation of the other offences. An act which infringed two provisions could, of course, lead to concurrent sentences. In other words, an abduction coupled with unlawful sexual intercourse could lead to a more severe punishment than the unlawful sexual intercourse *simpliciter,* although it was otherwise prohibited.

2. Contrary to civil law. S. 19 could be so construed as to prohibit abduction with intent to have sexual intercourse adulterously (although even this is questionable in that in one sense adultery is not unlawful), or where it would be tortious as amounting to deprivation of services,[14] or perhaps (and more doubtfully) where it would give a right to a judicial separation.[15] Any of these interpretations would have sufficed to convict the accused in the present case, he being a married man. Beyond these instances, it is doubtful whether sexual intercourse is ever unlawful in the sense of contrary to civil law.

3. Contrary to canon law.[16] This, in effect, is the interpretation which the court chose, hinting at its persistence by reference to its repeated retention by draftsmen without a close consideration of its necessity or precise meaning. It is submitted that this interpretation is not a proper one at all. There may, at one time, have been 'abundant authority for saying that Christianity is part and parcel of the law of the land',[17] but the sounder view would now seem to be that it is no longer blasphemous to celebrate the birthday of Thomas Paine on a Sunday.

Given these possibilities, the choice is determined by the rule of strict construction of penal statutes which leads to that interpretation which is least onerous to the party charged. It is not suggested that the court should have gone to the lengths of the court in *Tuck v. Priester.*[18] In that case, two substantially similar provisions for the protection of copyrights,

---

[13] The wording of these provisos is significant. Where corroboration is required, it is stated that 'a person shall not be convicted . . .' whilst in other cases where provisos are concerned with such matters as belief on reasonable grounds of age, or absence of reason to suspect the woman to be defective the phraseology used is 'a person is not guilty of an offence' (e.g., in ss. 6 (3), 8 (2), 9 (2)).

[14] For the Tasmanian position see p. 339.

[15] See the dictum of Willes J. in Reg. v. Clarence (1888) 22 Q.B.D. 23 at p. 36: 'Whilst of opinion that it is not every breach of moral duty that will satisfy the term "unlawfully", I am clearly of opinion that an act which would give a right to a judicial separation is abundantly sufficient to answer to it'. Thus, it might be 'unlawful sexual intercourse' for a person who knowingly had venereal disease to have sexual intercourse with a woman.

[16] See Hayes v. Stephenson (1860) 3 L.T. 296, where merely illicit intercourse was held not to be 'unlawful' for the purposes of the Vagrancy Act, 1824, s. 4.

[17] Per Kelly C.B. in Cowan v. Milbourn (1867) L.R. 2 Ex. 230.

[18] (1887) 19 Q.B.D. 629.

one providing for an action for damages, the other for a penalty, were under consideration. The court interpreted the former so as to allow the civil remedy and the latter so as to disallow the penal remedy. The words of Lindley L.J. deserve note:

> I agree with the Master of the Rolls that the probable meaning—I may almost say the certain meaning—of the word 'unlawfully' in s. 6 is 'without consent'. But I do not think it would be right in a penal section to substitute 'without consent' for 'unlawfully', because a great injury might be done to the defendant by substituting what you may call an equivalent for the language actually used in the Act.[19]

'Illicit' is far from being the probable meaning of 'unlawful' in s. 19, let alone the 'certain' one. It would thus seem that 'unlawful' in s. 19 means contrary to enacted criminal law or, at the very most, contrary to civil law.

If a solution can be reached by a consideration of the section by itself, there is no warrant for resorting to the consistency of the whole Act. The presumption of consistency is, in any case, a weak one.[20] So far as the present case is concerned, it would no more lead to the conclusion of the Court of Criminal Appeal than any other recognised avenue of approach, for the following reasons:

1. Although the fact that the 1956 Act is a consolidating measure, and would therefore seem to contain all statutory references to 'unlawful sexual intercourse', thus precluding the meaning of 'contrary to enacted criminal law', which would lead to infinite cross-reference, there is no reason why the meaning of 'contrary to civil law' should not be attributed to 'unlawful'. Such an interpretation would preserve the consistency of the whole Act and would be dictated by the presumption of strict construction of penal statutes.
2. Most of the offences contained in the 1956 Act are creatures of statute. There is one notable exception, rape, the essence of which is that sexual intercourse shall be obtained by force *outside the bond of marriage*. Yet the term 'unlawful sexual intercourse' is eschewed in this instance.[21]

The fact that two different but recognised channels of approach follow paths of reasoning untrod by the Court of Criminal Appeal serves only to underline the metaphysical and speculative nature of such criteria as the 'obvious intention of Parliament' and the 'plain purpose' of the Act which were the instruments of judicial preference in this case.

---

19 Ibid., at p. 644. See also the construction of 'unlawfully' in a penal statute in Daniel v. Janes (1877) 2 C.P.D. 351; Miles v. Hutchings [1903] 2 K.B. 714.

20 See Whitley v. Stumbles [1930] A.C. 544; Carter v. S.U. Carburettor Co. [1942] 2 K.B. 288.

21 S. 1 of the 1956 Act.

The Tasmanian Position

Regina v. Chapman is an important decision so far as Tasmania is concerned, for in no less than 74 of the 245 sections of the Code which deal with the creation of offences a similar problem arises, *i.e.*, that of definition of the constituents of an offence by reference to factors of 'unlawfulness', 'lawfulness', 'justifiability', etc.[22] Particularly, light may be shed upon the meaning of the term 'unlawful carnal knowledge' as used in Chapters XIV (crimes against morality) and XX (rape and abduction) of the Code. The problems are not, of course, identical, for the provisions themselves, as also their contexts, differ from the Sexual Offences Act, 1956. The main differences are noted below, after one preliminary matter.

There must be doubt whether *Regina v. Chapman* is authoritative in Tasmania *per se*, as a statement of definition of a technical term,[23] or whether its value is merely persuasive, as analogy. Strictly speaking, the decision comes 28 years too late for elaboration of the terms of the Code and since the interpretation in that case would seem to be unprecedented in any decision, it remains an open question whether the words 'unlawful carnal knowledge' may be said to have acquired the requisite technical significance at all, prior to the introduction of the Code. The following factors, however, are clearly relevant:

1. The interpretation of 'unlawful' in the sense of 'illicit' is rendered more difficult in Tasmania by virtue of the facts that:

   (a) s. 186 (rape) reads: 'Any person who has *carnal knowledge of a female not his wife* without her consent is guilty of a crime, which is called rape'. This goes further than s. 1 of the Sexual Offences Act where, although the use of the term 'unlawful sexual intercourse' is avoided by the use of the word 'rape', no positive inconsistency arises.

   (b) There being no established church in Tasmania there would seem to be no reason why, in a criminal statute and in the absence of any indication whatsoever to the contrary, attention should be paid to the canon law rather than to the rule of any other corporation or voluntary association.

---

22 The instances in which analagous problems would seem to be raised in the Code are as follows: ss. 63 I pr. 65 (1), 73 (1) I, 74, 156 (4), 196-225, 236, 267, 271, 285 (in which sections the solution also would seem to be offered); ss. 63 I (c), 73 (1) I, 65 (1) I and II, 66 (1) III, 78, 84 (2), 88, 92 (1), 94 (1), 95, 106, 107, 108, 109, 114, 115, 118, 124-130, 132, 134, 135, 152, 156 (2) III, 157 (1) III, 160 (2), 167, 170-172, 174-177, 180, 182-4, 187-191, 194, 195, 226, 235, 241, 246, 248, 253, 258, 268-270, 272-276, 281, 286, 290, 291, 297 (in which sections the solution would seem to be found in other provisions of the Code or in civil law principles); ss. 120 and 121, which may raise matters of Canon Law, and s. 239, where it is difficult to conceive of a situation in which the word 'unlawfully' would not be mere surplusage.

23 Within the meaning of the dictum of Lord Herschell in Bank of England v. Vagliano Bros. [1891] A.C. 107. Where a term has acquired a technical meaning prior to incorporation in a Code there exists an exception to the rule that Code provisions must be interpreted in their natural meanings and not by reference to the Common Law.

2. Interpretation in the sense of 'contrary to civil law' would involve some slight difference from such an interpretation in England by virtue of s. 118 of the Evidence Act, 1910, rendering unnecessary proof of loss of services in an action for 'deprivation of services', thus, in effect, creating a tort of seduction *simpliciter*.

The conclusion dictated in Tasmania will thus be that 'unlawful' in the term 'unlawful carnal knowledge' means either 'contrary to enacted criminal law' or 'contrary to civil law', depending upon whether or not resort is had to the criterion of the consistency of the Act as a whole.

Harry Calvert.

MOUNTBATTEN v. MOUNTBATTEN[1]

Divorce — Foreign decree — Decree granted to wife in Mexico after one day's residence there—Husband's domicil in England at time of decree—Wife normally resident in New York State — Recognition of decree in English courts.

The recognition of foreign divorce decrees granted on a jurisdictional basis other than the common domicil of the parties has been the subject of much discussion, both judicial and academic, and the well-known and comparatively recent case of *Travers v. Holley*[2] has stimulated interest in this field.[3] This particular field of the law has not only crystallised some of the problems arising from the law of status in the Conflict of Laws, but has also raised questions of considerable social as well as legal importance. It is clearly socially undesirable that a couple should be legally divorced in one country but still regarded as being validly married in another. On the other hand, merely to recognize the lowest common denominator would in many cases enable the clearly expressed legislative policy of one country to be thwarted at will by the simple means of obtaining a divorce in a jurisdiction with more liberal laws.

In the instant case Davies J. resolved a neat point which, had it remained purely academic, might well have become a popular standby for moot courts and examinations. The short question to be decided was the combined effect of *Travers v. Holley* and *Armitage v. Attorney-General*.[4]

The question arose as follows. The husband and wife, domiciled in England and resident in New York State, separated in 1952 and the wife continued to reside in New York State. The husband, however, returned to England and thus both parties were by English law domiciled

---

[1] [1959] 1 All E.R. 99.

[2] [1953] 2 All E.R. 794.

[3] For example, in 7 Int. & C.L.Q. 151, 4 Int. & C.L.Q. 499, 26 A.L.J. 400. See especially the articles by Professors Cowen and Blackburn in 31 A.L.J. 8 and 116 respectively, and the paper presented to the Australian Legal Convention by Dean Griswold 25 A.L.J. 248. This paper proved to be an accurate foreshadowing of Travers v. Holley.

[4] [1906] P. 135.

there.[5] In 1954 the wife obtained a Mexican divorce after fulfilling the required residential qualification of twenty-four hours. The husband submitted to the jurisdiction in circumstances that were clearly collusive and recognized to be such by the learned judge,[6] who, however, accepted expert evidence that the Mexican divorce would be recognized in New York State.

The husband petitioned for a declaration that the Mexican divorce was valid. His contention was, in effect, as follows:

(1) Formerly English courts would only recognize a divorce granted in the court of the domicil (say State D).

(2) After *Armitage v. Attorney-General*[7] English courts would recognize a divorce granted in State X if the courts of State D would also recognize the same divorce.

(3) *Travers v. Holley*[8] established that English courts would recognize a divorce in State X provided the statutory residential requirements in the Matrimonial Causes Act 1950, section 18, had been fulfilled. (It is to be noted that this section applies only to domestic suits).

(4) It followed then that if there was a divorce in State Y which would be recognized in State X (the State where the English residential requirements had been fulfilled) English courts would also recognize it. In other words, the *Armitage* rule could also be read with 'court of the State where the statutory residence period has been completed' substituted for 'court of the domicil'.

The learned judge rejected this contention and it is interesting to note, especially in view of the Victorian decision in *Fenton v. Fenton*,[9] that in doing so he relied on the basic premise that domicil is the foundation of jurisdiction and that there are exceptions to the rule.[10] He declined to accept the proposal of the husband's counsel that three years residence is now to be equated for all purposes with domicil.

Although as a judge of first instance he was obviously bound by *Travers v. Holley*[11] and was not prepared to dissent from the line of cases in which that decision was followed,[12] he did refer to *Shaw v. Gould*[13] and *Warden v. Warden*,[14] neither of which were mentioned in *Travers v. Holley*.[15] This,

---

[5] A.G. (Alberta) v. Cook [1926] A.C. 444.

[6] At p. 103.

[7] Supra, n. 4.

[8] Supra, n. 2.

[9] [1957] V.R. 17.

[10] See the judgment at pp. 113 and 118.

[11] Supra, n. 2.

[12] Arnold v. Arnold [1957] 1 All E.R. 570; Robinson-Scott v. Robinson-Scott [1957] 3 All E.R. 473; Manning v. Manning [1958] 1 All E.R. 291; and Gerard v. Gerard, The Times, Nov. 18th, 1958.

[13] (1868) L.R. 3 H.L. 55.

[14] 1951 S.C. 508.

[15] Supra, n. 2.

coupled with the reference to *Fenton v. Fenton*[16] and the express reservation by counsel for the Queen's Proctor of the right to argue in a higher court at a future date that *Travers v. Holley* was wrongly decided, indicates that the latter decision is now not as firmly entrenched as was once thought.[17]

A factor which might well have proved decisive in this particular case had not the learned judge taken the approach he did was the fact that the wife had deliberately left her place of residence in New York and obtained a certificate that she had been resident for one day in Mexico. Davies J. remarked that 'it seems to me to be most doubtful whether it can be said that at that moment she retained her New York ordinary residence'.[18]

It seems, with respect, that the learned judge is clearly correct here. But in other cases, the question of whether residence has been retained for the required period may well involve problems almost as difficult and situations almost as equivocal as the question of domicil itself.[19]

Although the Mexican procedure, with its one day residence period and clear provisions for collusion, seems somewhat strange to one familiar with the English or Australian systems, it is interesting to note that Davies J. gives rather short shrift to the contention of counsel for the Queen's Proctor that the finding of collusion should be taken into account in deciding whether the Mexican decree would be entitled to recognition. This is put simply on the basis of the well established rule that the decision of a foreign court cannot be challenged on the grounds that its law and practice are different from ours, except where it is contrary to natural justice.[20] Although the matter is certainly not discussed at length, the case may therefore be authority for the proposition that a collusive divorce is not contrary to natural justice.

Davies J. also suggested that the generally accepted interpretation of *Armitage v. Attorney-General*[21] may be too wide and that:[22]

> it seems perhaps a more accurate statement of the effect of that case would be that our courts will recognize a decree of divorce which is recognized as valid by the court of the husband's domicil as having been pronounced by a court in the jurisdiction of which the wife has obtained a separate domicil.

It is respectfully submitted that this conclusion is not justified. It imports the notion of the wife's separate domicil into what is a rule of the English municipal law, and it seems well established that English law

---

16 Supra, n. 9.
17 See also Gatty v. Gatty [1951] 2 T.L.R. 599.
18 At p. 115.
19 See, e.g., Stransky v. Stransky [1954] P. 428.
20 Godard v. Gray (1870) L.R. 6 Q.B. 139.
21 Supra, n. 4.
22 At p. 115.

knows nothing of this concept.[23] The *lex fori* (in this case English law) must provide its own definition of domicil and determine its own connecting factor.[24]

P. C. Heerey.

NATIONAL EXECUTORS AND TRUSTEES COMPANY OF TASMANIA LTD. v. EDWARDS[1]

Ius quaesitum tertio — Claim for third party right under a contract — Trustees conveyance — Conveyance by direction of mortgagor — Covenant.

The vexed question of a *ius quaesitum tertio* by way of contract was again raised in *National Executors and Trustees Company of Tasmania Ltd. v. Edwards*. The facts were that in 1929 the plaintiff company became trustee for the estate of A. In 1924 previous trustees for the estate had sold certain lands out of the estate to B. Part of this land was held under the Real Property Act, and the remainder under general law. A covenant in the transfer and the conveyance of the land stated that the purchaser, his heirs, executors, administrators and assigns would pay to the trustees a royalty 'on the gross market value of all minerals or metallic ores gotten or won from the lands hereby conveyed'. B subsequently mortgaged the lands and in 1949 the mortgagee, by direction of B, transferred them to the defendant. The covenant referred to above was also inserted in this conveyance and transfer.

The plaintiffs applied to the Supreme Court for a declaration that they were entitled to payment of the royalty. The application was refused and on appeal to the Full Court the decision was upheld.

In the course of his judgment Burbury C.J. considered the question of the right of a third person to sue on a contract to which he is not a party. He posed the question in this way. 'Can the appellant who was not a party to the conveyance to the respondent sue the respondent on the covenant?' Framed in another way, is there a *ius quaesitum tertio* by way of contract in our law?

In coming to his conclusion Burbury C.J. canvassed the possibilities of the common law position and the limitations and difficulties surrounding the equitable doctrine of the constructive trust. In relation to the latter doctrine the question could be asked, was B a 'promisee-trustee' or did the parties to the conveyance intend that a trust of the promise to pay the royalty should be constituted for the benefit of the third party—the trustees? The court may infer a trust, it is submitted, from evidence as to the surrounding circumstances and as to the actual intention of the parties. But the trust must be affirmatively proved.[2] The learned judge,

[23] A.G. (Alberta) v. Cook (Supra). But see 'Domicil of Married Women' by G. W. Bartholomew, 31 A.L.J. 878. The alteration of the law in this respect is proposed in the Domicil Bill now before the House of Commons.

[24] Cheshire, Private International Law, 5th Ed. (1957) at pp. 52-53.

[1] 1957 Tasmanian Supreme Court (unreported).

[2] Vandepitte v. Preferred Accident Co. [1933] A.C. 70 at p. 80.

however, held that 'there was no evidence upon which the court could infer that a trust was intended'. Dealing with the question of a right at common law he relied heavily on the judgment of Fullagar J. in the High Court of Australia in *Wilson v. Darling Island Stevedoring Co.*[3] He adopted Fullagar J.'s judgment as his own, and claimed that, despite the challenge of Denning L.J. in *Smith & Snipes Hall Farm v. River Douglas Catchment Board*,[4] the rule of the common law that only a person who is a party to a contract can sue on it remains unimpaired and Viscount Haldane's 'classic statement' in *Dunlop v. Selfridge*,[5] that 'our law knows nothing of a *ius quaesitum tertio* arising by way of contract, must be taken as still authoritative'.

It is submitted that in the light of many recent cases and the present trend of legislation particularly in the commercial field, and in the field of property law this so-called 'authoritative' statement of the law is being rapidly undermined, if it has not already fallen by the wayside.

What was the ratio of the decision in *Dunlop v. Selfridge*? It is far from clear that the broadly phrased assertion of Viscount Haldane must necessarily be accepted as unqualifiedly representing the settled law. It is not without significance that Viscount Haldane's conclusion in *Dunlop v.* Selfridge, that the manufacturer could not enforce the promise against a non-contracting third party, was based on two distinct and independent grounds. The first was that there is no *ius quaesitum tertio* by way of contract, the second was that the manufacturer had furnished no consideration, for he says that[6] 'if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request'.

Only one, Lord Parmoor, of the other five members of the House referred to the theory of a *ius quaesitum tertio* by way of contract, and it is significant that neither judge quoted a single authority for the proposition. It is difficult to see then why Viscount Haldane considered himself justified in referring to it as an 'elementary principle of our law'. The principle common to the speeches of all six members of the House is simply that a person who provides no consideration in return for a promise cannot enforce that promise. As Lord Dunedin says, 'My Lords, I confess that this case is to my mind apt to nip any budding affection which one might have for the doctrine of consideration . . .'[7]

Lord Atkinson expressed the same view when he said: 'The contract is as to them a *nudum pactum*, since no consideration moves from them to the respondents, or to any other person or body at the respondents' request'.[8]

---

[3] [1956] A.L.R. 311.
[4] [1949] 2 K.B. 500.
[5] [1915] A.C. 847 at p. 853.
[6] At p. 853.
[7] At p. 855.
[8] At p. 858.

And so within the hierarchy of precedents the so-called 'classic statement' of Viscount Haldane, supported as it is by only one other member of the House is only a dictum, albeit a dictum of weighty persuasive authority.

The old case of *Tweddle v. Atkinson*[9] is often quoted as an authority for the dictum of Viscount Haldane, but it is submitted that it is rather an authority for the ratio of the decision in *Dunlop v. Selfridge*. Wightman J. made this clear when he said in his judgment: '. . . it is now established that no stranger to the consideration can take advantage of a contract although made for his benefit'.

Denning L.J. attacked *Tweddle v. Atkinson* in *Smith's* case[10] and made 'so bold as to dispute it'. His weapon of attack was on historical grounds, and he claimed that the principle in that case, which reached its full growth in *Dunlop v. Selfridge*, 'has never been able entirely to supplant another principle whose roots go much deeper'.

If it is suggested that in the present case consideration did not move from the promisee, thus bringing the case within the principle in *Tweddle v. Atkinson*, it is extremely difficult to understand why the words in Section 61 (1) iii of the Conveyancing and Law of Property Act, 1884, were not considered by the court, nor by counsel for the appellant. It is true that Burbury C.J. said in his judgment: 'I would add that in *Smith & Snipes Hall Farm v. River Douglas Catchment Board* the court held that the covenant undertaken by the defendant affected the use and value of the land and were intended to benefit anyone to whom the land might be conveyed. The Court of Appeal relied upon Section 78 (i) of the English Law of Property Act, 1925 (which has no counterpart in Tasmania)'.

Denning L.J., however, could have arrived at the same conclusion on the grounds of s. 56 of the Act which has a counterpart in Tasmania, namely, Section 61 (1) iii. The Tasmanian and English provisions are identical and provide that:

> A person may take an immediate or other interest in land or other property or the benefit of any condition, right of entry covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

It is difficult to imagine a plainer case for the application of that provision than the present case.

It would seem that this is yet another example of judicial hesitation in following the clear and unambiguous words of a statute in order to leave unimpaired entrenched doctrines of the common law.

A. Bailey.

---

9 1 B. & S. 393.

10 [1949] 2 K.B. 514.

PONTICELLI v. PONTICELLI (*orse.* GIGLIO)[1]

Husband and wife — Marriage — Proxy — Recognition of ceremony — Nullity — Wilful refusal — Applicable law.

An Italian, resident in England, was married by proxy, in accordance with Italian law, to an Italian girl who subsequently came to England to join him. She arrived without forewarning him and it seems that by the time he met her at Paddington Station any disposition on her part to carry out further the wishes of her relatives (who had arranged the match) had evaporated. Evincing no interest whatever in travelling to Bedford, where he had secured accommodation, she went to a police station and introduced herself under her maiden name. The next few days she spent at the Italian Consulate and at a convent, thereafter returning to Italy.

The husband brought a petition for nullity of the marriage under section 8 (1) of the Matrimonial Causes Act, 1950 (Eng.), on the ground that the wife had wilfully refused to consummate the marriage. Sachs J., who heard the petition, found that the petitioner was domiciled in England when the betrothal and the marriage took place and 'it was the basis of the arrangement between the parties that the matrimonial home should be in this country'.[2]

Of the two main issues before His Lordship the first requires little comment. He held that the principle concerning recognition of proxy marriages had been clearly laid down by the decision of the Court of Appeal in *Apt v. Apt.*[3] In the instant case the fact that the petitioner was domiciled in England made no difference. The learned judge, however, did find cause for concern over 'the paucity of evidence as to the marriage itself',[4] but applying the presumption *omnia rite esse acta* in judicially considering the marriage certificate he held a valid marriage had taken place.

The other issue is of greater interest. It was, in the words of Sachs J., 'what law is applicable to the plea of nullity by wilful refusal to consummate the marriage?'[5] Such wilful refusal would, if established, be a ground for a nullity decree (if English law applied) under section 8 of the Matrimonial Causes Act, but would not be a ground for a decree of nullity before a civil court in Italy; nor before a consistory court unless at the time of the ceremony the intention of refusal to consummate existed.

Counsel for the respondent, who were instructed by the Official Solicitor as guardian *ad litem,* argued that this issue should be determined by the *lex fori,* though on what grounds it is somewhat difficult to determine.

---

1 [1958] P. 204.
2 At p. 209.
3 [1948] P. 83.
4 At p. 210.
5 At p. 211.

Counsel for the husband contended, on the other hand, that the law applicable should be either the *lex domicili* or the law of the intended matrimonial domicil.

His Lordship in considering this issue referred to the case of *Robert v. Robert*[6] in which Barnard J. said that wilful refusal to consummate 'must be considered as a defect in marriage'[7] and therefore be governed by the *lex loci celebrationis*. In *Way v. Way*[8] Hodson J. took a contrary view, holding that wilful refusal to consummate rendered voidable by English law a marriage between an English brigadier and a Russian ballet dancer which was celebrated in Moscow during the Second World War. English law was held to be the law of the matrimonial domicil.

Sachs J. remarked that the decision of Hodson J. 'retains considerable persuasive effect',[9] and then proceeded to consider the case of *De Reneville v. De Reneville*,[10] noting particularly that the petitioner in that case alleged incapacity on the part of the husband or alternatively wilful refusal to consummate. In the opinion of Lord Greene, M.R., whose judgment was supported by Somervell L.J., the case was one of essential validity.

Subsequently His Lordship states:

> Wilful refusal to consummate a marriage clearly cannot be said to fall within the categories of matters of form and ceremony. To my mind the true question is whether it should be treated as falling within the category of matters affecting the personal capacity of the spouse, in which case *lex domicilii* (which normally coincides with the law pertaining to the country of the husband's domicil at the time of marriage) applies, or whether it should be treated as something akin to matters for which the true remedy is divorce, in which case *lex fori* (*e.g.*, the law pertaining to the domicile of the husband at the date of presentation of the petition, or the law pertaining to the residence of a wife who may bring herself within the provisions of section 18 (1) of the Matrimonial Causes Act, 1950) applies.
>
> It is first to be noted that no direct decision has been cited to me on the question of whether sexual incapacity should be regarded as a matter of 'personal capacity' within the meaning of the words used by Cotton L.J. in *Sottomayor (orse De Barros) v. De Barros*[11] when delivering the judgment of the court.[12]

In His Lordship's view no distinction should be made in this case, because the ground was wilful refusal to consummate rather than sexual incapacity, and he cited as authority the opinion of Denning L.J. (as he

---

6 [1947] P. 164.

7 At p. 167.

8 [1950] P. 71. **Reversed on appeal on other grounds sub nom. Kenward v. Kenward [1951] P. 124.**

9 At p. 212.

10 [1947] P. 100.

11 (1877) 3 P.D. 1.

12 At p. 214.

then was) on this point in *Ramsay-Fairfax v. Ramsay-Fairfax*[13] in which the learned Lord Justice stated that 'Parliament has made it quite plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution'.[14]

It would appear, therefore, with respect, rather difficult to understand why the learned judge should then state that 'the choice, in my view, is between *lex domicilii* and *lex fori*', considering that he supports the view expressed by Denning L.J., as mentioned above, that the ground of the instant petition is one of nullity and not of dissolution. Consequently any reference to the *lex fori*, which is the law for determining dissolution issues, would appear to be redundant. Indeed, His Lordship admits 'that the judgments in *De Reneville v. De Reneville* clearly tend against the applicability of the *lex fori*', and is of opinion that 'the *lex domicilii* [presumably of the husband] would be more applicable'.[15]

Whether the *lex domicilii* or *lex fori* applied it was unnecessary for the learned judge to decide as either resulted in the application of English law:

> Further, if, and in so far as there may be, according to Mr. Dobry's submission, a third alternative as to the law to be applied in the present case, *viz.*, the law of the intended matrimonial domicil (should that be distinguishable from *lex domicilii*) again, no difference would be involved, for both spouses orginally intended to live and settle here after the marriage.[16]

This case illustrates clearly the impact on nullity proceedings made by *De Reneville v. De Reneville*. In the first place His Lordship took great care to consider the choice of law in determining the issue. Before *De Reneville v. De Reneville* it was often assumed that if the court had jurisdiction, then English law must be applied. Secondly, this case puts into focus the question whether wilful refusal to consummate a marriage is a question of capacity or essential validity, and also the wider question whether the dual domicil test of capacity has been superseded by the law of the husband's domicil or the law of the intended matrimonial home. Unfortunately, the facts of this case did not allow for a clear determination of these issues.

B. Doyle.

RE HASTINGS (No. 2)[1]

Habeas Corpus — Successive applications — Based on same evidence and same grounds — Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16, Geo. 5 (49) 563).

The applicant was convicted on five counts and sentenced to four years corrective training. He appealed on three of the counts and the Court of Criminal Appeal quashed the conviction on one of them, saying in other

---

[13] [1956] P. 115.
[14] At p. 133.
[15] At p. 215.
[16] At p. 215.
[1] [1958] 3 All E.R. 625.

respects the 'appeal fails and there will be no alteration of sentence'. The applicant then moved for a writ of habeas corpus claiming that he was unlawfully detained on the ground, *inter alia*, that as only one general sentence had been passed on him, no reference having been made to concurrent sentences, the quashing of the conviction on the first count meant that there was no lawful sentence on the other counts.

The application was dismissed by a Divisional Court of the Queen's Bench Division (Lord Goddard C.J., Streatfield and Slade JJ.). The Court of Appeal (Hodson, Morris and Sellers L.JJ.) refused to entertain an appeal on the ground that the question arose in a criminal cause in which it had no jurisdiction. The applicant thereupon made a fresh application for habeas corpus to a second Divisional Court of the Queen's Bench Division (Lord Parker C.J., Hilberry and Diplock JJ.). The renewed application was made on the same grounds and on the same evidence as the previous application. In a reserved judgment it was held that an applicant for a writ of habeas corpus in a criminal cause or matter, who has once been heard by a Divisional Court of the Queen's Bench Division, cannot be heard again on a renewed application made on the same evidence and the same grounds, as the decision on the previous application is equivalent to the decision of all the judges of the Queen's Bench Division.

Unabashed by these two setbacks, the applicant made yet a third attempt to gain his liberty: he applied to a Divisional Court of the Chancery Division[2] (Vaisey and Harman JJ.). The Solicitor-General stated, however, that the Crown had been unable to find any power in any statute or under any rule to set up a Divisional Court of the Chancery Division to hear the application. But under the Judicature Act, 1873, s. 46, a judge of the High Court, sitting elsewhere than in a Divisional Court, could reserve any case, or point in a case, for the consideration of a Divisional Court. This provided a loophole. Harman J. retired and Vaisey J. reserved the point. Harman J. then returned to constitute a Divisional Court which then proceeded to consider the point which Vaisey J. had reserved. Vaisey J. pointed out that the Chancery Division was part of the High Court of Justice and although a Chancery judge might quite properly criticise and, on occasion, depart from a decision of the Queen's Bench Division, it was quite impossible to interfere in the present case. Harman J. confessed that he, like most lawyers, had grown up in the belief that in cases of habeas corpus the postulant could go from judge to judge 'until he could find one more merciful than his brethren', but he accepted the decision of the Divisional Court of the Queen's Bench Division that this belief was more rhetorical than accurate.

Until these decisions it was widely assumed to be the law that an applicant for a writ of habeas corpus could apply to every judge in turn. In Halsbury's *Laws of England* it is stated:[3]

---

2 [1959] 2 W.L.R. 454.
3 Halsbury, 'Laws of England', 3rd ed., Vol. II, at p. 38.

> The applicant has a right to apply successively to every court competent to issue a writ of habeas corpus, and each tribunal must determine such an application on its merits unfettered by the decision of any other tribunal of co-ordinate jurisdiction, even though the grounds urged are exactly the same.

This view was supported by numerous judicial dicta. Thus in *Cox v. Hakes*[4] Lord Halsbury L.C. said:

> If release was refused, a person detained might make a fresh application to every judge or every court in turn, and each court or judge is bound to consider the question independently and not to be influenced by the previous decisions refusing discharge.

The same view was strongly supported by Lord Hailsham L.C. in *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*[5] where he said:

> Although the courts have been combined in the one High Court of Justice by the Judicature Acts, each judge of that court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and he is bound to hear such application on its merits notwithstanding that some other judge has already refused a similar application.

Finally, in *ex parte Chapple*[6] Denning L.J. said of habeas corpus: 'If any court or judge refused to issue it, the applicant had no right of appeal to a higher court (in criminal matters) but he could go from court to court and from judge to judge without being met by a plea of *res judicata*'.

Prior to the decision in *Eleko's* case there had been several conflicting decisions in the Dominions, but the balance of authority appears to have been in favour of the right of an applicant to make successive applications, the right having been recognised in both Canada[7] and India.[8] In Australia, in *ex parte Rowlands*,[9] Windeyer J. stated the law as being that a person seeking a writ may go from court to court or from judge to judge and the matter must, on each occasion, be considered without reference to previous decisions in the case. Thus *re Hastings* would appear to create an antinomy in the face of this apparent 'black letter' support for the right of successive applications.

Nonetheless the Lord Chief Justice took the view that Lord Halsbury L.C. and Denning L.J. were merely expressing *obiter dicta* and that *Eleko's* case,[10] though persuasive authority, was not binding on the court. The Lord Chief Justice questioned the historical foundation for the dictum

---

[4] Cox v. Hakes (1890) 15 A.C. 506, at p. 514.
[5] [1928] A.C. 459.
[6] (1950) 66 (Pt. 2) T.L.R. 932.
[7] R. v. Jackson (1914) 27 W.L.R. 31.
[8] Tops v. R. (1918) Ind. L.R. 46 Cal. 31, 52.
[9] (1895) 16 N.S.W.L.R. 239.
[10] Supra, n. 5.

of Lord Halsbury in *Cox v. Hakes*[11] and drew attention to the fact that neither Lord Bramwell nor Lord Herschell in that case subscribed to Lord Halsbury's observations. He disposed of the view taken by Denning L.J. in the words: 'It may be that he was referring to a Divisional Court of another Division, but if he meant a Divisional Court of the Queen's Bench Division consisting of different judges we think that he is wrong'.

However, with regard to *Eleko's* case His Lordship admitted: 'The only real authority to the contrary appears to be *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*',[12] but His Lordship added:

> Two considerations seemed to have influenced the Judicial Committee in that case: (1) That it would be curious if an applicant could by reason of the Act of 1679 renew his application before each judge in vacation whereas in term he could make it once to the Court of Chancery and once to each of the three Courts of Common Law. We have dealt with the historical evidence in its favour, but is this so curious? An applicant is entitled to the opinion of the full court. In vacation he cannot obtain that, and so he was given the right to go from judge to judge. (2) That since by reason of the Supreme Court of Judicature Act, 1873, there is only one court, the Supreme Court of Judicature, an applicant by reason of that Act would only be able to make one application, namely, to the Supreme Court, unless he also had the right to go from judge to judge.

Here the Lord Chief Justice referred to *The State (Dowling) v. Kingston*[13] and he cited with approval the 'most illuminating' judgment of Fitz-Gibbon J. which considered *Eleko*[14] in great detail and which, he says, we think gives cogent reasons for thinking that Lord Hailsham may have gone too far in that case.

Before the passing of the Judicature Act, 1873, it was always open to an applicant for the writ, if defeated in one court, at once to renew his application to another. A person detained in custody might thus proceed from court to court in a continuous search for his liberty. It is indisputable that before the Judicature Act, if the first application was to a common law court, a second application could be made to the Court of Chancery and *vice versa*. If, however, the first application were to a common law court then whether a second application could be made to one of the other common law courts appears to have remained undecided. On principle we would submit that the right to make successive applications to the three courts of common law existed before the Judicature Act, but this is now a problem of purely historical interest.

Regardless of what conclusion is reached on this point, Lord Bramwell in *Cox v. Hakes*[15] postulated the possibility of a second application, as of right, to replace the need for an express appeal to the appellate court—

---

11 Supra, n. 4.
12 At pp. 633-634.
13 [1937] I.R. 699.
14 Supra, n. 5.
15 Supra, n. 4.

as distinct from a re-application to a co-ordinate court—to supply the want of being able to try more than one tribunal. Lord Bramwell[16] appears to have considered that the right was merely to go from one court to another court.

Lord Halsbury's view has been interpreted to coincide with this by saying that when Lord Halsbury spoke of 'each court or judge' he meant each 'court or each judge representing the court'. That is to say, the words do not necessarily indicate that in Lord Halsbury's view there could be successive applications to different judges of the same court. If this is the correct construction of his words the Judicature Act, 1873, by combining the courts into one High Court of Justice, limited the previously existing rights of the subject; that, it is submitted, was probably an unforeseen result. It is possible that after the Habeas Corpus Act, 1679, which first gave power to grant the writ in vacation, an applicant could make successive applications in vacation to different judges. There is, however, no reported case showing successive applications to different judges of the same court.

Since the fusion of the courts of common law and equity in 1875 the Supreme Court of Judicature is now a permanent body, although it only sits for regulated sessions. That is to say, although the judges themselves go on vacation, the court in theory goes on continuously. This fact has reduced the former distinction between term time and vacation almost to vanishing point inasmuch as it is relevant to successive applications for a writ of habeas corpus. The modern practice is that a particular judge is appointed 'vacation judge' for the period which elapses between the sessions of the court. It is to this judge either in chambers or, in cases of real emergency, personally that all matters which 'may require to be immediately or promptly heard' must be referred and it would seem that he alone represents and acts for the court.

This line of argument leads one to the conclusion that after the Judicature Act, 1875, an applicant is limited both in vacation and term time to one application to the Supreme Court of Judicature. Whether the House of Lords, as a tribunal above the Supreme Court of Judicature, could also be applied to is undecided except to the extent of the decision of *in re Carroll*[17] where it was held that the Court of Appeal is not a part of the High Court of Justice, and has no original jurisdiction to entertain an application for the issue of a writ of habeas corpus.

A. G. Ogilvie.

---

16 At p. 523.
17 [1931] K.B. 104.