DISSOLUTION OF A VOIDABLE MARRIAGE

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Section 18 of the Matrimonial Proceedings Act 1963 is new in the sense that it gives a new name to a very old remedy, provides a new ground for dissolution that would have been laughed out of the House a generation ago, and in the matter of jurisdiction and effect equates dissolution of a voidable marriage with divorce. It is proposed in this article to show that the section is redundant, and serves only to perpetuate an inconsistency that tends to confuse, and to hinder the proper development of the law relating to an important section of marital relations.

Briefly, under the rubric "Dissolution of Voidable Marriage", the section provides that a marriage may be *dissolved* from the date of the decree where—

(a) it has not been consummated because of incapacity or wilful refusal,
(b) one party was at the time of the marriage mentally defective or suffering from venereal disease,
(c) at the time of the marriage the wife was pregnant by another man or the husband was responsible for the pregnancy of another woman.

Criticism could be offered in the first place of the whole concept of termination of voidable marriage, whether it is called dissolution or nullity. It is doubtful if it even has the justification of history.[1] A marriage that is declared to be no marriage because of some impediment existing at the time of the ceremony is understandable; but a marriage which ceases to be a marriage from the date of the decree terminating it is a divorce. It can be argued, of course, that a dissolution is granted only for shortcomings that existed at the time of the ceremony; but apart from the fact that it is not quite accurate (see e.g. wilful refusal), it can be said with equal force that some matters which are grounds for divorce (e.g. mental illness) possibly exist at the time of the marriage and only manifest themselves at a later date. It may be that the Legislature was unwilling to add to the already lengthy list of grounds for divorce but this seems a poor justification for the introduction of a distinction that has little else to commend it.

It is submitted, then, that the grounds (b) and (c) above could, if necessary, have been included in s.21, but a simpler and more satisfactory solution is offered by a provision making a premarital medical and psychiatric examination compulsory for both spouses. It would not of course cover the case of a husband responsible for the pregnancy of another woman, but s.18(2)(c) in such an odd section anyway, we can only say it has no place in a respectable statute. It is not, presumably, a protest against a husband's premarital misdemeanours for it applies only to those that result in the impregnation of another woman; and it is obviously not a safeguard against a husband having illegitimate offspring, since he may have a dozen that his wife

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knows nothing of as long as they are born before the date of the marriage.

Chief criticism in this study, however, falls on subs. 2(a), which confirms what is already established law, viz. that a petitioner whose partner cannot or will not consummate the marriage may obtain his freedom by a decree of dissolution (formerly called a decree of nullity). There could be little objection to this provision were it not that, in accepting uncritically a distinction that has lost most of its point, the Legislature has overlooked what appears to be a quite serious gap in this branch of the law. Consummation has always been a significant feature of marriage in a majority of primitive societies, and it was so regarded by the early Christian church. It was only by consummation that a marriage became a sacrament and so indissoluble. It followed that if the marriage had not been consummated, there was no obstacle to declaring the marriage a nullity. Once, however, it was accepted that marriage was a contract complete from the moment the parties took each other for man and wife, it was no longer logical to declare there never had been a marriage because subsequently they had failed to consummate it. That the courts continued to so decree we may attribute to the natural conservatism of church and law, to the fact that until 1857 matrimonial law was administered by the Church Courts, and in particular to the absence of any demand to close one of the few loopholes remaining to those seeking escape from an unhappy marriage.

Whatever the explanation, the continued emphasis placed on consummation encouraged in the courts an almost unhealthy preoccupation with what might be termed the mechanics of marital relations.[2] The only matter at issue was whether the parties were capable of going through the act of intercourse, and once this was established, what happened afterwards was a matter of no consequence. This is not to say the courts were unaware of the social consequences of their findings, as witness this passage from Dr Lushington's judgment in the most noteworthy of nullity cases, *D.* v. *A.*[3] "There must" he said "be the power present or to come of sexual intercourse. Without that power, neither of the two principal ends of matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence."[4] He went on to say that this requirement was only satisfied by "ordinary and complete intercourse . . . not so imperfect as scarcely to be natural."

The proposition that the procreation of children and normal sexual relations were fundamental in marriage was accepted without question in numerous cases following *D* v. *A* until 1948[5], when the House of Lords held that whatever the design of Divine Providence (as expressed in the Book of Common Prayer), the begetting of children was not a feature which the law was prepared to recognise as essential in marriage. No one, however, then or later cast any doubts on the "lawful indulgence of the passions" as a principal end in matrimony. As Salmond J. pointed out in *A* v. *B*,[6] it is the essential element which distinguishes it (marriage) from all other kinds of lawful cohabitation.

Dr Lushington was, of course, dealing with a case of nullity, based on an alleged incapacity, which was at that time the only context in which he could consider breaking the marriage tie of sexually incompatible spouses. But if the principle was sound it should have

applied with equal force to cases of wilful refusal to consummate and failure to co-operate after consummation. This is something the courts in England were apparently slow to grasp. Consider, for instance, this extract from the speech of Lord Shaw in *G.* v. *G.*[7] "Courts of law must be alert to dissever them and differentiate them from cases arising from any *minor*[8] cause such as the obstinancy to which I have referred. Otherwise the marriage tie could be severed by a thing which is the very opposite of incapacity, not a powerlessness of will but a resolute determination of will in the direction contrary to duty." It is impossible to think of a better commentary on this passage than the remarks of Salmond J. in *Barker* v.*Barker*[9]. "A wife who by some physical or nervous defect is innocently unable to consummate her marriage may be got rid of by a suit for a declaration of nullity; but a wife who is able to do so, but wrongfully refuses, retains a secure and indefeasible title to her matrimonial status."

The Matrimonial Causes Act 1937 (Eng.) removed this anomaly, but it did something more. In creating new grounds of divorce it provided the opportunity of granting relief in cases where sexual maladjustment *followed* consummation of the marriage, where, for instance, a wife, having co-operated in an initial act of intercourse refused to co-operate further. The majority of cases dealing with this problem have naturally been considered in the context of cruelty, since in England proof of cruelty entitles the petitioner to an immediate divorce, though it carries the disadvantage that danger to life or health must be proved. The courts after a period of indecision[10] have produced a reasonably satisfactory solution in *Sheldon* v. *Sheldon.*[11] Relief may be granted for refusal of intercourse if in all the circumstances of the case such refusal is unjustified.

The alternative ground of desertion has for obvious reasons proved less popular, but in New Zealand where cruelty without the added factor of habitual drunkenness is not a ground for divorce, relief for sexual incompatability after consummation has been dealt with almost exclusively in the context of desertion. There are however, certain difficulties in the way of using desertion as a vehicle for this purpose. Apart from the enforced delay of three years, it is by no means clear that refusal of sexual intercourse can without something further constitute desertion. From its very nature it is an offence that is hard to establish as long as the parties continue to cohabit, and there can be no doubt this was an important if not deciding factor in the leading cases of *Jackson* v. *Jackson*[12], and *Weatherley* v. *Weatherley*[13]. This point was stressed recently by a Divisional Court in *Hutchison* v. *Hutchison*[14] where Sir Jocelyn Simon P. referring to *Weatherley* said "There the House of Lords held that a mere refusal of sexual intercourse by one of the spouses could not constitute desertion within the Matrimonial Causes Act 1937 s.2. The whole argument in that case, however, turned on whether there can be a state of desertion while the parties are still living together; the House of Lords, approving *Jackson* v. *Jackson* held that there could not." It must be pointed out, however, that this interpretation appears to run counter to that of Willmer J. in *Scotcher* v. *Scotcher*[15], "If the mere refusal of intercourse is not desertion, on what principle does it become desertion when the offended party elects to go instead of staying under the same roof?"

Whatever interpretation is placed on the desertion cases, enough has been said to show that in the field of marital relief desertion

is by no means as reliable a prop as cruelty. In the early cases New Zealand courts were prepared to regard refusal of intercourse as desertion[16]. "Matrimonial cohabitation" said Salmond J. in *A* v. *B*[17], "has, I think been sufficiently abandoned when there has been eliminated from it by the wrongful act of either party the essential element which distinquishes it from all other kinds of co-habitation. There can be no legal distinction between a refusal to commence marital relations and a refusal to continue them." But in 1924 the Court of Appeal, albeit reluctantly, abandoned this attitude in favour of consistency within the Commonwealth when, in *Barker* v. *Barker*[18], it felt it should follow *Jackson* v. *Jackson*.[19] The Australian High Court had anticipated *Jackson* in *Maud* v. *Maud*.[20]

In England most of the gaps have been closed. A husband or wife whose partner cannot or will not consummate the marriage, may obtain a decree of nullity. After consummation a refusal to co-operate further may entitle the non-offending party to a decree of divorce on grounds of cruelty if the refusal is unjustified. There is no remedy for the husband or wife whose spouse is unable to overcome a natural repugnance to the sexual act. On this topic the words of Salmon L.J. in *Sheldon*[21] invite comment. "The law also recognises that a husband and wife normally enter into a contract of marriage on the fundamental assumption that they are each capable of consummating the marriage and that it will be consummated. Accordingly if the marriage is not consummated, it may be annulled . . . If Parliament had intended to make impotence a ground for divorce, it would no doubt have done so." With great respect, this is a somewhat unconvincing rationalisation of something that can only be explained in terms of history. As Dr Lushington pointed out over a hundred years ago, two people marry, not on the understanding that consummation is possible, but that they will have the opportunity of indulging in normal sexual relations throughout their married life. The fact that prior to 1937 (in England) the unoffending spouse was limited in his remedy to a nullity decree based on incapacity does not, it is submitted, narrow this principle in the manner suggested by Salmon L.J. It is surely unreal to suggest that a husband may obtain his freedom if his wife is unable to overcome her repugnance to the sexual act, but that the position is different if he persuades her to overcome her difficulties on a single occasion. As Dr Lushington observes in *D* v. *A*[22] "The condition of the lady is greatly to be pitied but on no principle of justice can her calamity be thrown upon another."

The position in New Zealand is less satisfactory, for once the marriage has been consummated the difficulties in the path of relief are considerable. As long as the parties remain together refusal of sexual intercourse alone is not desertion,[23] and it is doubtful if the petitioner can make it so by leaving the respondent. A petitioner could evade the issue by first seeking a decree of separation based on cruelty or a separation order for persistent cruelty; but these are clumsy expedients. It is submitted our thinking on this delicate subject has now reached a stage of maturity where we can ignore meaningless distinctions and seek an answer to these questions:

1. Are sexual relations so fundamental to a marriage as to warrant the severance of the marriage tie if they are unsatisfactory?
2. What constitutes normal sexual relations and what deviation from that norm entitles a party to claim a divorce?

3. Does it make any difference that the offending party is not to blame?

It must be admitted that from a practical point of view the gaps in this branch of New Zealand law are not as serious as might at first sight appear. Most spouses where sexual incompatabliity makes life together unbearable settle their differences in a reasonably civilised manner per medium of a separation agreement followed by a divorce founded on s.21(m). Nevertheless, apart from the delay involved and the need for agreement, it is unfortunate that in a statute designed to bring the law into conformity with present day thinking, the opportunity was lost of removing an anachronism and bringing some certainty into what is at present a rather uncertain field. It is submitted the problem could have been solved by providing as an additional ground of divorce, the failure to co-operate in normal sexual relations except where accident or advancing years render them impossible.

A simpler solution perhaps would have been the introduction of cruelty as a further ground of divorce; but this would have left us with the same gap as exists in current English law and moreover the anachronism of consummation would remain, a jarring feature in a new statute, and a possible source of unnecessary difficulties. In *White* v. *White*,[24] for instance, the issue was simple enough. "Were the husband's sexual practices abnormal and, if so, was the wife bound to endure them?" The court held they were and that the petitioner was entitled to a divorce. One of the potent factors contributing to the breakdown in her health was "the persistent refusal of the respondent to have full intercourse in the normal way."[25] The finding is exceptionable; but how can it be reconciled with the earlier part of the same judgment where the court decided these same practices amounted to consummation of the marriage, presumably because they constituted (in the words of Dr Lushington) "ordinary and complete intercourse . . . not so imperfect as scarcely to be natural?"[26] This objection may seem academic. Can one say the same about the dangers of a passage such as this? "I find it significant in this connexion that the Act of 1937, which provided that a decree of nullity could be pronounced on the ground that the marriage had not been consummated owing to the wilful refusal of the respondent, did not go on to say that a marriage could be dissolved if, when once it had been consummated, further sexual intercourse was withdrawn."[27]

1 See Newark (1945) 8 Mod.L.R.203, Tolstoy (1964) 27 Mod.L.R.385.
2 See e.g. *D.* v. *A* (1845) 1 Rob.Ecc.279, which could well bear the title "verdict by tapemeasure".
3 (supra.)
4 ibid, 298.
5 *Baxter* v. *Baxter* [1948] A.C.274.
6 [1920] G.L.R. 313.
7 [1924] A.C. 349, 367.
8 italics mine.
9 [1924] N.Z.L.R.1078, 1088.
10 *Hayes* v. *Hayes* 1958 (unrep); *Clark* v. *Clark* (1958) The Times, June 25; *B* v. *B* [1965] 3 All E.R. 263; *P* v. *P* [1964] 3 All E.R. 919; *P(D)* v. *P(J)* [1965] 2 All E.R. 456; and *Evans* v. *Evans* [1965] 2 All E.R.789.
11 [1966] 2 All E.R. 257.
12 [1924] P.19.

13 [1947] A.C.628.
14 [1963] 1 All E.R. 1, 4.
15 [1947] P. 1, 9.
16 *Lees* v. *Lees* (1907) 26 N.Z.L.R. 467 and *A* v.*B* [1920] G.L.R. 311.
17 [1920] G.L.R. 311, 313.
18 (supra)
19 (supra)
20 (1919) 26 C.L.R.
21 (supra) 264.
22 (supra) 299.
23 *Weatherley* v. *Weatherley,* (supra)
24 [1948] 2 All E.R. 151.
25 ibid 156.
26 *D* v. *A* (supra).
27 Lord Jowitt in *Weatherley* v. *Weatherley* [1947] A.C.628, 634.