1941
*Nov. 24, 25.
1942
*Feb. 3.

MATHIAS ANDREW HEIL (PLAINTIFF). APPELLANT;

AND

EDITH ALICE HEIL (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Suit for annulment of marriage—Alleged incapacity of wife owing to mental condition creating invincible aversion to act of consummation.

The mere refusal by a wife of marital intercourse due to her caprice is not a sufficient ground to warrant a decree of nullity of marriage; there must be an incapacity of some kind, which in some cases is a structural defect, but in some cases may arise out of a mental condition creating an invincible aversion to the physical act of consummation. Such a mental condition may be inferred from the proven facts, and justifies a decree for annulment of marriage.

G. v. *G.*, [1924] A.C. 349; *Napier* v. *Napier*, L.R. [1915] P. 184, at 193, and other cases, referred to.

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Taschereau JJ.

In the present case it was held, reversing the judgment of the Court of Appeal for Ontario ([1939] O.W.N. 524; [1939] 4 D.L.R. 402), that the drawing of such an inference, and judgment for annulment, by the trial Judge, was right. (Davis J. dissented, holding that, on the evidence, the husband had not made a case for a decree of nullity.)

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APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) reversing (Henderson J.A. dissenting) that part of the judgment of Greene J. which annulled the marriage between the plaintiff and defendant (unless sufficient cause were shown within six months why the judgment should not be made absolute). The Court of Appeal dismissed the plaintiff's action. Leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Ontario. The material facts and questions for consideration are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was allowed and the judgment of the trial Judge restored, Davis J. dissenting.

John J. Robinette for the appellant.

John Mirsky for the respondent.

The judgment of the majority of the Court (Rinfret, Crocket, Kerwin and Taschereau JJ.) was delivered by

TASCHEREAU J.—The appellant, who is a medical doctor engaged in the practice of his profession in the Town of Timmins, Ontario, married the respondent in Vienna in June, 1937, where he had undertaken post-graduate medical studies. After the marriage, which for some time remained unknown to the respondent's parents, both came to Canada, on board the *Empress of Britain,* and on the 8th of July they reached Quebec City, and proceeded immediately on the boat train to Montreal. The appellant remained in that city until the 17th of July, while the respondent had gone to Manchester, N.H., to visit her aunt. Upon her return, the respondent went to Ottawa with her husband, but the next day left again for Manchester, saying that she had not seen her aunt in her previous visit.

She was away until August 13th, and during this prolonged absence of his wife, the appellant, whose funds were depleted, stayed with friends in Ottawa, and finally accepted an offer to go and practise his profession in the

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Town of Timmins. When the respondent returned after her second visit to Manchester, she met the appellant at the Ford Hotel in Montreal, and immediately left for Europe where she lived in Vienna until March, 1938. It was only after that date, nearly one year after her marriage, that she decided, although the appellant had sent her several times the necessary funds to pay her fare, to come and live with her husband. However, her good intentions, if she ever had any, were not of a very long duration, for she left the common domicile in November, 1938. The next meeting of the parties was before the Ontario courts, where she was made the respondent in an action in nullity of marriage.

While the respondent was in the United States and in Europe, some correspondence was exchanged between these unfortunate people, which is of great assistance in determining the points raised in the present appeal. The husband, appellant, claims that in spite of his repeated requests, the respondent refused to consummate the marriage, and he further alleges that the respondent is impotent and incapable of having or submitting to sexual intercourse. The learned trial Judge disbelieved the plea of the defendant that she had fulfilled her marital duties, found that there was no physical inability on the part of the respondent, but that she was mentally incapable of sexual relationship between man and woman. He therefore declared the marriage null.

The Court of Appeal, Mr. Justice Henderson dissenting, allowed the appeal and dismissed the action. The Court is unanimous in finding that the marriage has not been consummated, and agrees with the trial Judge who found against the story of the respondent. The majority, however, reached the conclusion that she was not suffering from any physical disability, and that the refusal of intercourse is the result of obstinacy, which is a creature of her will, and not the result of an invincible repugnance to the physical life of marriage.

The mere refusal of marital intercourse due to caprice is not a sufficient ground to warrant a decree in nullity. The earlier decision, *Dickinson* v. *Dickinson* (1), which held that persistent refusal was a legal ground for a decree, is overruled, and it is now settled that there must be an

(1) L.R. [1913] P. 198.

incapacity of some kind, which in certain cases is a structural defect, but which may also arise out of mental condition, with the resulting effect of creating in the mind of the woman an aversion to the physical act of consummation.

In *Napier* v. *Napier* (1) it was held:—

> It is true that in recent times the Court has not always required proof of an actual structural defect as evidence of incapacity, but has considered itself at liberty to infer from the conduct of the parties or one of them an incapacity arising from some abnormal condition of mind or body.

Reference might also be made to: *Hudston* v. *Hudston* (2), *K.* v. *K.* (3), *Barnes* v. *Barnes* (4), *Vickery* v. *Vickery* (5), *Bethell* v. *Bethell* (6), *Szrejher* v. *Szrejher* (7).

In *F.* v. *P.* (8), Sir Francis Jeune expressed his views as follows:—

> If it be satisfactorily proved that repeated endeavours of a potent husband, who has tried all means short of force, have been uniformly unsuccessful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife.

The latest pronouncement on the matter is a decision of the House of Lords in the case of *G.* v. *G.* (9), where it was held that the conclusion to be drawn from the evidence was that the wife's refusal was due, not to obstinacy or caprice, but to an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity, and that the husband was entitled to a decree of nullity. The words of Lord Phillimore are as follows:—

> The evidence here seems to me to prove "invincible repugnance", "invincible" in the full sense of an unconquerable, uncontrollable nervous condition which is physical and which creates nullity.

In the case at bar, the medical examinations clearly reveal that there was no structural defect, the respondent

(1) L.R. [1915] P. 184, at 193.
(2) (1922) 39 T.L.R. 108.
(3) [1923] 3 W.W.R. 22; [1923] 3 D.L.R. 485.
(4) (1921) 14 Saskatchewan Law Rep. 505.
(5) (1921) 37 T.L.R. 332.
(6) [1932] O.R. 300.
(7) [1936] O.R. 250.
(8) (1896) 75 L.T. 192. (*See* quotation in Lord Dunedin's judgment in *G.* v. *G.*, [1924] A.C. 349, at 353-4. The words quoted do not appear in the oral judgment reported in 75 L.T. 192).
(9) [1924] A.C. 349.

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being physically normal and fully capable of sexual intercourse. There is no alleged motive for the refusal of the respondent to consummate the marriage, and the only defence put forward is that she has performed her marital duties. The learned trial Judge who has heard her evidence, and appreciated her behaviour, has come to the conclusion that she was not telling the truth, and this finding has been unanimously upheld by the Court of Appeal, and I see no valid reason why it should be altered. This ground of defence having been rejected, we have to look elsewhere to see if the respondent's refusal is due to obstinacy or to an invincible repugnance to the act of consummation. The learned trial Judge has reached the conclusion that the proper inference to be drawn from the proven facts is that her hostility to the fulfilment of her marital duties is due to a mental condition with the resulting effect of creating an invincible aversion to the sexual act.

And the reading of the evidence which discloses her mentality, leads me to an identical conclusion. Her correspondence with her husband, and the conversations she had with some of her friends in Timmins, and even her own testimony, reveal her ideas that marriage is exclusively spiritual, eliminating all physical relations, and therefore bring the case within the principles laid by the House of Lords in *G.* v. *G.* (1). We are not confronted here with an obstinacy of a momentary nature which may for a time only keep the respondent away from her husband, but with a repugnance which she has unsuccessfully endeavoured to overcome in spite of her promises to yield to the appellant's requests, and which cannot amount to anything else but to an aversion to the act of consummation itself.

I would allow the appeal and restore the judgment of the trial Judge. In view of the circumstances, there should be no costs in the Court of Appeal and in this Court.

DAVIS J. (dissenting).—This appeal arises out of an action brought in Ontario by the appellant against his wife (respondent) for a decree of nullity. There is a concurrent finding of fact in the courts below that the marriage was never consummated due to the wife's unwillingness alone. There was no structural impediment to marital

(1) [1924] A.C. 349.

relations and the issue in this case is the same as that stated by Lord Shaw of Dunfermline in the House of Lords to be the issue in the case of *G.* v. *G.* (1):

> That issue, as I view it, is whether the refusal of the respondent to consummate the marriage can be ascribed to a cause which the law can hold to be such incompetence as can ground a decree of nullity of marriage.

Since 1938 a marriage is now voidable in England on the ground, amongst others, that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage. *Matrimonial Causes Act, 1937,* sec. 7 (1) (*a*). But there is no such statutory provision available to the appellant here. Obstinate or wilful refusal is not enough.

Were it not for the very able and exhaustive judgments in the House of Lords in the *G.* v. *G.* case (2), this would be a very difficult appeal to determine, but that decision, as I understand it, laid it down to be necessary, in the absence of direct proof of incapacity, that there be evidence upon which the Court would be entitled to draw the inference that the refusal has been due to incapacity—what Lord Dunedin called an "invincible repugnance" to the physical act as distinct from a mere obstinacy of denial. Lord Phillimore at p. 376 put "invincible repugnance" in these words:—

> "invincible" in the full sense of an unconquerable, uncontrollable nervous condition which is physical and which creates nullity.

I think it useful to quote a short passage from the judgment of Lord Shaw at pp. 366-367:—

> * * * it is now settled that Courts have the power to annul the contract of marriage on the ground of incapacity, although that incapacity may not be structural; room is still left for a declaration of nullity, although structural incapacity is not proved. There may be cases—rare and extreme cases they of course must be—in which incapacity is established *de facto* to exist, that incapacity not being a mere hostile determination of the mind arising from obstinacy or caprice, but such a paralysis and distortion of will as to prevent the victim thereof from engaging in the act of consummation. From this paralysis and distortion the incapacity arises. I have said that these instances are rare and most extreme, while of course Courts of law must be alert to dissever them and differentiate them from cases arising from any minor cause such as the obstinacy 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.

(1) [1924] A.C. 349, at 366. (2) [1924] A.C. 349.

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A careful reading of the evidence in the case now before us leads me to the conclusion that the appellant has not made a case for a decree of nullity. I should therefore dismiss the appeal with costs.

Appeal allowed.

Solicitors for the appellant: *MacBrien & Bailey.*

Solicitors for the respondent: *Kester & Kerr.*