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*Oct. 16
*Dec. 12

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Husband and wife—Suit for nullity of marriage because of malformation and impotence—Lapse of time since marriage—Unsatisfactory explanation for delay—Reversal of findings at trial.

A marriage, one of the parties to which is incapable of properly consummating it, may, nevertheless, be so approbated by the acts and conduct of the other as to preclude the latter from impeaching its validity (*G.* v. *M.*, 10 App. Cas. 171, at 186). Lapse of time, though not in itself under ordinary circumstances an absolute bar to a suit for nullity, is yet an important factor for consideration, and may operate with other circumstances as a bar to such a suit (*B-n* v. *B-n*, 164 Eng. Rep. 144).

Where a husband petitioned, over eight years after the marriage, for nullity of his marriage because of his wife's malformation and impotence, this Court *held* (affirming judgment of the Court of Appeal for Manitoba which reversed judgment at trial granting the petition) that the husband, on the facts and circumstances established, should have known years before the suit, and would have so known had he acted as any ordinarily reasonable and prudent man would have acted in the circumstances, that his wife's condition was one which could not be rectified by surgical skill, and his explanation at the trial for his inaction was one which should not be accepted as valid and sufficient in the circumstances disclosed.

*PRESENT:—Duff, C.J., and Cannon, Crocket, Hughes, and Maclean (*ad hoc*) JJ.

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Where the relevant facts as to the relation and conduct of the parties are not disputed, a judge sitting on appeal, with the whole record before him, is quite as competent to make a finding, as to the petitioner's belief and motive, as the trial tribunal, and should find in accordance with his firm conviction thereon.

APPEAL (by leave granted by the Court of Appeal for Manitoba, on certain conditions fulfilled) by the petitioner (husband) from the judgment of the Court of Appeal for Manitoba which reversed the judgment of Montague J. granting the petitioner a decree of nullity of his marriage with the respondent. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

J. S. Lamont for the appellant.

P. C. Locke and *L. D. Morosnick* for the respondent.

The judgment of the court was delivered by

CROCKET J.—This is an appeal from the judgment of the Court of Appeal for Manitoba setting aside the decision of Mr. Justice Montague granting the prayer of the appellant's petition for the nullity of his marriage with the respondent by reason of malformation and impotence.

The marriage was solemnized at Winnipeg on June 20th, 1925, and the appellant's petition filed on January 19th, 1934, after the parties had lived and cohabited together continuously and apparently congenially for a period of over eight years.

The appellant was 28 years old at the time of the marriage. He was then a practising barrister, but some time afterwards accepted a position with the Traders' Finance Corporation of Winnipeg. He said his wife was the same age, but her counsel stated before the Appeal Court that her age at the time of the marriage was 25.

There seems to be no doubt as to the existence of an irremediable congenital malformation on the part of the respondent, which rendered normal coition impossible. Indeed that fact was expressly admitted by the respondent's counsel at the trial, where the controversy between the parties was confined to the issue as to whether the

appellant, by reason of his constant cohabitation with the respondent for a period of more than eight years and his laches, delay and insincerity in seeking a nullity decree, had not barred himself from the relief to which he would otherwise have been entitled.

There is no doubt that it must now be taken as authoritatively settled that a marriage solemnized between two persons, one of whom is incapable of properly consummating it, may, nevertheless, be so approbated by the acts and conduct of the other as to preclude the latter from impeaching its validity. Lord Chancellor Selborne's dictum to this effect in the Scottish appeal of *G.* v. *M.* (1) in the House of Lords in 1885 has never since been questioned. "There may" he said,

> be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation, which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed.

It must also, we think, be taken as settled that lapse of time, though not in itself under ordinary circumstances an absolute bar to nullity proceedings, is yet an important factor for consideration, and *will,* if not satisfactorily accounted for, operate with other circumstances proving insincerity, as a bar to such a suit. See *B-n* v. *B-n* (2), in which Dr. Lushington in delivering the judgment of the Privy Council in 1854, said:—

> It is obvious, for these reasons, that time, though not in itself, under ordinary circumstances, a bar, yet, especially when the lapse has been very considerable, is not an unimportant matter in suits of this description, and more particularly as concerns the wife.
>
> In other respects, too, as relates to the right of the husband to prosecute a suit of this description, time, with other facts, deserves great consideration. The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only *vigilantibus non dormientibus.* The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period, unaccounted for, that the presumption would necessarily arise that he acquiesced in the consequences which such an unfortunate connection entailed upon him, he could hardly be entitled to say, "Give me a remedy for a grievance I have not felt," and that to the detriment of another.

(1) 10 App. Cas. 171, at 186.

(2) (1854) 1 Spinks (Ecc. & Ad.) 248; 164 Eng. Rep. 144.

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Their Lordships are all of opinion that cases might occur where long acquiescence with knowledge, or the means of procuring knowledge, would operate as a bar to the prosecution of such a suit, and more especially if the circumstances shewed that the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons.

The learned trial Judge with an apparently clear appreciation of these principles found that the appellant did not learn of the incurability of the condition complained of until January, 1934, and that a satisfactory, reasonable explanation had been given as to why he had not learned it sooner. He also found that during the time the marriage existed the petitioner had done nothing, knowing the true facts, which amounts in law to approbation of the marriage and which made it unfair and inequitable for him to take these proceedings, and that there was nothing in the evidence which would in the slightest degree justify the court in inferring insincerity on his part.

During the more than eight years of their cohabitation it seems it was Mr. and Mrs. B.'s custom to occupy the same bed and that, notwithstanding from the very beginning both parties recognized that there was some serious impediment to normal coition, imperfect acts of intercourse were more or less regularly indulged in by the husband with the wife. Both seem at the outset to have regarded the condition as temporary and one which would in time disappear. As it did not, they discussed the advisability of a surgical examination, but no physician or surgeon was even consulted until July, 1929, when Mr. B. says his wife consented to submit herself to examination by an elderly practitioner, Dr. Hurst. The excuse put forward by him for doing nothing up to this time was his wife's sensitiveness and aversion to such an examination. Dr. Hurst made a manual examination and reported an abnormal vagina. He advised that an exploratory examination would be necessary in order to determine whether the condition could be remedied. Mr. B. says the doctor informed him that the operation would cost $400 and he gave this and his financial straits and the uncertainty of his income as his reason for not having such an operation performed. Mrs. B. says that after Dr. Hurst's preliminary examination and a discussion between them immediately thereafter the matter was allowed to drop and that it was never mentioned again between them.

In the summer of 1933, after their return to Winnipeg from a several months' temporary residence in Saskatoon, and while they were living together in an apartment suite, Mrs. B.'s health became impaired and later she was found to be developing goitre. A consultation by Mr. and Mrs. B. on December 26th, with a Dr. Douglass, a lady practitioner, led to the calling in of a surgeon, Dr. Fahrni, who upon a manual examination found the same condition as Dr. Hurst had reported four and a half years before, and undertook on instructions from Mr. B. and Mrs. B.'s father to do the goitre operation and at the same time while the patient was under the anaesthetic to make an exploratory vaginal examination to ascertain if the malformation was curable. Dr. Fahrni performed the operation on January 3rd, 1934, and found as to the vaginal condition that no operation could be performed for its correction.

Mrs. B. was discharged from the hospital on January 10th, and went to her parents' home where it had been arranged she should remain during her convalescence. On January 16th or 17th Mr. B., after having conferred with her father, had a two or three hours' interview with his wife, during which he informed her he had decided that they must separate. He stated that her attitude during the interview was friendly and that she made no objection to their separation, though she did suggest that it should be brought about by an action for divorce, to which he objected. He says she asked if they could not go to their suite the next day and spend the week-end to sort out and pack their personal belongings, which he agreed to do. This was not denied by Mrs. B. He did not, however, call to see her the next day, and when he went back on January 19th, in response to a telephone call from her, after she had been served with the nullity petition, he found her attitude had changed. She told him she thought he was cruel and refused to go to the suite with him. That was their last meeting.

Whatever may be said as to the correctness of the statement in the Appeal Court's judgment that it was not necessary to the success of the present respondent's appeal to that court to dispute the findings of the learned trial Judge as to delay and insincerity, and that his nega-

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tiving of an approbation of the marriage was a finding of law, it is perfectly clear from the reasons for the Appeal Court's judgment, as delivered by Mr. Justice Richards, that that court did reject the learned trial Judge's finding

> that during the time the marriage existed the petitioner has done nothing, knowing the true facts, which amounts in law to approbation of the marriage and which makes it unfair and inequitable for him to take these proceedings.

That finding manifestly involves not only the whole question of delay and the petitioner's explanation therefor, but the whole question of knowledge, as well as the petitioner's sincerity in instituting the nullity proceedings, and it is quite evident from the whole judgment of the Appeal Court that it did in fact consider all these features. Otherwise it could not have founded its reversal of the judgment of the learned trial Judge upon the cases of *G.* v. *M.* (1) and *B-n* v. *B-n* (2), as it undoubtedly did.

Witness the following passages from Mr. Justice Richard's opinion:—

> Now what are the facts here as stated by the husband? He found immediately after the marriage that his wife was incapable of ordinary sexual intercourse. He thought for a while the difficulty would be overcome but soon came to the conclusion that an operation would be necessary. He has given his reasons for taking no action. One of them is that the inquiry as to an operation, or whatever might be required to cure his wife, was postponed because he expected to have a child as soon as his wife's condition has been overcome and he would be in a position to assume the responsibility.
>
> It seems to me that the inescapable conclusion to be drawn from that statement, the long delay, the continued imperfect acts of coition and the happiness with which the parties lived together is that for the time being he preferred things as they were and deliberately resolved not to have an operation for some time.
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> The petitioner is a lawyer and knew his legal rights. It is true that he had not been informed that the trouble was incurable but he must have known that it might be. In effect he acted as though he had decided: "I love my wife; I am happy; I will take the chance of a cure being possible or impossible; I will approbate the marriage in any event."
>
> The parties discussed a number of times during the last few years the advisability of adopting a child. That indicates that they realized that the wife might be incapable of bearing one.
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> The age of the wife at the time of her marriage was 28 years according to the evidence. Her counsel, on the argument said 25 years. It makes no difference. Eight and one-half of the best years of her life have gone. If the husband had acted promptly, those years could have

(1) (1885) 10 App. Cas. 171.

(2) (1854) 1 Spinks (Ecc. & Ad.) 248; 164 Eng. Rep. 144.

been spent by the wife in preparing herself for a business life to earn a competency for her old age, or some man might have come along who would have married her for her companionship.

The wife was a good housekeeper and the husband took the benefit of that during their married life.

My greatest difficulty has been to determine whether the Appeal Court was justified in rejecting or ignoring the findings of the trial tribunal on such questions as the petitioner's knowledge of the incurability of his wife's condition and the reasonableness and *bona fides* of his excuse for not sooner discovering the permanent character of that condition. Personally, I am disposed to shrink from the responsibility of setting aside the findings of any trial tribunal on questions which depend entirely on the credibility and sincerity of witnesses that tribunal has had the advantage of seeing in the witness box, and especially where the issues the court is trying are themselves directly pointed to the motives and good faith of a plaintiff or petitioner in instituting such a suit as this.

The relevant facts of this case, in so far as they concern the relations and conduct of the parties, are not in any manner disputed. The cruical question concerns the belief and motive of the petitioner's mind and heart, as to which his own statement, with whatever apparent sincerity it may be made, ought not for that reason alone to be deemed to be conclusive. Its real truth can only be satisfactorily tested by a judge or jury by a careful consideration of its consistency or inconsistency with the undisputed or established facts. As to this, where the relevant facts are all admitted or undisputed, a judge sitting on appeal, with the whole record before him, is quite as competent to make a finding as the trial tribunal, and if the admitted or proved facts are such as to force upon one's mind a firm conviction that they do not accord with the declared attitude of the party concerned, one should not hesitate to say so.

After as careful consideration, I think, as I have ever bestowed upon any case, I have not been able to resist the conviction that, if the appellant did not definitely know until Dr. Fahrni's exploratory examination in January, 1934, that his wife's condition was one which could not be rectified by surgical skill, he should have known years before and would have known had he acted as any ordinarily

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reasonable and prudent man would have acted in the unfortunate circumstances in which he found himself, and that the explanation which he advanced on the trial for his inaction during a period of more than eight years is one which the learned trial Judge should not have accepted as valid and sufficient in the circumstances disclosed. In *B-n* v. *B-n* (1) the full Board of the Judicial Committee of the Privy Council, though accepting the plaintiff's statement that he did not become aware of the incurability of a malformation of the same character until seventeen years after his marriage, did not hesitate to find that he should have known long before, and that the explanation put forward for not knowing before was not a valid or satisfactory excuse.

For this reason I am of opinion that the findings of the learned trial Judge were not reasonably warranted by the evidence, and that this appeal must now be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Clark, Jackson, Arundel & Robertson.*

Solicitor for the respondent: *Philip C. Locke.*