Corbett v. Corbett (otherwise Ashley)

The judgment by Justice Ormrod

February, 1970

Foreword

Ormrod's judgment in this divorce case has had tragic and far-reaching consequences.

Following the failure of his marriage to model and trans woman April Ashley, Arthur Corbett sought a way to end the marriage and avoid the inheritance issues which would normally be raised. British Divorce law then required proof of adultery or cruelty; mutual consent was not admissible and, in any case, April did not wish to be divorced. Instead therefore, a case was constructed on the premise that the marriage had never been legal in the first place (since she had been registered as a boy at birth) and should always therefore (and in perpetuity) be treated as male.

Medical opinion at the time was divided, and the judge (Lord Justice Ormrod), who was himself a medical man, constructed a medical test and definition, by which the sex in such cases was to be determined. The outdated test devised by Ormrod remains, 30 years later, the basis of establishing sex for most purposes relevant to trans people … and prevents any change to the birth certificates whose unaltered status denies trans people the most basic of civil rights: legal recognition in their true gender.

Thirty years after Ormrod's judgment, his test would no longer be supported by any informed medical opinion. But the effect of his decision in this one divorce case is that it is still applied.

Judgment

Corbett v Corbett (otherwise Ashley)

PROBATE, DIVORCE AND ADMIRALTY DIVISION

ORMROD J

Hearing dates : 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 26, 27, 28 NOVEMBER, 1, 2, 8, 9 DECEMBER 1969, 2 FEBRUARY 1970

Nullity - Incapacity of wife - Wife registered as male at birth - Wife later undergoing sex-change operation - Provision of artificial vagina - Whether wife a woman for purposes of marriage - Whether wife capable of consummating marriage.

Nullity - Declaration - Marriage void - Wife a man - Power of court to make bare declaratory order - RSC Ord 15.

Headnote

In September 1963 the parties went through a ceremony of marriage. At that time the petitioner knew that the respondent had been registered at birth as of the male sex and had in 1960 undergone a sex-change operation consisting in removal of the testicles and most of the scrotum and the formation of an artificial vagina in front of the anus, and had since then lived as a woman. In December 1963 (the parties having been together for no more than 14 days since the ceremony of marriage), the petitioner filed a petition for a declaration that the marriage was null and void because the respondent was a person of the male sex, or alternatively for a decree of nullity on the ground of non-consummation. The respondent, by her answer, asked for a decree of nullity on the ground of either the petitioner's incapacity or his wilful refusal to consummate the marriage; and, by an amendment made during the trial, pleaded that the petitioner was estopped from alleging that the marriage was void and of no effect or, alternatively, that in the exercise of its discretionary jurisdiction to make declaratory orders under RSC Ord 15, the court, in all the circumstances of the case, ought to refuse to grant to the petitioner the declaration prayed for in the prayer to the petition. On the medical criteria for assessing the sexual condition of an individual, the trial judge found that the respondent had been shown to be of male chromosomal sex, of male gonadal sex, of male genital sex and psychologically to be a transsexual.

Held - (i) Marriage being essentially a relationship between man and woman, the validity of the marriage depended on whether the respondent was or was not a woman and, the respondent being a biological male from birth, the so-called marriage was void (see p 49 a, post).

(ii) With regard to non-consummation (assuming the marriage to be valid), the respondent was physically incapable of consummating a marriage as intercourse using the completely artificially constructed cavity could never constitute true intercourse (see p 49 h, post).

S v S (otherwise W) (No 2) [1962] 3 All ER 55 distinguished.

(iii) Since the case fell within the statutory jurisdiction of the High Court derived from s 2 of the Matrimonial Causes Act 1857, and the ecclesiastical courts did in fact grant declaratory sentences in cases of 'meretricious marriages', there was no discretion to withhold a decree of nullity (see p 51 f, post).

Kassim (otherwise Widmann) v Kassim (otherwise Hassim) (Carl and Dickson cited) [1962] 3 All ER 426 applied.

Notes

For failure to consummate a marriage owing to malformation, see 12 Halsbury's Laws (3rd Edn) 229, para 430.

For the form of decree in nullity suits, see 12 Halsbury's Laws (3rd Edn) 226-228, para 424, and for cases on the subject, see 27 Digest (Repl) 551, 552, 5015-5018. 33

Cases referred to in judgment

- Bateman v Bateman (otherwise Harrison) (1898) 78 LT 472, 27 Digest (Repl) 689, 6606.
- Bruce v Burke (1825) 2 Add 471, 162 ER 367, 27 Digest (Repl) 483, 4212.
- D-E v A-G (falsely calling herself D-E) (1845) 1 Rob Eccl 279, 163 ER 1039, 27 Digest (Repl) 273, 2187.
- Dennis v Dennis [1955] 2 All ER 51, [1955] P 153, [1955] 2 WLR 817, Digest (Cont Vol A) 716, 2592b.
- Elliott v Gurr (1812) 2 Phillim 16, 161 ER 1064, 27 Digest (Repl) 269, 2157.
- Hayes (falsely called Watts) v Watts (1819) 3 Philim 43.
- Hayward v Hayward [1961] 1 All ER 236, [1961] P 152, [1961] 2 WLR 993, Digest (Cont Vol A) 740, 3096a.
- Kassim (otherwise Widmann) v Kassim (otherwise Hassim) (Carl and Dickson cited) [1962] 3 All ER 426, [1962] P 224, [1962] 3 WLR 865, Digest (Cont Vol A) 233, 922a.
- S v S (otherwise W) (No 2) [1962] 3 All ER 55; sub nom SY v SY (otherwise W) [1963] P 37, [1962] 3 WLR 526, Digest (Cont Vol A) 701, 2197b.
- Sapsford v Sapsford and Furtado [1954] 2 All ER 373, [1954] P 394, [1954] 3 WLR 34, Digest (Cont Vol A) 716, 2592a.
- W (otherwise K) v W [1967] 3 All ER 178 n, [1967] 1 WLR 1554, Digest Supp.
- Wilkins v Wilkins [1896] P 108, 65 LJP 55, 74 LT 62, 27 Digest (Repl) 598, 5596.

Introduction

Petition

This was a petition by Arthur Cameron Corbett praying for a declaration that the ceremony of marriage which took place in Gibraltar on 10 September 1963 between himself and the respondent, then known as April Ashley, was null and void and of no effect, because the respondent at the time of the ceremony was a person of the male sex; or in the alternative for a decree of nullity on the ground that the marriage was never consummated owing to the incapacity or wilful refusal of the respondent to consummate it. By her answer, the respondent asked for a decree of nullity on the ground of either the petitioner's incapacity or his wilful refusal to consummate the marriage. By an amendment made during the trial, the respondent pleaded that the petitioner was estopped from alleging that the marriage was void

and of no effect or, alternatively, that, in the exercise of its discretionary jurisdiction to make declaratory orders, the court in all the circumstances of the case, ought to refuse to grant the petitioner the declaration prayed for in the prayer to the petition. The facts are set out in the judgment.

Counsel

Joseph Jackson QC and *J C J Tatham* for the petitioner.

J P Comyn QC and *Leonard Lewis QC* for the respondent.

Judgement read

Cur adv vult. 2 February 1970.

Panel

ORMROD J

Judgment

ORMROD J read the following judgment. The petitioner in this case, Mr Arthur Cameron Corbett, prays, in the first place, for a declaration that a ceremony of marriage which took place in Gibraltar on 10 September 1963 between himself and the respondent, then known as April Ashley, is null and void and of no effect because the respondent, at the time of the ceremony, was a person of the male sex. In the alternative, he alleges that the marriage was never consummated owing to the incapacity or wilful refusal of the respondent to consummate it, and asks for a decree of nullity. In her answer, the respondent denied the allegation that she was of the male sex at the time of the ceremony and asserted that she was of the female sex at that time. She denied that she was incapable of consummating or had wilfully refused to consummate the marriage. In para 5 of the answer, she admitted that for many years she had been regarded as a male but had undergone an operation for the construction of a vagina before the ceremony of marriage, and alleged that the petitioner was aware of all the material facts before the ceremony took place and was, therefore, not entitled to a decree of nullity on the ground of 34 incapacity or wilful refusal. In para 6, she alleged that the petitioner had achieved full penetration on several occasions but withdrew after a very short time without ejaculation, either because he was incapable of ejaculation, or because he was unwilling to do so, and then became hysterical. Paragraph 7 contains an implied averment that the marriage was in fact consummated, and then goes on to allege in the alternative that the petitioner wilfully refused to consummate it. Paragraph 8 contains an alternative allegation of incapacity on the part of the petitioner. The prayer to the answer, therefore, asks for a decree of nullity in favour of the respondent, on either incapacity or wilful refusal. By an amendment, made by leave at a late stage of the trial, the respondent pleaded that the petitioner was estopped from alleging that the marriage was void and of no effect or, alternatively, that in the exercise of its discretionary jurisdiction to make declaratory orders, the court, in all the circumstances of this case, ought to refuse to grant the petitioner the declaration prayed for in the prayer to the petition.

A number of technical points arise on these pleadings which I will deal with in detail at a later stage in this judgment. For the moment it is enough to say that counsel for the respondent very frankly admitted that there were formidable difficulties in his way on both limbs of his late amendment to the answer; and that, in my judgment, there is no foundation in law or fact for either submission.

The case, therefore, resolves itself into the primary issue of the validity of the marriage, which depends on the true sex of the respondent; and the secondary issue of the incapacity of the parties, or their respective willingness or unwillingness, to consummate the marriage, if there was a marriage to consummate. On the primary issue, the basic facts are not in dispute; the problem has been to discover them. On the secondary issue, there is a direct conflict of evidence between the petitioner and the respondent, but it lies within a narrow compass. An unusually large number of doctors gave evidence in the case, amounting to no less than nine in all, including two medical inspectors to the court. Each side called three leading medical experts to deal with various aspects of anatomical and psychological sexual abnormality. In the event, as is to be expected when expert witnesses of high standing are involved, there was a very large measure of agreement between them on the present state of scientific knowledge on all relevant topics, although they differed in the inferences and conclusions which they drew from the application of this knowledge to the facts of the present case. The quality of the medical evidence on both sides was quite outstanding, not only in the lucidity of its exposition, but also in its intellectual and scientific objectivity, and I wish to express to all the distinguished doctors concerned in this case my gratitude for the immense amount of time and trouble which they have devoted to it, and for the patient and careful way in which they answered the many questions put to them during the long periods for which some of them were in the witness box. The cause of justice is deeply indebted to them. My only regret is that it did not prove possible to save a great deal of their time by exchanging reports and making available to all of them all the known facts about the respondent's physical condition both before and after the operation, including facilities for a joint medical examination, before the hearing began. Had such steps been taken a great deal of time and expense might have been saved.

The relevant facts must now be stated as concisely as possible. The respondent was born on 29 April 1935 in Liverpool and registered at birth as a boy in the name of George Jamieson, and brought up as a boy. It has not been suggested at any time in this case that there was any mistake over the sex of the child. In 1951, at the age of 16 years, he joined the Merchant Navy. Before being accepted, the respondent had what she (I shall use 'he' and 'she' and 'his' and 'her' throughout this judgment as seems convenient in the context) described in cross-examination as a 'vague medical examination', and was accepted. As George Jamieson, the respondent did one and a half voyages as a merchant seaman before being put ashore at San Francisco and admitted to hospital there, after taking an overdose of tablets. He was subsequently 35 returned to this country and became a patient at Ormskirk Hospital. No evidence was available from this hospital but subsequently, in January 1953, at the age of 17, he was referred by his general practitioner to the psychiatric department of the Walton Hospital, Liverpool, where he came under the care of Dr Vaillant, the consultant psychiatrist, at first as an out-patient, and later, for a short time, as an in-patient. Dr Vaillant gave evidence under a subpoena issued on behalf of the petitioner, and produced the hospital records which showed that the respondent had been physically examined by one of Dr Vaillant's assistants and that no abnormality had been observed other than that he presented a 'womanish appearance' and had 'little bodily and facial hair'. Dr Vaillant said in evidence that he never had any doubt that the respondent was a male. The hospital records contain

summaries of several therapeutic interviews with the respondent, some under the influence of small doses of amytal or ether, in the course of which he expressed an intense desire to be a woman, which, he said, he had experienced since he was a child and gave some account of various homosexual experiences which he had had on board ship. After some six months' treatment, the doctor who had been treating the respondent under Dr Vaillant's supervision reported his conclusions to the general practitioner in a letter dated 5 June 1953, which reads in part as follows:

'This boy is a constitutional homosexual who says he wants to become a woman. He has had numerous homosexual experiences and his homosexuality is at the root of his depression. On examination, apart from his womanish appearance, there was no abnormal finding.'

Unfortunately, it has proved impossible to trace this doctor whose evidence would have been of great value in resolving some of the questions raised by the experts called on behalf of the respondent.

Thereafter, the respondent came to London and did casual work in the hotel trade there, and in Jersey, until, in 1956, he went to the south of France, where he met the members of a well-known troupe of male female impersonators, normally based at the Carousel night club in Paris, and later himself became a member of the troupe. By this time, on any view of the evidence, the respondent was taking the female sex hormone, oestrogen, regularly, to encourage the development of the breasts and of a feminine type of physique. At that stage he was known as 'Toni/April'.

It will be necessary to examine the evidence relating to the taking of oestrogen in more detail later. After about four years at the Carousel night club, he was introduced to a certain Dr Burou who practised at Casablanca, and, on 11 May 1960, he underwent, at Dr Burou's hands, a so called 'sex-change operation', which consisted in the amputation of the testicles and most of the scrotum, and the construction of a so-called 'artificial vagina', by making an opening in front of the anus, and turning in the skin of the penis after removing the muscle and other tissues from it, to form a pouch or cavity occupying approximately the position of the vagina in a female, that is between the bladder and the rectum. Parts of the scrotum were used to produce an approximation in appearance to female external genitalia. I have been at some pains to avoid the use of emotive expressions such as 'castration' and 'artificial vagina' without the qualification 'so-called', because the association of ideas connected with these words or phrases are so powerful that they tend to cloud clear thinking. It is, I think, preferable to use the terminology of Miss Josephine Barnes, who examined the respondent as one of the medical inspectors in this case. She described the respondent as having a 'cavity which opened on to the perineum'. There is no direct evidence of the condition of the respondent's genitalia immediately before their removal at this operation. I was informed by counsel that Dr Burou had refused to supply any information, or even to answer letters addressed to him by the respondent's solicitors. The respondent, herself, was almost as unhelpful. In evidence-in-chief, she said that she 'thought' that she had a penis at the time when she was in the Merchant Navy. 36She had testicles at that time. She said 'I haven't the foggiest idea of the size of my penis' and had no idea of the size of the testicles. In cross-examination, she was asked whether she had ever had an erection, and whether she had had ejaculations. She simply refused to answer either question and wept a little. It is a curious fact that, in the further and better particulars under para 5 of the answer, the operation is said to have been for the removal of a 'vestigial' penis, and the construction of an artificial vagina. No explanation was forthcoming as to the source of the word 'vestigial', and there is

no evidence that the respondent's penis or testicles were abnormal. Insofar as credibility is concerned, I do not think that it would be right to hold that these particular answers reflect adversely on the respondent's credit generally, because the evidence of the psychiatrists is that persons who suffer from these intense desires to belong to the opposite sex, often exhibit a profound emotional reaction when asked about the genitalia which they so much dislike. Nevertheless, such unhelpful evidence does nothing to support the suggestion that there was anything unusual about the respondent's sexual anatomy.

Following the operation, the respondent returned to London, now calling herself April Ashley, and dressing and living as a female. In evidence she stated that, after the operation, she had had sexual relations with at least one man, using the artificial cavity quite successfully. In November 1960, about six months after the operation, the petitioner and the respondent met for the first time. He was then aged 40, married and living with his wife and four children, but sexually unhappy and abnormal. In the witness box, he described his sexual experience in considerable detail with apparent frankness and without obvious embarrassment. He was, in fact, an unusually good witness, answering all the questions put to him carefully, and without any attempt at prevarication or evasion. He said that he had had sexual relations with a large number of women before his first marriage, and with others, both during it, and after it was dissolved in 1962. He also described his sexual deviations. From a comparatively early age, he had experienced a desire to dress up in female clothes. In the early stages of his marriage he had done so in the presence of his wife on a few occasions. Subsequently, he had dressed as a woman four or five times a year, keeping it from his wife, but the urge to do so continued. With considerable insight he said 'I didn't like what I saw. You want the fantasy to appear right. It utterly failed to appear right in my eyes'. These remarks are highly relevant to the understanding of the human aspects of this unusual case. From about 1948 onwards his interest in transvestism increased; at first it was mainly literary, attracting him to pornographic bookshops, but gradually he began to make contact with people of similar tendencies and associated with them from time to time in London. This led to frequent homosexual behaviour with numerous men, stopping short of anal intercourse. As time went on he became more and more involved in the society of sexual deviants, and interested in sexual deviations of all kinds. In this world he became familiar with its ramifications and its personalities, amongst whom he heard of Toni/April as a female impersonator at the Carousel, which he described as 'the Mecca of every female impersonator in the world'. Eventually, through an American transvestite known as 'Louise', he got in touch with the respondent and they met for the first time on 19 November 1960 at his invitation for lunch at the Caprice restaurant. The petitioner's description of this first meeting contains the key to the rest of this essentially pathetic, but almost incredible story. By this time he was aware that April Ashley, as she was now calling herself, had been a man and had undergone a so-called 'sex-change operation'. When he first saw her he could not believe it. He said he was mesmerised by her. 'This was so much more than I could ever hope to be. The reality was far greater than my fantasy.' In cross-examination he put the same thought in these words, 'It far outstripped any fantasy for myself. I could never have contemplated it for myself'.

This coincidence of fantasy with reality was to determine the petitioner's behaviour towards the respondent over the next three years or more. The respondent's 37 reaction to the petitioner appears to have been largely passive throughout the whole period of the relationship. After the meeting in November 1960 they saw more and more of each other, meeting daily and sometimes twice a day. He had originally introduced himself to her under an assumed name but soon disclosed his real identity. During these meetings, the respondent

gradually 'in dribs and drabs' disclosed the whole of her history to the petitioner, including a detailed account of the operation. According to the petitioner, his original motive in seeking an introduction to the respondent was essentially transvestite in character, but quite soon he developed for her the interest of a man for a woman. He said that she looked like a woman, dressed like a woman and acted like a woman. He disclosed his true identity to the respondent to show that his feelings had become those of a full man in love with a girl, not those of a transvestite in love with a transsexual. He repeatedly said that he looked on the respondent as a woman and was attracted to her as a woman. On the other hand, it is common ground that, before the ceremony of marriage, nearly three years later, there was no sexual activity in a physical sense between them at all of any kind, although there was the most ample opportunity. At the most, their relationship went no further than kissing and some very mild petting. At no time did the respondent permit the petitioner to handle her naked breasts or any part of her body. The petitioner's letters to the respondent, nearly all of which appear to have survived, whereas all but one of the respondent's have been destroyed, show a similar emotional situation, affectionate, yet quite passionless, with continual emphasis on marriage and the pleasure which the petitioner felt in thinking of the respondent as the future Lady Rowallan. This is not at all the sort of relationship which one would expect to satisfy a man of such extensive and varied sexual experience as the petitioner claims to be. The respondent, however, agrees with his account of their relationship, except that she claims on one single occasion, in a fit of jealous rage in Paris in 1961, he attempted to assault her sexually. Her description of the incident did not suggest to me that there was anything particularly sexual about it. She said that she never had any real feeling for the petitioner and had been his 'nurse' for three years. She obviously found him a difficult and perplexing person. She says, and some of the petitioner's letters bear her out, that his emotions swung about like a pendulum, from feeling jealous of her as a woman, by which, I think, she meant, jealous of her success in adopting the female role which he often wished he could adopt also, to jealous feelings about other men who were attracted to her. I think that there is a good deal of substance in this view of the petitioner's attitude. Listening to each party describing this strange relationship, my principal impression was that it had little or nothing in common with any heterosexual relationship which I could recall hearing about in a fairly extensive experience of this court. I also think that it would be very unwise to attempt to assess the respondent's feminine characteristics by the impression which the petitioner says she made on him. While I accept his account of his sexual experience from a qualitative point of view, I am sceptical about the quantity of it, but I have no difficulty in concluding that he is a man who is extremely prone to all kinds of sexual fantasies and practices. He is an unreliable yardstick by which to measure the respondent's emotional and sexual responses. As a further indication of the unreality of his feelings for the respondent, it is common ground that he introduced her to his wife and family and quite frequently took her to his house or on outings with them.

By September 1961, the situation between the petitioner and his wife had become impossible owing to his obsession with the respondent, and a separation was arranged. In the meanwhile, with his assistance, she had changed her name to April Ashley by deed poll and obtained a passport in that name. Attempts to persuade the superintendent registrar to change her birth certificate, however, failed. At some stage after the operation, the Ministry of National Insurance issued her with a woman's insurance card, and now treat her as a woman for national insurance purposes. During 1961, she worked successfully as a female model, until the press got hold of 38 the story and gave it wide publicity. Later that year the petitioner decided to live in Spain and bought a villa and a night club, called Jacaranda, at Marbella. In December 1961 they went together to Marbella on the basis that they would

share the villa but not sleep together, and eventually marry when his divorce came through. The respondent stayed about a week and then left for a while, returning later for about a month and then leaving again. This pattern of coming and going continued for a long time. When she was in Marbella the respondent slept at the villa and the petitioner at the club. She was largely supported by him and he was happy to do so. In 1962, they became the subject of intense press publicity, culminating in a series of articles in the News of the World in which the respondent told her life story in considerable detail, most of which seems to have been comparatively accurate. After his wife obtained a decree absolute in June 1962, the petitioner repeatedly pressed the respondent to marry him but she would not agree. She continued to come and go as she wished while he remained at Marbella. Between July 1962 and July 1963 he estimated that they were together for rather less than half the time; their relations remained the same, they slept in separate houses and their 'engagement' was continually on and off as rows took place between them. Nothing of a sexual nature occurred during all this time. In July 1963, the petitioner took the first steps about a marriage. He consulted a lawyer in Gibralter about it and discussed financial arrangements with the respondent.

It is, I think, obvious that both of them had considerable doubts about whether they could marry, or whether they could find anyone to marry them. In fact, the lawyer in Gibralter succeeded in getting a special licence for them. They neither asked for, nor received, any legal advice as to the validity of such a marriage. The ceremony was fixed provisionally for 10 September when she suddenly agreed to go through with it and they rushed off to Gibralter. I think that there can be little doubt that the petitioner was still in the grip of his fantasies and that the respondent had much more sense of reality.

After the ceremony, they returned to the villa at Marbella where some sexual approach was made by the petitioner. It is, however, common ground that the respondent then said that she was suffering from 'abscesses' in her so-called vagina and the subject was dropped, and they continued to sleep apart, she at the villa, he at the club, for the next three or four nights. She then left for London as had been previously arranged, to take some lessons, preparatory to getting into a drama school. It was agreed that she would find a flat in London and he would join her when he could. In fact, he went to London on about 4 October 1963 and stayed about a week in a flat with her. There is a direct conflict of evidence as to what happened sexually between them at this period. He says that she continued to complain of the abscesses. She says that they had cleared up and that they slept together, and that on several occasions he succeeded in penetrating her fully, but immediately gave up, saying 'I can't, I can't' and withdrew without ejaculation, and burst into tears. On 12 October, the petitioner returned to Spain; the respondent, who had failed to get into the drama school, remained in London until early December, when she joined him at the villa. Again there is a conflict of evidence as to what took place between them which I shall examine in more detail when I come to the issues of incapacity and wilful refusal. After about three days, the respondent suddenly packed her suitcases and, immediately and without warning, left for London. This was the end of their relationship. They had been together for no more than 14 days in all since the so-called marriage. Shortly after her return to London, probably on 11 December, the respondent wrote a letter which is significant, and throws some light of this strange situation and on her behaviour since the marriage. It shows, I think, that reality had broken in on her and that she, quite understandably, could not face the intolerably false position into which they had got themselves. The letter reads as follows: 39

'11 Dec 1963
London

Dear Arthur,

A letter from me. A none too happy one I'm afraid. I have thought and thought, not slept for days. But from all the pain and torture on my mind I see only one thing very very clear. That is I will not ever be coming back to you. I don't know what I will do. I don't know how I will live. But I know I won't be back.

The last three years have been the longest the unhappiest, the most horrible of my short twenty eight years. In those three years I have known you!!!! So you must understand that although I don't put all the blame on you, you do seem to have been a terrible jinks on me.

I am paying dearly for my sin of marrying you. The worry and anguish I have felt in the past three years is making me ill. So the only thing I can do is to try to cut you out of my life completely. Then all I have are my earthly problems. A job, a less expensive place to live. Arthur don't think I expect any money from you I don't. Because I know I should never have married you. But I do hope you will either let the house or pay whatever rent you think. At least that.

It's so funny but I felt so much more (although I never really did) secure before I married you than I did after. Then you denying what you had so promised made me feel so sick to the stomach. I could never have stood myself, let alone you afterwards. Then I seem to remember you trying to convince me of other lies of yours in the past. I don't want to sound bitter, but I suppose I am a little. At the moment my life seems a wreck all over again. I hope this time I have a little more strength.

Arthur as I am quite a nice person I will say, and do nothing about getting an annulment until you let me know. I can respect that you would not like to hurt your family any more with cheap publicity in that I hope should I ever want my freedom you will respect my wishes.

I hope you sell your land. In brief Arthur I hope one day you will find happiness. Although my heart is breaking I think you had better have Mr Blue. Give my kindest thoughts to Rogelia, Pepe and Jose Luis.

God bless you
April

P.S. You have better address your C/of Caroline 73 Queen Gate as I will leave here in a few days.'

The petitioner, still living his fantasy, was able to sustain it for a longer period. His reply is written in terms which suggest that he did not take her letter very seriously. There are two other letters written by him in 1964. So far as he is concerned the love affair was continuing despite the respondent's obvious withdrawal. Thereafter, communications seem to have ceased altogether until, on 16 February 1966, the respondent's solicitors issued an originating summons under s 22 of the Matrimonial Causes Act 1965 claiming maintenance. No previous request for maintenance had been made, and in the witness box in the present suit

the respondent expressly disclaimed any intention of asking for financial provision from the petitioner. She does, however, maintain that he gave her the villa at Marbella and she has been looking for some means of enforcing her claim to it. Difficulties, however, arose over serving the necessary proceedings on the petitioner out of the jurisdiction, and proceedings for maintenance were started as a substitute for a direct claim to the villa. The s 22 proceedings reached the stage of filing affidavits of means but got no further. The petitioner did not challenge the validity of the marriage in his affidavit but eventually, on 15 May 1967, filed his petition in this suit.

I now turn to the medical evidence and will begin by reading the report and the 40 supplementary report of the medical inspectors to the court, Mr Leslie Williams, FRCS, FRCOG, and Miss Josephine Barnes, DM, FRCS, FRCOG:

'We, the undersigned, appointed by the High Court Medical Inspectors in the above cause, have this day, at 44 Wimpole Street, W.I., examined the sexual organs of April Corbett (otherwise Ashley) the respondent. We find that the breasts are well developed though the nipples are of masculine type. The voice is rather low pitched. There are almost no penile remains and there is a normally placed urethal orifice. The vagina is of ample size to admit a normal and erect penis. The walls are skin covered and moist. There is no impediment on "her part" to sexual intercourse. Rectal examination does not reveal any uterus or ovaries or testicles. There is no scar on the thigh indicating where a skin graft might have been taken. We strongly suggest that an attempt be made to obtain from Dr Burou, Clinique du Parc, 13 Rue Lepbei, Casablanca a report on what exactly was done at the operation. We also strongly suggest that an investigation into "her" chromosomal sex be carried out by some expert such as Prof Paul Polani, Dept. of Paediatric Research, Guys Hospital, London.

22nd May, 1968'

Supplementary Report

April Corbett the respondent was examined at 44 Wimpole Street, London, W.I., on May 22nd, 1968 by Miss Josephine Barnes and Mr. Leslie Williams. April Corbett had had an operation for the construction of an artificial vagina and the surgical result was remarkably good. It may be noted that the normal vagina is lined by skin which is moistened by mucoid secretion from the cervix uteri. The artificial vagina in this case also appeared to be lined with skin and it was moist presumably owing to the presence of sweat glands in the skin used to line the artificial vagina. The suggestion in the first report that a chromosome test should be done was because the result of such a test would be one means of making our factual information about the case more complete.

6th July, 1968.'

The suggested investigation into the respondent's 'chromosomal sex' refers to a method of examining the structure of the individual body cells for evidence of male or female characteristics, which I shall have to discuss in more detail later. The investigation was carried out by Professor F T G Hayhoe of Cambridge who reported, on 31 October 1968, that all the cells which he examined were of the male type.

The expert witnesses called by the petitioner were Professor C J Dewhurst, FRCSE, FRCOG, Professor of Obstetrics and Gynaecology at Queen Charlotte's Hospital; Professor Dent, MD, FRS, FRCP, Professor of Human Metabolism at University College Hospital; and Dr J B Randell, MD, FRCP, DPM, consultant psychiatrist at Charing Cross Hospital. Professor Dewhurst is the co-author of a book called 'The Intersexual Disorders'; and is particularly interested in cases which exhibit anomalies in the development of the sex organs. Dr Randell has made a special study of individuals with abnormal psychological attitudes in sexual matters, particularly transvestites and transsexuals. He and Professor Dewhurst are working together with a plastic surgeon in a team which is studying the treatment of transsexuals by operations similar in character to that which was performed on the respondent by Dr Burou. The experts called by the respondent were Dr Armstrong, MD, FRCP, consultant physician at Newcastle Royal Infirmary; Professor Ivor Mills, FRCP, Professor of Medicine at Cambridge; and Professor Roth who is Professor of Psychiatry in the University of Newcastle-on-Tyne. Dr Armstrong has written a number of papers on sex and gender problems and is co-editor of a well- known book 'Intersexuality in Vertebrates including Man'. Professor Mills is particularly interested in endocrinology as applied to cases showing various kinds of sex anomalies, that is, in the study of the chemical substances produced by the sex organs and other tissues in the body, and of their effects in the individual patient. 41Professor Roth has considerable experience of the psychological aspects of such cases.

It was agreed by counsel on both sides that reports, articles in learned journals, and books written by any of the witnesses could be used in evidence without formal proof. It was also agreed that publications by other writers, either in the form of articles or books, should be treated as part of the evidence in the case. This sensible course enabled the relevant material to be put before the court in a convenient and sensible way. It is easier for scientific witnesses to give their evidence-in-chief in narrative form rather than on a question and answer basis. It enables them to express themselves in a form to which they are more accustomed, and avoids some of the pitfalls of the question and answer technique in which the form of a question may inadvertently condition the answer and lead to misunderstanding. It is easier also for counsel and the judge.

There was general agreement among all the doctors on the basic principles and the fundamental scientific facts. Anomalies of sex may be divided into two broad divisions, those cases which are primarily psychological in character, and those in which there are developmental abnormalities in the anatomy of the reproductive system (including the external genitalia). Two kinds of psychological abnormality are recognised, the transvestite and the transsexual. The transvestite is an individual (nearly, if not always a man) who has an intense desire to dress up in the clothes of the opposite sex. This is intermittent in character and is not accompanied by a corresponding urge to live as or pass as a member of the opposite sex at all times. Transvestite males are usually heterosexual, often married, and have no wish to cease to play the male role in sexual activity. The transsexual, on the other hand, has an extremely powerful urge to become a member of the opposite sex to the fullest extent which is possible. They give a history, dating back to early childhood, of seeing themselves as members of the opposite sex which persists in spite of their being brought up normally in their own sex. This goes on until they come to think of themselves as females imprisoned in male bodies, or vice versa, and leads to intense resentment of, and dislike for, their own sexual organs which constantly remind them of their biological sex. They are said to be 'selective historians', tending to stress events which fit in with their ideas and to suppress those which do not. Some transsexual men live, dress and work regularly as females and pass more or less unnoticed. They become adept at make-up and knowledgeable

about using oestrogen, the female sex hormone, to promote the development of female-like breasts, and at dealing with such masculine attributes as facial and pubic hair. As a result of the publicity which has been given from time to time to so-called 'sex-change operations', many of them go to extreme lengths to importune doctors to perform such operations on them. The difficulties under which these people inevitably live result in various psychological conditions such as extreme anxiety and obsessional states. They do not appear to respond favourably to any known form of psychological treatment and, consequently, some serious-minded and responsible doctors are inclining to the view that such operations may provide the only way of relieving the psychological distress. Dr Randell has recommended surgical treatment in about 35 cases, mostly restricted to castration and amputation of the penis, but in a few carefully selected cases he and Professor Dewhurst and the plastic surgeon who is working with them have undertaken vagino-plasty as well, that is the construction of a so-called artificial vagina. The purpose of these operations is, of course, to help to relieve the patient's symptoms and to assist in the management of their disorder; it is not to change their patient's sex, and, in fact, they require their patients before operation to sign a form of consent which is in these terms:

'I … of … do consent to undergo the removal of the male genital organs and fashioning of an artificial vagina as explained to me by … (surgeon). I understand it will not alter my male sex and that it is being done to prevent deterioration in my mental health.

…

(Signature of Patient)'

Professor Roth is doubtful about the therapeutic efficacy of these procedures and has only recommended one of his patients for operation.

There is, obviously, room for differences of opinion on the ethical aspects of such operations but, if they are undertaken for genuine therapeutic purposes, it is a matter for the decision of the patient and the doctors concerned in his case. The passing of the Sexual Offences Act 1967, s 1, seems to have removed any legal objections which there might have been to such procedures. This phenomenon of transsexualism must, however, be seen in its true perspective. It occurs in men and women of all ages, some of whom are married in their true sex and are fathers or mothers of children. In a paper published on the British Medical Journal in December 1959, Dr Randell refers to 13 transsexual men who were or had been married. Some of his male patients, on whom operations have been performed, have been men of mature age; one was a naval petty officer aged 42 years. All his male transsexual patients, which now number 190, have been biologically, that is anatomically and physiologically, normal males. Female transsexuals present corresponding problems but they are not relevant to the present case.

It is clear from the account which I have given of the respondent's history that it accords very closely with this description of a male transsexual. Dr Randell considered that the respondent is properly classified as a male homosexual transsexualist. Professor Dewhurst agreed with this diagnosis and said the description 'a castrated male' would be correct. Dr Armstrong

agreed that the evidence contained in the Walton Hospital records was typical of a male transsexual, but he considered that there was also evidence that the respondent was not a physically normal male. He said that the respondent was an example of the condition called inter-sex, a medical concept meaning something between intermediate and indeterminate sex, and should be 'assigned' to the female sex, mainly on account of the psychological abnormality of transsexualism. Professor Roth thought that the respondent was a case of transsexualism with some physical contributory factor. He was prepared to regard the case as one of inter-sex, and thought that the respondent might be classified as a woman 'socially'. He would not recommend that the respondent should attempt to live in society as a male. Both he and Dr Randell had been successful in asking the Ministry of Labour to register some of their male transsexual patients as female for national insurance purposes. Insofar as there are any material differences in the evidence of Dr Randell, Dr Armstrong and Professor Roth, I was less impressed by Dr Armstrong's evidence than by that of the other two doctors, both of whom were exceptionally good witnesses. Of the latter two, I am inclined to prefer the evidence of Dr Randell because I do not think that the facts of this case, when critically examined, support the assumptions which Professor Roth had been asked to make as the basis of his evidence.

There was a considerable amount of discussion in the course of the expert evidence about the aetiology or causation of transsexualism. Dr Randell and Professor Roth regard it at present as a psychological disorder arising after birth, probably as a result of some, as yet unspecified, experiences in early childhood. The alternative view is that there may be an organic basis for the condition. This hypothesis is based on experimental work by Professor Harris and others on immature rats and other animals, including rhesus monkeys, which suggests that the copulatory behaviour of the adult animals may be affected by the influence of certain sex hormones on particular cells in the hypothalamus, a part of the brain closely related to the pituitary gland, in early infancy. At present the application of this work to the human being is purely hypothetical and speculative. Moreover, the extrapolation of these observations on the instinctual or reflex behaviour of animals to the conscious motives and desires of the human being seems to be, at best, hazardous. The use of such phrases as 'male or female brain' in this connection is apt to mislead owing to the ambiguity of the word 'brain'. In the present context it refers to a particular group of nerve cells, but not to the seat of consciousness or of the thinking process. In my judgment, 43these theories have nothing to contribute to the solution of the present case. On this part of the evidence my conclusion is that the respondent is correctly described as a male transsexual, possibly with some comparatively minor physical abnormality.

I must now deal with the anatomical and physiological anomalies of the sex organs, although I think that this part of the evidence is of marginal significance only in the present case. In other cases, it may be of cardinal importance. All the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are-

(i) Chromosomal factors.

(ii) Gonadal factors (ie presence or absence of testes or ovaries).

(iii) Genital factors (including internal sex organs).

(iv) Psychological factors.

Some of the witnesses would add-

(v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc which are thought to reflect the balance between the male and female sex hormones in the body).

It is important to note that these criteria have been evolved by doctors for the purpose of systematising medical knowledge, and assisting in the difficult task of deciding the best way of managing the unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities. As Professor Dewhurst observed 'We do not determine sex-in medicine we determine the sex in which it is best for the individual to live'. These criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination.

The hermaphrodite has been known since earliest times as an individual who has some of the sexual characteristics of both sexes. In more recent times the true hermaphrodite has been distinguished from the pseudo-hermaphrodite. The true hermaphrodite has both a testis and an ovary and some of the other physical characteristics of both sexes. The pseudo-hermaphrodite has either testes or ovaries, and other sexual organs which do not correspond with the gonads which are present. Still more recently, much more knowledge has been obtained about these cases by the development of techniques which enable the structure of the nucleus of the individual cells of the body to be observed under the microscope. Using these techniques, it is possible to see the individual chromosomes in the nucleus. These are the structures on which the genes are carried which,in turn, are the mechanism by which hereditary characteristics are transmitted from parents to off-spring. The normal individual has 23 pairs of chromosomes in his ordinary body cells, one of each pair being derived from each parent. One pair is known to determine the sex of normal individuals. The normal female has a pair which is described as XX; the normal male a pair which is described as XY. The Y chromosomes can be distinguished quite clearly from the X. In the male, the X chromosome is derived from the mother and the Y from the father. In the female one X chromosome is derived from the father and one from the mother. All the ova of a female carry an X chromosome but the male produces two populations of spermatozoa, one of which carries the Y, and the other the X chromosome. Fusion of a Y spermatozoon with an ovum produces an embryo with XY chromosomes which, under normal conditions, develops into a male child; fusion of an ovum with an X spermatozoon produces an XX embryo, which becomes a female child. Various errors can occur at this stage which led to the production of individuals with abnormal chromosome constitutions, such as XXY and XO (meaning a single X only). In these two cases, the individuals will show marked abnormalities in the development of their reproductive organs. The XXY patient will become an under-masculinised male with small, under-developed testes and some breast enlargement. The abnormality will become apparent at puberty when the male secondary sex characteristics, such as facial hair 44 and male physique, will not develop in the normal way. The XO individual has the external appearance of a female, a vagina and uterus but no active ovarian tissue. Without treatment the vagina and uterus remain infantile in type and none of the normal changes of puberty occur. Administration of oestrogen, however, produces many of these changes. The individual of course remains sterile.

The Y chromosome is, therefore, normally associated with the development of testicular tissue in the embryo, the second X chromosome with the development of ovarian tissue. This is, however, by no means the whole story. Whether or not a normal male or female child develops depends on what may be loosely called the maintenance of the correct chemical

balance in the embryo. The process may be illustrated by two examples. The first is called the 'adreno-genital syndrome', in which the chromosomal constitution is XX but the external genitalia appear to be male. Gross enlargement of the clitoris produces a phallus which may be mistaken for a penis, and fusion of the labia produces the appearance of a scrotum, but no testicles are present in it. This may lead to a diagnosis of undescended testicles in a male, but further investigation reveals that the individual has normal ovaries, a normal uterus and vagina and no actual male organs. This condition is caused by the exposure of the embryo at a critical phase of its development to the effect of masculinising or androgenising substances either from the mother or from some abnormality in the foetus itself. The individual is, in fact, a fertile female and surgical removal of the abnormal external genitalia will enable her to live and function as a normal woman. In the second example, the external genitalia appear to be female but the chromosomal constitution is XY. Testes are present, usually in the abdomen. In the extreme case called the testicular, feminisation syndrome, the individual appears to be more or less normal female with well-formed breasts and female external genitalia but with an abnormally short vagina, ending blindly, no cervix and no uterus. In another type, the testicular failure syndrome, the appearance of the external genitalia may be more doubtful, with a phallic organ which could be either a small penis or an enlarged clitoris and a short vagina. It seems that in these cases the embryonic sexual organs fail to respond normally to the male hormone, testosterone, which is produced by the foetal testis.

All the medical witnesses accept that these examples are properly described as cases of inter-sex. In each there are discrepancies between the first three criteria for sex assessment, ie the chromosomal sex and the gonadal sex do not correspond with the genital condition of the patient. But there is a difference of opinion whether cases in which the chromosomal, the gonadal and the genital sex are congruent, but psychological or hormonal factors are abnormal, should be classified as cases of inter-sex. Dr Randell said that, in terms of sex determination, he would not give much weight to such psychological factors as transsexualism if the chromosomes, the gonads and the genitalia were all of one sex. Professor Dewhurst's views are similar. Dr Armstrong and Professor Roth, on the other hand, would classify transsexuals as cases of inter-sex. Professor Mills, as an endocrinologist, takes a rather different view. In his opinion, patients in whom the balance between male and female hormones is abnormal should be regarded as cases of inter-sex, and he considers that there is sufficient evidence to justify the view that the respondent is an example of this condition.

Professor Mills's conclusion is, of necessity, based largely on inference because the removal of the testicles at the operation in 1960 would, to a considerable extent, affect the hormonal balance at the present time. He thinks that the respondent was probably a case of partial testicular failure, in the sense that, though born a male, the process of androgenisation at and after puberty did not proceed in the normal way. It is suggested that she may be a case of what is called Klinefelter's syndrome, a disorder in which a degree of feminisation takes place about the time of puberty in hitherto, apparently, normal males. The diagnostic signs of this condition are atrophied or very small testicles, some spontaneous development of the breast, 45a female pattern of pubic hair and very little facial hair. Many, but not all, of these cases are of the XXY chromosome type. To make this diagnosis with any degree of confidence it is necessary to know whether the respondent's testicles were abnormally small or not, and it is desirable to examine a biopsy specimen of them under the microscope. There is, however, no evidence on this point at all. There is evidence from the respondent that spontaneous development of the breasts occurred at about the age of 18 years, but I am unable to accept her statement that this was spontaneous. It is admitted that she had taken

oestrogen over a long period to promote the growth of the breasts. In evidence she said that she began to take it in Paris at the age of 20 years, but she told Professor Roth that she had started taking it at the age of 18 years. The Walton Hospital notes record that, on 22 May 1953, she was suggesting that she should take female hormones to help her change her sex. Oestrogen can be obtained quite easily and without prescription. It was suggested that the absence of pigmentation round the nipples indicated that she could not have taken large quantities of oestrogen but, on her own admission, she was taking it regularly in Paris over a period of four years. In the circumstances I am not prepared to accept her evidence that the development of the breasts was spontaneous.

Professor Mills attached much significance to the note in the Walton Hospital records, 'little bodily or facial hair', and to his examination of the face which showed no sign of what he called 'androgenised hair'. In his opinion, this condition could not have been produced by taking oestrogen, nor could he find any sign of the removal of the hair by electrolysis or any other type of depilation. Professor Dent, however, said that he had seen cases in which puberty in boys had been delayed for several years but had then come on, in which there was no sign of male-type facial hair at the age of 18. In such cases he thought that oestrogen followed by castration could account for its absence as in this case. Dr Randell said that he had seen male transsexuals with no sign of facial hair. Professor Mills, I think, was relying largely on his experience of attempting, unsuccessfully, to treat hirsute women with oestrogens. In my judgment, it would not be safe to draw any inferences from the absence of facial hair in an individual who had been closely associated with experienced female impersonators for a number of years.

Professor Mills also referred to two chemical tests carried out on the respondent's urine, both, of course, after the removal of the testicles, the results of which indicated that the hormonal balance in the respondent was strongly female in character. One of these tests, the estimation of the 17 ketosteroids in the urine, was repeated during the trial in the laboratory at University College Hospital, and gave a distinctly different result. Professor Dewhurst pointed out that this test requires the collection of a 24-hour specimen of urine, and that in both cases the volume of urine supplied by the respondent was much smaller than was to be expected. As neither sample was collected under supervised conditions-the respondent being merely asked to supply the specimen-little significance can be attached to the results, particularly in a forensic as opposed to clinical situation. A similar comment is to be made about a psychological test called the Turner-Miles test which was used on the respondent. This is a questionnaire which is completed by the patient, but in this case the psychologist was not present and, indeed, has never seen the respondent. There is no evidence as to how the questionnaire was completed.

In my judgment, therefore, the factual basis for the Klinefelter syndrome or any other hormonal disorder has not been established, although the respondent may have been a partially under-developed male at the time of the operation. It follows that it has not been established that the respondent should be classified as a case of intersex on the basis of hormonal abnormality.

My conclusions of fact on this part of the case can be summarised, therefore, as follows. The respondent has been shown to have XY chromosomes and, therefore, to be of male chromosomal sex; to have had testicles prior to the operation and, therefore, to be of male gonadal sex; to have had male external genitalia without 46 any evidence of internal or external female sex organs and, therefore, to be of male genital sex; and psychologically to be

a transsexual. The evidence does not establish that she is a case of Klinefelter's syndrome or some similar condition of partial testicular failure, although the possibility of some abnormality in androgenisation at puberty cannot be excluded. Socially, by which I mean the manner in which the respondent is living in the community, she is living as, and passing as, a woman more or less successfully. Her outward appearance, at first sight, was convincingly feminine, but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitude became increasingly reminiscent of the accomplished female impersonator. The evidence of the medical inspectors, and of the other doctors who had an opportunity during the trial of examining the respondent clinically, is that the body, in its post-operative condition, looks more like a female than a male as a result of very skilful surgery. Professor Dewhurst, after this examination, put his opinion in these words-'the pastiche of feminity was convincing'. That, in my judgment, is an accurate description of the respondent. It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex. The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.

On that state of facts, counsel for the petitioner submitted that it had been established that the respondent was a male and that, accordingly, the so-called marriage must be void and of no effect. Counsel for the respondent, however, contended that the respondent should be classified, medically, as a case of inter-sex, and that, since the law knew only two sexes, male and female, she must be 'assigned' to one or the other, which, in her case, must be female, and that she should be regarded for all purposes as a woman. He submitted further that 'assignment' was a matter for the individual and his doctor, and that the law ought to accept it as determining his sex. The word 'assign', although it is used by doctors in this context, is apt to mislead since, in fact, it means no more than that the doctors decide the gender, rather than the sex, in which such patients can best be managed and advise accordingly. It was also suggested that it was illogical to treat the respondent as a woman for many social purposes, such as nursing her in a female ward in hospital, or national insurance, and not to regard her as a woman for the purpose of marriage. These submissions are very far-reaching and would lead to some surprising results in practice but, before examining them in detail, I must consider the problems of law which arise in this case on a broader basis.

It appears to be the first occasion on which a court in England has been called on to decide the sex of an individual and, consequently, there is no authority which is directly in point. This absence of authority is, at first sight, surprising, but is explained, I think, by two fairly recent events, the development of the technique of the operation for vagino-plasty, and its application to the treatment of male transsexuals; and the decision of the Court of Appeal in *S v S (otherwise W) (No 2)*, in which it was held that a woman, suffering from a congenital defect of the vagina, was not incapable of consummating her marriage because the length of the vagina could be increased surgically so as to permit full penetration. There are passages in the judgments which seem to go so far as holding that an individual, born without a vagina at all, could be rendered capable of consummating a marriage by the construction of an entirely artificial one. But for this decision, the respondent would have had no defence to the prayer for a decree of nullity on the ground of incapacity. Until this decision, all matrimonial cases arising out of developmental abnormalities of the 47 reproductive system could be dealt with as case of incapacity, and, therefore, it has not been necessary to call in question the true sex of the respondents, assuming that it had occurred to any pleader to raise this issue. Now

that it has been raised, this case is unlikely to be the last in which the courts will be called on to investigate and decide it. I must, therefore, approach the matter as one of principle.

The fundamental purpose of law is the regulation of the relations between persons, and between persons and the State or community. For the limited purposes of this case, legal relations can be classified into those in which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship. Over a very large area the law is indifferent to sex. It is irrelevant to most of the relationships which give rise to contractual or tortious rights and obligations, and to the greater part of the criminal law. In some contractual relationships, eg life assurance and pensions schemes, sex is a relevant factor in determining the rate of premium or contributions. It is relevant also to some aspects of the law regulating conditions of employment, and to various State-run schemes such as national insurance, or to such fiscal matters as selective employment tax. It is not an essential determinant of the relationship in these cases because there is nothing to prevent the parties to a contract of insurance or a pension scheme from agreeing that the person concerned should be treated as a man or as a woman, as the case may be. Similarly, the authorities, if they think fit, can agree with the individual that he shall be treated as a woman for national insurance purposes, as in this case. On the other hand, sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex. There are some other relationships such as adultery, rape and gross indecency in which, by definition, the sex of the participants is an essential determinant: see Rayden on Divorce,a *Dennis v Dennis* and the Sexual Offences Act 1956, ss 1 and 13.

a 10th Edn, p 172

Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, on whether the respondent is or is not a woman. I think, with respect, that this is a more precise way of formulating the question than that adopted in para 2 of the petition, in which it is alleged that the respondent is a male. The greater, of course, includes the less, but the distinction may not be without importance, at any rate in some cases. The question then becomes what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large. Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt, in the first place, the first three of the doctors' criteria, ie the chromosomal, gonadal and genital tests, and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these three criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have said that greater weight would probably be given to the genital criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical inter-sex, must be left 48 until it comes for decision. My conclusion,

therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows that the so-called marriage of 10 September 1963 is void.

I must now return briefly to counsel for the respondent's submissions. If the law were to recognise the 'assignment' of the respondent to the female sex, the question which would have to be answered is, what was the respondent's sex immediately before the operation? If the answer is that it depends on 'assignment' then, if the decision at that time was female, the respondent would be a female with male sex organs and no female ones. If the assignment to the female sex is made after the operation, then the operation has changed the sex. From this it would follow that if a 50 year old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female, and capable of 'marrying' a man! The results would be nothing if not bizarre. I have dealt, by implication, with the submission that, because the respondent is treated by society for many purposes as a woman, it is illogical to refuse to treat her as a woman for the purpose of marriage. The illogicality would only arise if marriage were substantially similar in character to national insurance and other social situations, but the differences are obviously fundamental. These submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender.

I now turn to the secondary issue of incapacity or wilful refusal to consummate the marriage, assuming for this purpose that the marriage is valid and that the respondent is to be treated as, or deemed to be, a woman. I must deal with this quite shortly because this judgment is long enough already. Of the two versions of the events which took place after the ceremony I prefer, and accept, the petitioner's. Although in some ways the respondent's account seems more plausible, and the lack of any contemporary complaints by the petitioner in the correspondence seems surprising, the evidence of the respondent on the question of the alleged abscesses in the so-called artificial vagina was so unsatisfactory and unconvincing that I had little doubt but that on this part of the case she was not telling the truth. The failure on her part to call the doctor, Dr Rosedale, who, she said, had been treating her for this condition at the relevant time, and the absence of any explanation for not calling him, casts further doubt on her reliability. I was, moreover, impressed by the petitioner's frankness in dealing with his letter written on 26 October 1964. This letter is typical of the kind of letter which one often finds in nullity cases and which throws light on the sexual situation between the parties. To my surprise, the petitioner immediately made it clear that he was not referring to the sexual failure. A dishonest witness would have seized on this letter as most helpful to his case. I accordingly, accept his evidence that the respondent evaded the issue of sexual relations, and that he did not press it believing that this aspect of the marriage would come right in the end. I find it extraordinarily difficult, in the peculiar circumstances of this case, to judge whether the respondent's attitude should be regarded as a wilful refusal or a psychological repugnance. I regard both as essentially unreal in this particular case, but the evidence supports refusal better than repugnance. In any event, however, I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity constructed by Dr Burou, can possibly be described in the words of Dr Lushington in D-E v A-G (falsely calling herself D-E)b as 'ordinary and complete intercourse' or as 'vera copula-of the natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres.

I am aware that this view is not in accordance with some of the observations of 49 the Court of Appeal in S v S (otherwise W) (No 2), but, in my respectful opinion, those parts of the judgments which refer to a wholly artificial vagina, go beyond what was necessary for the decision in that case and should be regarded as obiter. The respondent in that case was assumed to be a woman, with functioning ovaries, but with a congenital abnormality of the vagina, which was only about two inches long and small in diameter, according to the report of the medical inspectors. This is a very different situation from the one which confronts me. There are, I think, certain dangers in attempting to analyse too meticulously the essentials of normal sexual intercourse, and much wisdom in another of Dr Lushington's observations in the same case where he said ((1845) 1 Rob Eccl at 297):

'It is no easy matter to discover and define a safe principle to act upon: perhaps it is impossible affirmatively to lay down any principle which, if carried to either extreme, might not be mischievous.'

The mischief is that, by over-refining and over-defining the limits of 'normal', one may, in the end, produce a situation in which consummation may come to mean something altogether different from normal sexual intercourse. In this connection, I respectfully agree with the judgment of Brandon J in *W (otherwise K) v W*. The possibility mentioned by Wilmer LJ in his judgment in S v S (otherwise W) (No 2) ([1962] 3 All ER at 63, [1963] P at 61) that a married man might have sexual relations with a person, using a so-called artificial vagina, and yet not commit adultery, does not seem to me to be very important, since neither oral intercourse with a woman, nor mutual masturbation will afford the wife the remedy of adultery: *Sapsford v Sapsford and Furtado*.

The issue of approbation in relation to the prayer for relief on the ground of the respondent's incapacity was raised by para 5 of the answer, but it was not, in fact, argued before me, so I propose to say no more about it than that, in his evidence-in-chief, the petitioner admitted that he knew all about the respondent's physical condition before the ceremony of marriage.

In the result, therefore, I hold that it has been established that the respondent is not, and was not, a woman at the date of the ceremony of marriage, but was, at all times, a male. The marriage is, accordingly, void, and it only remains to consider the pleas raised by the reamended answer of estoppel or, alternatively, that the court should, in its discretion, withhold a declaration; and the proper form of the order in which my judgment should be recorded. On the issue of estoppel it is important to remember that there is no question here of estoppel per rem judicatam, as in *Wilkins v Wilkins*. Here the alleged estoppel is an estoppel in pais or by conduct. I am content to follow the decision of Phillimore J in *Hayward v Hayward*, in which he held that the doctrine of estoppel was not applicable in proceedings for a declaration that a marriage was void, and that, in any event, no estoppel in pais could arise in that case, as in this, because the relevant facts were known equally to both parties. The suggestion that a ceremony, which is wholly ineffectual and void in law, can be rendered effectual between the actual parties by some species of estoppel, would produce the anomalous result that any third party, whose interests are affected by this 'marriage', could at any time successfully challenge its validity, relying on the admissions in the evidence given before me. This defence accordingly fails. For reasons which I will give in a moment in connection with the form of my order, the court has, in my judgment, no discretion to withhold a decree of nullity.

The petitioner, therefore, succeeds on the issue of the validity or otherwise of the marriage, and the only remaining question is whether he is entitled to a declaratory judgment under RSC Ord 15, or whether the order of the court should be in the usual form of a decree of nullity. Counsel for the petitioner sought to distinguish 50 the present case from *Kassim (otherwise Widmann) v Kassim (otherwise Hassim)* (Carl and Dickson cited), in which I held that, in a case of bigamy, the court had no option to give a declaratory judgment, but must grant a decree of nullity under its matrimonial jurisdiction, derived from the former ecclesiastical courts. He submits that, if he is right in his contention that the respondent is a man, the ceremony of marriage in this case was in fact, if not in intention, a mere sham, and the resulting 'marriage' not merely a void but a meretricious marriage, which could not, in any circumstances, give rise to anything remotely matrimonial in character. Accordingly, the court ought to make a bare declaratory order, recording the fact that the so-called marriage was not a marriage at all. Counsel for the respondent contended that this case could not be distinguished from *Kassim v Kassim*, and that, if I was against him on the first part of the case, I should grant a decree of nullity to the petitioner. The importance of this distinction is, of course, that, on a decree of nullity, the court has power to entertain an application for ancillary relief whereas, if a declaratory order is made, there is no such power. I have considerable sympathy with counsel for the petitioner's argument because, on the facts as I have found them, a matrimonial relationship between the petitioner and the respondent was a legal impossibility at all times and in all circumstances, whereas a marriage which is void on the ground of bigamy, non-age or failure of third party consents, might, in other circumstances, have been a valid marriage. I do not, however, think that these arguments in fact support the distinction between this case and *Kassim v Kassim*, the ratio decidendi of which was that, in granting a decree of nullity in the case of a marriage which is void for bigamy, this court is exercising its statutory jurisdiction, that is the jurisdiction transferred to it from the ecclesiastical courts by the Matrimonial Causes Act 1857. The real question, therefore, is whether or not the ecclesiastical courts would have entertained such a case as the present and granted a 'declaratory sentence' on proof that the 'wife' was a man. I have not been referred to any authority on this point, and it may well be that no such case ever came before the ecclesiastical courts, but, in the absence of any indication that they would not have entertained such a case, I feel bound to conclude that this case falls within the statutory jurisdiction of the High Court, derived originally from s 2 of the 1857 Act. The ecclesiastical courts did in fact grant declaratory sentences in cases of 'meretricious' marriages: Elliott v Gurr. There is, in my judgment, no discretion to withhold a decree in the exercise of this jurisdiction: *Hayes (falsely called Watts) v Watts, Bruce v Burke and Bateman v Bateman (otherwise Harrison).*

If it had been a matter of discretion, under either the statutory jurisdiction of this court or RSC Ord 15, I should, unhesitatingly, have granted a decree or a declaration, as the case may be, in this particular case, because to decide otherwise would be absurd in the extreme. The effect of a refusal to do so would merely be to deprive the parties of a record of my decision in a convenient form since the facts, once determined, speak for themselves. In cases where transactions are void ipso jure the order of the court effects nothing. It merely records the existing state of facts.

The petitioner, is therefore, entitled, in my judgment, to a decree of nullity declaring that the marriage in fact celebrated on 10 September 1963 between himself and the respondent was void ab initio.

Disposition:

Decree of nullity to petitioner.

Solicitors

Crossman, Block & Keith (for the petitioner); Fallons (for the respondent).