

# MARRIAGE — NULLITY BASED ON INABILITY TO CONSUMMATE — EFFECT OF THE DIVORCE ACT

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In *Hill v. Hill*<sup>1</sup> the Manitoba Court of Queen's Bench considered the effect of Sections 4(1)(d) and 23(2) of the Divorce Act on the availability of a Decree of Nullity based on non-consummation and impotence or wilful refusal to consummate. Dewar C.J.Q.B. concludes that the provisions of the Divorce Act which make non-consummation a ground for divorce are a substitute remedy for a Decree of Nullity based on the same grounds and that accordingly, the latter is no longer available in Manitoba. It is only this aspect of the decision that will be the subject of comment.

Section 4(1)(d) of the Divorce Act reads as follows:

4(1) In addition to the grounds specified in Section 3, and subject to Section 5, a petition for divorce may be presented to a court by a husband or wife where the husband and wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances as specified in the petition, namely:

(d) the marriage has not been consummated and the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage, or has refused to consummate it;

and Section 23(2):

Subject to Subsection 19(3), all other laws respecting divorce that were in force in Canada or any province immediately before the 2nd day of July 1968 are repealed, but nothing in this Act shall be construed as repealing any such law to the extent that it constitutes authority for any other matrimonial cause.

The learned Trial Judge begins by describing the petition as a "confused document"<sup>2</sup> and with this there can be no quarrel. Examination of the petition reveals that whereas the prayer for relief merely seeks "a decree that the said marriage be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in law whatsoever . . .",<sup>3</sup> the grounds are stated to be under both the Divorce Act, S.4(1)(d) and the Divorce and Matrimonial Causes Act, 1857 (Imp). The petition particularizes the grounds as follows:

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1. [1976] 4 W.W.R. 210 (Man. Q.B.).

2. *Ibid* at p.210.

3. See Petition in Manitoba Court of Queen's Bench Pocket 2602/74.

"The Respondent has wilfully refused and/or has been unable by reason of illness or disability to consummate the marriage"<sup>4</sup>

In denying the petitioner the relief sought Dewar C.J.Q.B. held:

"As I interpret it (Section 23(2) of the Divorce Act) it has the effect of substituting a right to proceed under S.4(1)(d) of the Act for the former right to seek a decree of nullity pursuant to the provisions of the Matrimonial Causes Act, 1857, when the grounds on which the proceedings rest are non-consummation and impotence or wilful refusal to consummate. Section 4(1)(d) of the Divorce Act requires the impotence or wilful refusal relied upon to have continued for a period of not less than one year. A similar restriction did not exist under the former law in force in Manitoba and to that extent the Divorce Act has effected a change."<sup>5</sup>

With respect it is submitted that the decision is based upon a misinterpretation of the Statute.

Section 23(2) of the Divorce Act seems clear in its intention. Prior to the passage of the Divorce Act 1967-68 (Can.), C24 the law governing divorce in Manitoba was found in the Imperial Statute (*supra*). By enacting Section 23(2) Parliament meant to repeal all existing *Divorce* laws except "any such law to the extent that it constitutes authority for any other matrimonial cause". Surely Parliament was specifically preserving those provisions of the Imperial Statute (and others) that did not relate to divorce but for some reason Dewar C.J.Q.B. concludes that at least one matrimonial cause other than divorce is affected by Section 23(2), namely, nullity based on impotence. Because inability to consummate, etc., is now a ground for divorce then, by operation of Section 23(2), it can no longer be used as a ground for nullity. By extending the argument one must conclude that the Chief Justice would not be prepared to grant an Order of Judicial Separation based on cruelty, for cruelty is now a ground for divorce. It is submitted that the Court has erred by equating what are unquestionably distinct causes of action.

The issue was considered in *Rose (otherwise Abrams) v. Rose*<sup>6</sup>. There Pennell J. was asked to consider, *inter alia*, the effect of the Divorce Act on the availability of nullity decrees based on impotence. In reaching the conclusion that nullity actions founded on impotence and divorce relief sought on the same grounds are both available in Ontario because they are separate matrimonial causes, the Court says this of Section 23(2):

"I am of the respectful opinion that the expressions used in this Subsection point to an intention to retain the law enacted in the Divorce Act (Ontario), 1930, with respect to nullity."

There the Court was considering nullity provisions contained in

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4. *Ibid*

5. *Supra* footnote 1 at p.210-11.

6. (1969) 8 D.L.R. (3d) 45 (Ont. H.C.).

the Divorce Act (Ontario) but the same reasoning applies, it is submitted, to the nullity provisions of the Imperial Statute.

The writer has been unable to find any support for the position taken by the Court in the *Hill* case. In fact, the literature<sup>7</sup> and the practice in Manitoba<sup>8</sup> seem consistent with the reasoning of the Ontario High Court in *Rose* (supra). The decision is unfortunate, for if followed will deprive Manitobans of a remedy that Parliament clearly intended to preserve.

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7. See e.g. the article "Divorce" by D. Mendes da Costa, Q.C. found at p.359 of *Studies in Canadian Family Law*, Butterworths 1972. At p.479 the learned author states:

"Prior to the Divorce Act non-consummation of marriage, by itself, provided no relief; but non-consummation due to impotency provided grounds for annulment. The Divorce Act does not directly affect the law of nullity and, therefore, a nullity decree can still be obtained on the ground of impotence.

Accordingly alternative remedies may be available to a petitioner . . ."

8. The Manitoba Court of Queen's Bench has on numerous occasions since the passage of the Divorce Act granted Decrees of Nullity based on inability to consummate. For decrees granted prior to *Hill* see e.g. the decisions of:

- (a) Solomon J. in Q.B. Suit # 2398/75
- (b) Hunt J. in Q.B. Suit # 914/75
- (c) Wright J. in Q.B. Suit # 1315/74
- (d) Wilson J. in Q.B. Suit # 2984/74
- (e) Tritchler C.J.Q.B. in Q.B. Suit # 1207/73
- (f) Hamilton J. in Q.B. Suit # 2606/73

For an example of a decree granted after *Hill* see the decision of Deniset J. in Q.B. Suit # 81/76.

