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Annulment Proceedings for Fraud—Sufficiency of Proof—How to Prove Refusal to Have Sexual Intercourse

Morree M. Levine

rule before the court, the decision seems to be a logical extension of the law of the District despite the denial of the right to the wife in foreign jurisdictions. The wife's right to recover for loss of consortium negligently caused, has been, and is, advocated by legal writers who stress the equal interest of the wife and the husband in the consortium. HARPER, LAW OF TORTS (1933) at 566; PROSSER, TORTS (1941) at 948; Lippman, *The Breakdown of Consortium* 30 COL. L. REV. 651 at 668 (1930); Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1 at 8 (1923).

There is now, therefore, an authority in the United States that a wife has a cause of action for loss of consortium due to the negligent injury of her husband by the defendant. Whether this case and its reasoning will be followed in other jurisdictions, or whether the sheer weight of contrary precedents will prevail is a question for each jurisdiction to determine as the problem is raised.

Thomas J. Kelly

ANNULMENT PROCEEDINGS FOR FRAUD — SUFFICIENCY OF PROOF — HOW TO PROVE REFUSAL TO HAVE SEXUAL INTERCOURSE

In an annulment action based on the fradudulent implied promise to have normal sexual relations, plaintiff gave evidence as to all the essential elements of fraud and her son corroborated her as to certain admissions allegedly made by defendant. Husband contended that plaintiff failed to show "other satisfactory evidence" required by § 1143, N. Y. Civil Practice Act. Decree of annulment affirmed. *Held* (4-3): Husband's ignorance of conspicuous scars on wife's body sufficiently corroborated her claim of refusal to have normal relations. *DeBaillet-Latour* v. *DeBaillet-Latour,* 301 N. Y. 428, 94 N. E. 2d 715 (1950).

This decision presents a timely re-examination of a vital evidentiary factor in many annulment actions. Section 1143 of the Civil Practice Act provides that in an annulment action "the declarations or confessions of either party to the marriage is not alone sufficient as proof, but other satisfactory evidence of the facts must be produced." The statute is but a reiteration of a rule whose origin is in the ecclesiastical court of England. See *Davenbach* v. *Davenbach,* 5 Paige 554, 555, 28 Am Dec. 443 (N. Y. 1836); see also 2 BURN, ECCLESIASTICAL LAW 509; 1 PHILLIMORE, ECCLESIASTICAL LAW 640. In 1829 the New York Legislature embodied the rule in the Revised Statutes. Rev. Stat., Part 2, ch. 8, tit. 1, § 36. In 1880 the provision was adopted into the Code of Civil Procedure in § 1753. The present statute represents a repetition without change of that section.

Absence of corroboration is the second most frequently raised defect re-

lied upon in New York to guard against abuse of annulment procedure. See 48 COL. L. REV. 918, 919 (1948). Under this section, an annulment will not be granted in New York without evidence of the facts other than the declarations or confessions testified to by the plaintiff. *Broad* v. *Broad,* 40 N. Y. S. 2d 258 (Sup. Ct. 1943); *Johnscn* v. *Johnson,* 189 Misc. 131, 70 N. Y. S. 2d 493 (Sup. Ct. 1948). This provision applies both to contested and non-contested annulment proceedings as well as to declaratory judgment actions to declare marriages void. *Feig* v. *Feig,* 232 App. Div. 172, 249 N. Y. Supp. 95 (1st Dept. 1931); *Wilson* v. *Wilson,* 181 Misc. 941, 43 N. Y. S. 2d 526 (Sup. Ct. 1943). But see *Caleca* v. *Caleca,* — Misc. —, 101 N. Y. S. 2d 857, 858 (Sup. Ct. Jan. 1951), indicating that prior to the principal case § 1143 was not strictly observed in uncontested actions. The statute stands as a bar to possible imposition on the court, collusion and easy dissolution of marriages. *Fowler* v. *Fowler,* 29 Misc. 670, 672, 61 N. Y. Supp. 109 (Sup. Ct. 1899); *Labbate* v. *Labbate,* 189 Misc. 447, 451, 69 N. Y. S. 2d 867 (Sup. Ct. 1947); see 9 CARMODY ON NEW YORK PRACTICE, § 82.

Circumstances merely repelling suspicion of collusion or falsity do not necessarily furnish affirmative corroborative evidence which will satisfy the requirements of § 1143. Where fraud is involved the proof generally must be clear, definite and convincing. *Gabriel* v. *Gabriel,* 274 App. Div. 141, 143, 79 N. Y. S. 2d 823, 825 (1st Dept. 1948); 35 AM. JUR., MARRIAGE, § 88; 55 C. J. S., MARRIAGE, § 58(c); 3 NELSON, DIVORCE AND ANNULMENT (2d Ed.) § 31.64.

A letter written to plaintiff's attorney is at best a confession by one of the parties which is not enough to satisfy the section. *Hallock* v. *Hallock,* 62 N. Y. S. 2d 558 (Sup. Ct. 1946). However, clear distinct confessions, not collusive, corroborated by letters of the guilty party have been held sufficient. *Madge* v. *Madge,* 42 Hun. 524 (N. Y. 1886). Furthermore the corroborative evidence must not consist of a non-factual or cursory statement by an interested witness. *Nilsen* v. *Nilsen,* 66 N. Y. S. 2d 204 (Sup. Ct. 1946). Corroborative testimony by a parent, brother, sister or other close relative to prove the alleged imposition of fraud is regarded with suspicion by many courts. See *Gerwitz* v. *Gerwitz,* 66 N. Y. S. 2d 327 (Sup. Ct. 1945); *Hafner* v. *Hafner,* 66 N. Y. S. 2d 442 (Sup. Ct. 1946). There is some indication that conduct repugnant to federal statutory policy may act as a factor to be considered towards mitigation of the proof demanded. See *Rubman* v. *Rubman,* 140 Misc. 658, 212 N. Y. Supp. 474 (Sup. Ct. 1931) (marriage to plaintiff in order to evade United States Immigration Law quota).

The court has some discretion as to the amount and caliber of corroborative proof necessary, but has no discretion to override the statute and dispense with corroboration altogether. *Bentz* v. *Bentz,* 188 Misc. 86, 67 N. Y. S. 2d 345 (Sup. Ct. 1947); *Zoske* v. *Zoske,* 64 N. Y. S. 2d 819 (Sup. Ct. 1946). The amount and character of proof required is in an inverse ratio to the circum-

stances, probability and strength of the plaintiff's cause. See *Zoske* v. *Zoske, supra,* at 834.

In the principal case, the majority's interpretation of the statute directs the trier of facts to refuse an annulment unless he be able to recognize from sources, other than the declarations of the parties, factual material which substantially verifies the integrity of the action. The rule is converted from one of evidence to one for the guidance of the judicial conscience. See *Winston* v. *Winston,* 165 N. Y. 553, 59 N. E. 273, *aff'd,* 189 U. S. 506 (1901). Under this reading, appeals would be restricted to those cases in which appellant could show that the trial forum was unreasonable in believing or disbelieving the additional proof offered.

The opposite approach would require as a technical rule of law that each vital factor of the action be established by "other satisfactory evidence." This view indicates a formalistic approach and exhibits greater concern for the traditional interest of the state in the preservation of marriages. By this conception, a defendant-appellant would prevail by showing that the "other evidence" was insufficient to sustain the establishment of any one of the required elements of the action; an appealing plaintiff would be forced to show that the additional proof established each factor. See *Matter of Case,* 214 N. Y. 199, 108 N. E. 408 (1915); *Blum* v. *Fresh Grown Preserve Corp.,* 292 N. Y. 241, 54 N. E. 2d 809 (1944).

The instant case is indicative of a relaxed interpretation of the statute and the majority has construed § 1143 to require only that there be in the record, in addition to "declarations" or "confessions" of the parties, material from other sources, substantial and reliable enough to satisfy the conscience of the trier of the facts. The emphasis is apparently relaxed as to substantiation of the factors constituting the fraud when demonstrated proof has impugned the defendant's truthfulness. The result in this case is surely chargeable in part to the pressure of modern liberal attitude, regarding the sanctity of the marriage state, considered in light of New York's one-ground divorce law. But by highlighting the existence and force of the statute, the decision may serve rather, in a practical way, to raise the existing requirements for dissolution—at least in uncontested annulment actions. See *Caleca* v. *Caleca, supra,* and the comment of Referee Lapham in *Richardson* v. *Richardson,* 103 N. Y. S. 2d 219 (Sup. Ct. 1951): "Certainly it (the principal case) is serving the very useful purpose of stimulating the thinking of the Bench and Bar as to the exact meaning of § 1143."

Morree M. Levine

NEGLIGENCE — LAST CLEAR CHANCE HELD APPLICABLE THOUGH DEFENDANT'S DRIVER DID NOT SEE DECEDENT

Decedent and his brother hitched a ride on the side of defendant's truck