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CORBETT *v.* CORBETT (OTHERWISE ASHLEY)

1969 Nov. 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 26, 27, 28;
Dec. 1, 2, 8, 9;
1970 Feb. 2

Ormrod J.

Husband and Wife—Marriage—Capacity to marry—Woman—
B *Definition of—Wife registered as male at birth—Operation for amputation of male genitalia and provision of artificial vagina —Thereafter lived as female—Whether capable of being woman for purposes of marrying.*

Husband and Wife—Nullity—Consummation—Male wife—Biological male, registered as male at birth—Operation for amputation of male genitalia and provision of artificial vagina—
C *Thereafter lived as a female—Whether a woman for purposes of marriage—Whether capable of consummating marriage.*

Husband and Wife—Nullity—Decree—Declaration of nullity—Marriage void—Wife a biological male—Whether discretion in court to make declaratory order.

The petitioner and the respondent went through a ceremony of marriage in September, 1963. The petitioner knew that the respondent had been registered at birth as a male and
D had in 1960 undergone an operation for the removal of the testicles, most of the scrotum and the construction of an artificial vagina. Since that operation the respondent had lived as a woman. In December, 1963, 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 either incapacity or wilful refusal to consummate. The respondent in
E the answer prayed 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 or, alternatively, that, in the exercise of its discretionary jurisdiction to make declaratory orders under R.S.C. Ord. 15, the court ought to refuse to grant to the petitioner the declaration prayed for in his petition:—

F *Held*, (1) that marriage was essentially a relationship between man and woman, and that to determine sex for the purposes of marriage the law should adopt the chromosomal, gonadal and genital tests and if all three were congruent determine sex accordingly, ignoring any operative intervention; that, therefore, the respondent was not a woman for the purposes of marriage but was from birth and had remained at all times a biological male; and that, accordingly, the so-called
G marriage was void (post, p. 106B, D–E, F).

(2) That, assuming that the marriage was valid and that the respondent was to be deemed to be a woman, she was physically incapable of consummating a marriage as intercourse using the completely artificial cavity constructed could never be ordinary and complete intercourse (post, p. 107F–G).

Dicta of Dr. Lushington in *D—e* v. *A—g* (*falsely calling herself D—e*) (1845) 1 Rob.Eccl. 279, 297, 298, 299 applied.

H *S. Y.* v. *S. Y.* (*orse. W.*) [1963] P. 37; [1962] 3 W.L.R. 526; [1962] 3 All E.R. 55, C.A. distinguished.

(3) That a ceremony of marriage which was wholly ineffectual and void in law could not be rendered effectual

between the actual parties by some species of estoppel (post, p. 108G–H).

(4) That the case fell within the statutory jurisdiction of the High Court derived from section 2 of the Matrimonial Causes Act, 1857; and there was no discretion to withhold a decree of nullity (post, p. 109F, H).

Kassim (orse. Widmann) v. *Kassim (orse. Hassim)* *(Carl and Dickson cited)* [1962] P. 224; [1962] 3 W.L.R. 865; [1962] 3 All E.R. 426 applied.

Per curiam. 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 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 (post, p. 104D–E).

The following cases are referred to in the judgment:

Bateman v. *Bateman (orse. Harrison)* (1898) 78 L.T. 472.
Bruce v. *Burke* (1825) 2 Add. 471.
D—e v. *A—g (falsely calling herself D—e)* (1845) 1 Rob.Eccl. 279.
Dennis v. *Dennis* *(Spillett cited)* [1955] P. 153; [1955] 2 W.L.R. 817; [1955] 2 All E.R. 51, C.A.
Elliott v. *Gurr* (1812) 2 Phillim. 16.
Hayes (falsely called Watts) v. *Watts* (1819) 3 Phillim. 43.
Hayward v. *Hayward (orse. Prestwood)* [1961] P. 152; [1961] 2 W.L.R. 993; [1961] 1 All E.R. 236.
Kassim (orse. Widmann) v. *Kassim (orse. Hassim)* *(Carl and Dickson cited)* [1962] P. 224; [1962] 3 W.L.R. 865; [1962] 3 All E.R. 426.
S. Y. v. *S. Y. (orse. W.)* [1963] P. 37; [1962] 3 W.L.R. 526; [1962] 3 All E.R. 55, C.A.
Sapsford v. *Sapsford and Furtado* [1954] P. 394; [1954] 3 W.L.R. 34; [1954] 2 All E.R. 373.
W. (orse. K.) v. *W.* [1967] 1 W.L.R. 1554; [1967] 3 All E.R. 178.
Wilkins v. *Wilkins* [1896] P. 108, C.A.

The following additional cases were cited in argument:

Bullock v. *Bullock* [1960] 1 W.L.R. 975; [1960] 2 All E.R. 307, D.C.
Commonwealth v. *Lane* (1873) 113 Mass. 458.
Garthwaite v. *Garthwaite* [1964] P. 356; [1964] 2 W.L.R. 1108; [1964] 2 All E.R. 233, C.A.
Hyde v. *Hyde* (1866) L.R. 1 P. & D. 130.
Lindo v. *Belisario* (1795) 1 Hag.Con. 216.
Russian Commercial & Industrial Bank v. *British Bank for Foreign Trade Ltd.* [1921] 2 A.C. 438, H.L.(E.).
Square v. *Square (orse. Bewicke)* *Cowan Intervening* [1935] P. 120.
Talbot (orse. Poyntz) v. *Talbot* (1967) 111 S.J. 213.

PETITION.

Arthur Cameron Corbett petitioned for a declaration that the ceremony of marriage which took place in Gibraltar on September 10, 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. Alternatively, he petitioned 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 do so. The respondent, by answer, denied being of the male sex, denied any incapacity to consummate or any wilful refusal to consummate the marriage and cross prayed 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 fully stated in the judgment of Ormrod J.

James Comyn Q.C. and *Leonard Lewis Q.C.* for the respondent. In a case of inter-sex the person must be assigned a sex, and if when the matter reaches a court that person has been assigned a sex the court should accept that assignment. Manhood and womanhood is not decided on the presence or otherwise of a penis or other sexual organs. Sex is the sum of a number of things both external and internal and pertaining to both body and mind. Consideration must be given to hormonal make up, the person's psychological condition and chromosomal factors.

S. Y. v. *S. Y.* (*orse. W.*) [1963] P. 37 is very strongly relied upon and is binding on the court. No woman is obliged to disclose hidden defects to her husband before marriage. The decision of Brandon J. in *W.* (*orse. K.*) v. *W.* [1967] 1 W.L.R. 1554 is plainly wrong: in logic and in law, a judge must hold that a marriage has been consummated once he finds that there has been penetration. Otherwise, one gets to the point of having to decide what length of entry is too short. That would be an invidious and impossible task.

A man is not simply a penis and testicles. To say so would mean paying too much regard to the external characteristics of the male. The medical evidence establishes that the respondent was a case of inter-sex at the time of the operation and so was properly operated on. The differentiation between a man and a woman is the sum of all the biological factors which go to make up a man or a woman. It is superficial, dangerous and illogical to have regard simply to external genitalia. There has got to be very often in these cases an arbitrary decision made by the persons themselves and their medical advisers. The court cannot brush aside the fact that the respondent is a true case of inter-sex who has been allocated the female sex. If the respondent were an undetermined case of inter-sex the court would have the choice of which sex into which to put the respondent, but the many factors to be considered would weigh more heavily one way than the other. If a decision as to sex has been responsibly made by a doctor and his patient the court should give that decision due consideration.

This respondent is treated as a woman for every other legal purpose, for example, she is classed as a woman for National Insurance.

This is a new field and one must readjust one's thinking to the facts of the case. If on the day of the ceremony the court holds that the respondent was a man then the court has a discretion in the matter of granting

the declaration sought in the same way that the courts of the Queen's Bench Division have a discretion in declaration cases. If the petitioner persists in his plea for a declaration then the exercise of that discretion will arise and it should be exercised against him. He is an experienced man who left his wife and children for the respondent whom he pressed to marry him knowing all about her and overcoming all objections raised. Any discretion the court has in the present matter could not conceivably be operated in his favour. He is seeking to nullify a marriage which he freely entered into knowing all the relevant facts.

On the face of it there are immense illogicalities in saying that if the marriage is void estoppel can operate. In seeking to distinguish the case of *Hayward* v. *Hayward* (*orse. Prestwood*) [1961] P. 152 from the present case reliance is made on the observations of Lord Merriman P. in *Bullock* v. *Bullock* [1960] 1 W.L.R. 975, 979. In the present case there should be an estoppel by conduct. Nobody in the previous cases had in mind just such a case as the present one.

[ORMROD J. If all the court were being asked to do was to declare that a certain state of facts exists, there could be no possible question of estoppel.]

That is not correct as in the present case one can see just the case in which such a doctrine should be applied. In certain cases of prima facie void marriages, e.g., the present one, estoppel can operate. One must never forget that no one is obliged to come to court on a question of a void marriage. Justice would be done by deciding the whole case on the estoppel point alone. Alternatively, the ends of justice might be served by granting decrees of nullity to both parties on the ground of non-consummation.

The burden of proof is on the petitioner and he cannot be said to have discharged that burden.

Joseph Jackson Q.C. and *J. C. J. Tatham* for the petitioner. Once one has the basic facts disclosing what has happened in a case of this kind one has to establish to the satisfaction of the court that one has a marriage before going further. The first question to be answered, a unique one, is whether there is anything matrimonial about a ceremony between two men and whether it can have legal consequences. Can two male homosexuals (or lesbians) go through a ceremony of marriage and thereby create the legal consequences of a marriage? How they regard one another is irrelevant. The test for that purpose should not be a subjective one. [Reference was made to *Talbot* (*orse. Poyntz*) v. *Talbot* (1967) 111 S.J. 213.]

There are two essential ingredients of a marriage, first, there has to be a union expressed to be for life, and, secondly, it must be made between one man and one woman. It is axiomatic that a valid marriage must create the status of husband and wife and that a valid marriage can only be contracted between a man and a woman: see the classic definition of marriage by Lord Penzance in *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130, 133; *Lindo* v. *Belisario* (1795) 1 Hag.Con. 216, 230; and sections 44 (3) and 45 (1) of the Marriage Act 1949.

The petitioner's case is that the respondent was and is a castrated male who has a passage in the form of an artificial vagina constructed for him but who has not and never has had ovaries or a uterus. It is not a case of a woman with a rudimentary vagina where the passage can be enlarged so as to permit full penetration as envisaged in *S. Y.* v. *S. Y.* (*orse. W.*) [1963]

P. 37, because the vagina of the respondent in the present case is not even in the natural position and it is arguable whether it resembles a natural vagina and any observations in that case which refer to a wholly artificial vagina were obiter.

The fact that a defect is put in the classification of void marriages is not the end of it as it is a purely arbitrary matter. The principal defects resulting in void marriages are bigamy, affinity and consanguinity, nonage and third party consent. Those defects all possess one characteristic; taking the parties involved, one can see at once that the marriage could in certain circumstances be valid because in each case the two essentials are present. It is something extraneous and arbitrary, imposed by law, which prohibits there being a valid marriage. In this country we do not presume to say that every bigamous marriage cannot be valid under any circumstances; for example, a child of a polygamous marriage has long been regarded as legitimate. There is nothing fundamentally or inherently wrong in two persons contracting a bigamous marriage: we acknowledge and recognise bigamous marriages validly contracted elsewhere and call them polygamous.

Before 1835 affinity and consanguinity made marriages merely voidable not void. *Commonwealth* v. *Lane* (1873) 113 Mass. 458 shows quite clearly that it is a different matter from something which one would regard as fundamental and essential: e.g. countries holding different views recognise the right for nieces and uncles to marry elsewhere in the world.

Before 1929, when it was levelled out at 16 years, the minimum contracting age was 14 years for a boy and 12 years for a girl. So, it cannot be a fundamental matter if Parliament can so easily alter it. After 1822 lack of third party consent was no longer to be regarded as making a marriage void.

The marriage ceremony is merely a public way of recording that a marriage has taken place; it is not an essential ingredient. The present case lacks one of the essentials of marriage. If there is not one man and one woman the marriage ceremony cannot be matrimonial. It is simply an abuse of that ceremony and is a simulation of marriage falling short even of a void marriage, because the two persons involved could never marry under any system of law. This country should refuse to recognise any purported marriage of two men on the ground of public policy.

When there is a problem as to the sex of a party it seems absurd to look at the matter as at the date of the marriage. In the ordinary case, which this is, one must take the date of birth as the relevant date for investigation. By " ordinary " case is meant a case where the first three criteria of sex are all one way, i.e., excluding psychological factors. A woman is a person chromosomally XX with female gonads and whose apparent sex is feminine. It is accepted that external and internal genitalia must be of the utmost importance.

On the question of the re-amendment in the answer, the alleged estoppel, being by conduct, is based on lack of knowledge of relevant facts: see *Square* v. *Square* (*orse. Bewicke*) [1935] P. 120, 126. The matter could not be better put than by Phillimore J. in *Hayward* v. *Hayward* (*orse. Prestwood*) [1961] P. 152, 158. The respondent's knowledge of the relevant facts was and is far better than that of the petitioner. The basic defect

of the allegation of estoppel is that it is based on the validity of the marriage. As the matter does not come into the category of marriage because the respondent is not a woman, the question of an estoppel simply does not come into it. Knowledge cannot estop a man into being considered a woman.

All the three tests adumbrated in *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade Ltd.* [1921] 2 A.C. 438 are satisfied in the present case.

The present case is one of a petition in the first instance (but not in the alternative prayer) under the inherent jurisdiction of the court. Taking the facts of *Kassim* (*orse. Widmann*) v. *Kassim* [1962] P. 224, the present case is in line because there the court was dealing with a man and a woman and a union for life. There never has been a case of two men or two women marrying, but the ecclesiastical court would have had power to declare that it was a nothing. Whether one looks at the first prayer of the petition as a prayer for nullity or a prayer for declaratory relief, it is a prayer in any event in a matrimonial suit: see *Garthwaite* v. *Garthwaite* [1964] P. 356, 383. It is akin to a jactitation suit.

Cur. adv. vult.

February 2, 1970. ORMROD J. read the following judgment. The petitioner in this case, Arthur Cameron Corbett, prays, in the first place, for a declaration that a ceremony of marriage which took place in Gibraltar on September 10, 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 or had wilfully refused to consummate the marriage. In paragraph 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 incapacity or wilful refusal. In paragraph 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 Mr. Comyn, 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 upon 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 April 29, 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 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 June 5, 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. There 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 regularly taking the female sex hormone, oestrogen, to encourage the development of the breasts and of a feminine type of physique. At this 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 Dr. Burou who practised in Casablanca and who, on May 11, 1960, performed on the respondent 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

A 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 is 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 B this case. She described the respondent as having a "cavity which opened onto 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 to answer letters addressed to him by the respondent's solicitors. The respondent was almost as unhelpful. In evidence in chief, she said C that she thought she had a penis at the time when she was in the Merchant Navy. She 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 refused to answer either question and wept a little. It is a curious fact that in the further and D better particulars under paragraph 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. In so far as credibility is concerned, I do not think that it would be right to hold that these particular answers reflect adversely upon the respondent's credit generally because the E 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, F 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 con- G siderable 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 and after it was dissolved in 1962. He also described his sexual deviations. H 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 book shops, 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 into touch with the respondent and they met for the first time on November 19, 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 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 description 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 upon 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 other 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 that 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 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. 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 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 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 the 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 this time. In July, 1963, the petitioner took the first steps about a marriage. He consulted a lawyer in Gibraltar 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 Gibraltar 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 September 10, 1963, but the respondent continued to vacillate until the morning of September 10 when she suddenly agreed to go through with it, and they rushed off to Gibraltar. I think 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. 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 October 4, 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 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 October 12, 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 December 11, the respondent wrote a letter which is significant and throws some light on this strange situation and on her behaviour since the marriage. It shows, I think, that reality had broken in upon her and that she, quite understandably, could not face the intolerably false position into which they had got themselves. The letter reads as follows:

"December 11, 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 28 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 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 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 February 16, 1966, the respondent's solicitors issued an originating summons under section 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 section 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 May 18, 1967, filed his petition in this suit.

I now turn to the medical evidence and will begin by reading the report and the supplementary report of the medical inspectors to the court, Mr. Leslie Williams, F.R.C.S., F.R.C.O.G., and Miss Josephine Barnes, D.M., F.R.C.S., F.R.C.O.G.:

> "We, the undersigned, appointed by the High Court medical inspectors in the above cause, have this day, at 44 Wimpole Street, W.1., 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 urethral 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.
> May 22, 1968."

> "*Supplementary Report*
>
> April Corbett, the respondent, was examined at 44 Wimpole Street, London, W.1., on May 22, 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.
July 6, 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 October 31, 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, F.R.C.S.E., F.R.C.O.G., Professor of Obstetrics and Gynaecology at Queen Charlotte's Hospital; Professor Dent, M.D., F.R.S., F.R.C.P., Professor of Human Metabolism at University College Hospital, and Dr. J. B. Randell, M.D., F.R.C.P., D.P.M., 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, M.D., F.R.C.P., Consultant Physician at Newcastle Royal Infirmary, Professor Ivor Mills, F.R.C.P., 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 "Inter-sexuality 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. Professor 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 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 have 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 upon 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 patients' symptoms and to assist in the management of their disorder; it is not to change their 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)"

A 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 section 1 of the Sexual Offences Act 1967 seems to have removed any legal objections which B 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 in 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 C 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 trans- D sexual. Dr. Randell considered that the respondent is properly classified as "a male homosexual transsexualist." Professor Dewhurst agreed with this diagnosis and said that the description "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 E 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 F 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. In so far 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 G the other two doctors both of whom were exceptionally good witnesses. Of those 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 H expert evidence about the actiology or causation of transsexualism. Dr. Randell and Professor Roth regard it at present as a psychological disorder 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 hypothalmus, 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 these 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 (i.e., 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 purposes 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 physical 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 upon which the genes are carried which, in turn, are the mechanism by which hereditary characteristics are transmitted from parents to offspring. 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 chromosome 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 lead 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 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 upon 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 produce 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 a 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 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, i.e., the chromosomal sex and the gonadal sex do not correspond with the genital condition of the patient. But there is a difference of opinion as to 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' 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, a 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

A 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 May 22, 1953, she was suggesting that she should take female sex hormones to help her change her sex. Oestrogen can be obtained quite easily and without prescription. It was suggested that the absence of pigmentation
B 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
C 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
D 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 oestrogen. In my judgment, it would not be safe to draw any inferences
E 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
F 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
G can be attached to the results, particularly in a forensic as opposed to a 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.

H In my judgment, therefore, the factual basis for the diagnosis of 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 inter-sex on the basis of hormonal abnormality. A

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 any evidence of internal or external female sex organs and, therefore, to be of male genital sex; and B 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 C longer examination in the witness box it was much less so. The voice, manner, gestures and attitudes 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 D 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, E 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 F 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 the 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 G 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, H or national insurance, and not to regard her as a woman for the purposes of marriage. These submissions are very far-reaching and would lead to some surprising results in practice, but, before examining them in detail,

A 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 upon 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-
B plasty and its application to the treatment of male transsexuals, and the decision of the Court of Appeal in *S. Y.* v. *S. Y.* (*orse. W.*) [1963] P. 37, 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
C 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 reproductive system could be dealt with as cases of incapacity, and, therefore, it has not been necessary to
D 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 upon 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
E 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
F contractual relationships, e.g., 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
G 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
H is the institution on which the family is built, and in which the capacity for natural hetero-sexual 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*, 10th ed. (1969), p. 172; *Dennis* v. *Dennis* (*Spillett cited*) [1955] P. 153; and Sexual Offences Act 1956, ss. 1, 13.

Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon 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 paragraph 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 hetero-sexual 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, i.e., 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 the 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 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 September 10, 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 bizzare. 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 October 26, 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 upon 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*) (1845) Rob.Ecc. 279, 298, 299 as " ordinary and complete intercourse " or as " vera copula —of the natural sort of coitus." In my judgment, it is the reverse of ordinary, and in no sense 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 the Court of Appeal in *S. Y.* v. *S. Y.* (*orse. W.*) [1963] P. 37, 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, at p. 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.* (*orse. K.*) v. *W.* [1967] 1 W.L.R. 1554. The possibility mentioned by Willmer L.J., in his judgment in *S. Y.* v. *S. Y.* (*orse. W.*) [1963] P. 37, 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* [1954] P. 394.

The issue of approbation in relation to the prayer for relief on the ground of the respondent's incapacity, was raised by paragraph 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 re-amended 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* [1896] P. 108. 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* (*orse. Prestwood*) [1961] P. 152, 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 because in that case, as in this, 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 R.S.C., 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 the present case from *Kassim* (*orse. Widmann*) v. *Kassim* (*orse. Hassim*) (*Carl and Dickson cited*) [1962] P. 224, 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 section 2 of the Act of 1857. The ecclesiastical courts did in fact grant declaratory sentences in cases of "meretricious" marriages: *Elliott* v. *Gurr* (1812) 2 Phillim. 16. There is, in my judgment, no discretion to withold a decree in the exercise of this jurisdiction: *Hayes* (*falsely called Watts*) v. *Watts* (1819) 3 Phillim. 43; *Bruce* v. *Burke* (1825) 2 Add. 471 and *Bateman* v. *Bateman* (*orse. Harrison*) (1898) 78 L.T. 472.

If it had been a matter of discretion, under either the statutory

jurisdiction of this court or R.S.C., 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 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 September 10, 1963, between himself and the respondent was void ab initio.

Decree nulli.

Solicitors: *Fallons; Crossman, Block & Keith.*

C. N.

CORBETT *v.* CORBETT (ORSE. ASHLEY) (No. 2)

1970 May 4; 14 Ormrod J.

Legal Aid—Costs—Security for costs—Husband and wife—Nullity—Husband ordered to give security for costs—Wife legally aided—Husband having ample means—Discretion to order security for wife's costs—Legal Aid and Advice Act, 1949 (12 & 13 *Geo.* 6, *c.* 51), *s.* 1 (7) (*b*).[1]

The husband, who had petitioned for a decree of nullity, was granted a declaration that the marriage was null and void and of no effect. The wife's cross-prayer for a decree of nullity was dismissed. Prior to the hearing the husband, who resided abroad, had been ordered to pay into court £1,000 as security for costs. On cross-applications by the parties relating to the sum paid into court:—

Held, that the court had always had a discretion to order a husband to pay his wife's costs in matrimonial proceedings or to give security for them and section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, expressly provided that that discretion should be exercised even though a party to such proceedings had received legal aid (post, p. 117C–G); that the court should exercise that discretion so as to do substantial justice between the parties in the circumstances of each individual case and that as the husband had had to bear a greater burden of costs than was necessary it would be a severe hardship on him if he were ordered to pay a substantial sum towards the costs of the wife and he should not be ordered

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[Reported by MRS. HARRIET DUTTON, Barrister-at-Law.]

[1] Legal Aid and Advice Act, 1949, s. 1: "(7) . . . (*b*) the rights conferred by this part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."