1948 *Present :* **Basnayake and Gratiaen JJ.**

FERNANDO, Appellant, *and* PEIRIS, Respondent.

*S. C. 503—D. C. Kalutara, 26,282.*

*Nullity of marriage—Delay in bringing action—Three year rule—Discretion of Court—Proviso to section 602 of Civil Procedure Code.*

An action for nullity of marriage on the ground of latent impotency should not be instituted until the lapse of at least three years from marriage.

*Per Gratiaen J. (obiter) :* The proviso to section 602 of the Civil Procedure Code under which the Court can refuse a decree on grounds of unreasonable delay applies only to actions for divorce and not to actions for nullity of marriage.

[1] *(1926) A. C. 275.* [2] *(1884) 14 Q.B.D. 739.*

[3] *(1925) 1 K.B. 474.*

APPEAL from a judgment of the District Judge, Kalutara.

*N. K. Choksy, K.C.*, with *Kingsley Herat*, for plaintiff, appellant.

*N. E. Weerasooria, K.C.*, with *A. L. Jayasuriya* and *M. L. S. Jayasekere*, for defendant, respondent.

*Cur. adv. vult.*

September 27, 1948. GRATIAEN J.—

The plaintiff and the defendant were married on March 17, 1941. It was not a happy marriage. They lived together till June 2, 1946, on which date the defendant left the plaintiff after a quarrel. Each party claims in this action that the other has been guilty of malicious desertion. The learned District Judge has rightly decided that neither party has established malicious desertion. The only matter which remains for consideration is whether the learned Judge was also right in refusing the plaintiff a decree of nullity of marriage on the ground of the defendant's alleged incurable impotency at the date of the marriage. That an action for nullity lies in Ceylon on this ground is well established. (*Gunatileke v. M. Nona* (*1936*) *38 N. L. R. 291.*)

The effect of the evidence of the plaintiff, who is the wife, is that throughout the five years during which they lived together her husband the defendant made frequent attempts at sexual intercourse but that these attempts, through no fault of hers, invariably resulted only in incipient or imperfect *coitus*. It is not suggested that she is not *apta viro*. On the contrary, the husband's case is that he frequently had successful intercourse with her. It is common ground then between the parties that over a considerable period of time there were combined attempts at normal sexual intercourse. The only issue is whether the husband was unable to consummate the marriage in the sense that he failed successfully to achieve *vera copula*. It is well settled law that in nullity cases impotence is established if it is proved that one or other of the spouses is, to quote the judgment of Dr. Lushington in " *D. v. A.* " (*163*) *English Reports 1039.*, " incapable of a *vera copula*, or the natural sort of *coitus*." In such an event, the judgment continues, " if the spouse is not and cannot be made capable of more than an incipient, imperfect, and unnatural *coitus*, the marriage will be pronounced void . . . . No person ought to be reduced to this state of *quasi*-unnatural connection " This test has been consistently followed in nullity cases in England and was recently quoted with approval by the House of Lords in *Baxter v. Baxter* (*1948*) *A. C. 274.* It is a test which must commend itself to any tribunal which is called upon to decide these unhappy cases, and I have not been referred to any contrary opinion expressed by the Roman Dutch writers.

It is not necessary to examine the conflicting evidence of the spouses in very great detail. Suffice it to say that the plaintiff stated on oath that her husband " was never able to introduce his male organ into my private parts. After he got on top of me he used to behave as though

he was finishing off and got off." If this version is substantially true, it is obvious that the marriage has not been consummated. The husband's evidence on the contrary is that he frequently had complete intercourse with her, and he described in some detail how her hymen was ruptured on the wedding night. This evidence has been entirely disproved by Dr. Jayawardene, an impartial witness who examined the plaintiff in December, 1946, very nearly 6 years after the marriage was celebrated, and found her hymen intact. In view of Dr. Jayawardene's evidence, the defendant's evidence is demonstrably untrue, while the plaintiff's assertion that she is still *virgo intacta* is strongly corroborated. I am aware that Dr. Jayawardene admitted in cross-examination that there have been rare and exceptional cases where a woman's hymen remained intact after intercourse and penetration, but it was never suggested to him that the plaintiff's might possibly be one of these rare and exceptional cases. As Lord Birkenhead pointed out in similar circumstances in "*C. v. C.*" (*1921*) *P. 399 at 403* "the medical evidence, which is possibly consistent with the wife's evidence, and wholly inconsistent with the husband's, gives me the necessary guidance. *Her story may be true. His cannot be*".

On the evidence, I am satisfied that there was no *vera copula* between the plaintiff and the defendant at any period of their married life, and that the marriage has not been consummated. Has it been further established that this unhappy state of affairs is due to incurable impotence on the part of the defendant, in which event alone would the plaintiff be entitled to a decree of nullity? There is no imputation against the defendant of any incapacitating malformation. Nevertheless it has been proved that in spite of many attempts at intercourse the wife was still *virgo intacta* after over 5 years of cohabitation. In that state of things the Courts administering the English Law as well as the Roman-Dutch Law are agreed as to the inference to be drawn from the facts. A presumption of latent impotency is raised against the husband, and the onus lies on him to show by clear and satisfactory evidence that the non-consummation of the marriage by him was due to causes other than his impotency. ("*S. v. V*" (*1916*) *C. P. D. 109*). The defendant in this case has failed to discharge this onus, and in the circumstances the plaintiff is entitled to a decree of nullity of marriage. My decision does not of course involve any finding of general impotency against the defendant. All that need be established, and all that has been established in this case, is permanent and incurable incapacity *quoad hanc*. ("*C. v. C.*" (*1921*) *P. 399*), and not necessarily as far as all women are concerned.

The learned District Judge has expressed the view that the plaintiff is in any event precluded from claiming a decree against the defendant because of unreasonable delay on her part in instituting these proceedings for nullity of marriage. I cannot agree. Where the allegation against the husband is, as in the present case, one of latent impotency, the Courts would normally refuse a decree until at least three years of cohabitation without consummation. This "three year rule" which is followed by the English and South African Courts and also enjoys the authority of *Voet* (*24–2–15*) is not a rule of positive law but merely establishes a

presumption of impotence. ("*Hunt v. Hunt*" (*1940*) *W. L. D. 55* and "*G. v. M.*" *L. R. 10 Appeal Cases 171*). The plaintiff could not therefore in any event have instituted proceedings before 1944 with any reasonable hope of success.

This disposes of the question of "delay", but I desire to add that in my opinion the proviso to section 602 of the Civil Procedure Code, under which the Court can refuse a decree on grounds *inter alia* of "unreasonable delay", applies only to decrees for divorce *a vinculo matrimonii* and not to actions of nullity of marriage which are provided for by section 607 of the Code. In England delay, however long, in bringing a suit for nullity on the ground of impotence is not regarded as an absolute bar ("*L v. B*" (*1895*) *P. 274*), although it may prove want of sincerity, *i.e.*, such conduct as ought to estop the petitioner from the remedy asked for. Want of sincerity is established, and disentitles a party to relief, "where the party has, with a knowledge of the facts and of the law, approbated the marriage . . . . or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her . . . . to treat as if no such relation had ever existed." (*per* Lord Selbourne in "*G. v. M.*" (*1885*) *10 Appeal Cases 171 at page 186.*) The South African Courts have also granted decrees of nullity after very long delays in instituting proceedings when satisfied that want of sincerity has not been established.

I would set aside the judgment of the learned District Judge, and enter a decree declaring the marriage between the plaintiff and the defendant null and void on grounds of the defendant's permanent and incurable impotence.

The plaintiff is entitled to her costs in both Courts.

BASNAYAKE J.—I agree.

*Appeal allowed.*