1936 *Present :* **Akbar and Koch JJ.**

GUNATILEKE *v.* MILLE NONA.

40—D. C. Colombo, 51,097

Marriage—Action for nullity—Incurable impotency—Roman-Dutch law.

Under the Roman-Dutch law a marriage may be dissolved on the ground of incurable impotency in either party at the time of marriage.

APPEAL from a judgment of the District Judge of Colombo.

N. E. Weerasooria (with him *E. F. N. Gratiaen*), for plaintiff, appellant.

L. A. Rajapakse, for defendant, respondent.

Cur. adv. vult.

July 10, 1936. AKBAR J.—

The plaintiff sued his wife in this action for a decree of nullity of marriage on the ground that at the time of the solemnization of the marriage the defendant was incapable of entering into the contract of marriage by reason of an incurable impotency which made her incompetent to be a wife. Such an action could be brought under sections 596 and 607 of the Civil Procedure Code if the ground alleged would render the marriage void by the law applicable to Ceylon. An action of this kind would seem to be different to an action for divorce on the ground of incurable impotency under section 20 of Ordinance No. 19 of 1907 and hence the scope of that section need not be discussed by me in this judgment. As a matter of fact the plaintiff alleged an alternative ground of malicious desertion in his plaint, but this plea was abandoned by the plaintiff at the trial.

There can be no doubt that the Roman-Dutch law which applies to the parties in this case did recognize that a marriage could be dissolved if the party accused was incapable of procreation at the time of the marriage. This applied to the woman as well as to the man, and the incapacity to perform the sexual act or to procreate must exist at the time of the marriage and must be incurable. (See *Van Zyl's Judicial Practice of South Africa, pp. 523 and 524.*)

Van Zyl states that the English law upon the subject was copied from the Roman law and therefore English cases would appear to apply. In *L. v. L.*[1] a decree was entered for nullity of marriage on medical evidence that the woman was suffering from vaginismus or from a spasmodic affection of the parts which were extremely painful to touch, and that connexion was then impossible. A cure could however be effected if the lady would undergo an operation but this she refused to do. In *G. v. G.*[2] the House of Lords held that invalidity of marriage on the ground of the incapacity of the wife for its consummation was not confined to cases of structural incapacity but included a case where the woman was the victim of such an invincible repugnance to the physical act as to paralyse her will power. The ground alleged in this case is the same as in the two cases above quoted, namely, vaginismus. It is obvious that a case of this kind would depend to a great extent on corroborative evidence from medical

[1] *(1882) L. R. 7 Probate 16.* [2] *(1924) A. C. P. 349, also 40 Times Law Reports 322.*

men and there was such evidence in this case. In my opinion the learned District Judge came to a wrong conclusion on a question of fact when he dismissed plaintiff's case because he did not consider the true effect of the evidence of the two doctors nor did he give due weight to the circumstantial evidence in this case, which directly contradicts the defendant's evidence. As the dates are very material to this case, let me put them in order here, as they appear in the evidence. The marriage took place on March 14, 1932. Dr. W. F. H. Perera, a doctor who had served Government for 25 years and had retired, examined the plaintiff and the defendant in October, 1932, on the complaint of the husband that he was not able to have any sexual connexion with his wife. His evidence is perfectly clear that he examined the wife with her consent and that she was a virgin at that time, her hymen being intact. Although her genital organs were quite normal, she herself confessed to the doctor that she was not capable of allowing her husband to satisfy his sexual appetite. His further evidence was as follows :—

"But she said that she was not capable of allowing her husband to satisfy his sexual appetite. By that I mean to have natural intercourse. She was not able to have any sexual intercourse with her husband. She said that they both made efforts. The husband made the efforts. She had no desire whatever. She did not want any intercourse whatever. She said that it was because of a repulsion. I treated her for the discharge and at the same time for vaginismus. I considered it a case of vaginismus which is frigidity of the system. There was no malformation.

Q.—Is it correct to say that where a woman suffering from vaginismus by reason of some repulsion is unable to have intercourse with one man it does not necessarily mean that she cannot have intercourse with other persons ?

A.—Vaginismus is absolutely a nervous symptom. As a disease vaginismus can be cured. Vaginismus can be overcome if there is no repugnance to one individual. If that person takes a dislike to one individual there will be vaginismus. As long as there is that repulsion against that man she is physically unable to have intercourse ; even if she wished to have intercourse it would be a physical impossibility. She did not make any allegations against her husband to say that he was incapable of any such thing. I saw her three times within about a fortnight's time. I do not know whether the parties live behind my house. I gave a mixture for the discharge. I gave the husband some ordinary advice, if she finds any difficulty, such as lubricants, and try to excite her sexual instinct. He said it was a failure, in spite of my advice. I advised them to take a little discharge and examined in their presence to see if she had any venereal disease and she had not, and I advised them to consult a specialist. I suggested Dr. Lucian de Zilwa. I am quite sure that at the time I saw her she was a virgin ".

In the same year 1932, presumably on Dr. Perera's advice, the plaintiff and the defendant with their respective mothers saw Dr. de Zilwa. It is strange that Dr. de Zilwa although he examined the woman " as it was alleged that there was some impediment to intercourse " could not remember whether his examination revealed a rupture of the hymen.

On November 17, 1932, presumably after the visit to Dr. de Zilwa, the defendant presented a petition and an affidavit together with an affidavit from her husband, the plaintiff, praying for a nullity of marriage on the ground of sexual incapacity of the wife to perform the marriage owing to a malformation in her genital organs. Nothing further took place on this petition and the next step was a plaint filed by the plaintiff in person on November 25, 1932, alleging the same grounds and asking for a nullity of marriage. On this plaint being filed the District Judge ordered the production of a doctor's certificate to support the plaint. In February, 1933, the wife left her husband's house, and on July 20, 1933, plaintiff filed the plaint in this case through a Proctor asking for a nullity of marriage on the ground of the wife's incurable impotency at the time of the marriage. The learned District Judge again ordered the production of a doctor's certificate. On July 26, 1933, the defendant filed a maintenance case against her husband and on September 22, 1933, Dr. Perera gave evidence in that case testifying to his examination of the woman three times in October, 1932, and his treatment of her for vaginismus. At this stage a strange thing happened, the defendant and her mother again appeared before Dr. de Zilwa. Dr. de Zilwa stated that the patient and her mother told him that there was some impediment. He could not again recollect if the hymen was ruptured, although he said that he made a minute examination. "She had no vaginismus from my point of view." He further stated that he gave them a certificate that there was no physical impediment. Whether he was referring to the certificate dated October 27, 1933, signed by him and produced by the plaintiff to support his plaint in accordance with the trial Judge's order I cannot say, but in this certificate he stated as follows:—

"In order to justify dissolution of marriage on the ground of impotency the impediment to intercourse should be irremediable. It must have existed before the marriage, and have been entirely unknown to the party suing for the divorce. If the woman alleged to be impotent refuses to undergo treatment which might cure her the husband has a just claim to have the marriage dissolved.

"Impotence may be due to malformation or to 'frigidity of constitution'. In case of vaginismus treatment may sometimes cure the patient, but if the condition is due to feeling of repulsion against intercourse with a particular individual, no success would be obtained if the *psychical* antipathy were not overcome.

"In the present case, as in any other, it is impossible to say with certainty that treatment would cure the vaginismus. If the idea of intercourse with this particular man excites a feeling of disgust and repulsion, physical treatment will be unsuccessful. There might be no vaginismus, even without treatment, if intercourse were attempted by a man who excited her feelings and senses to attraction".

On September 22, 1933, the Police Magistrate fixed Rs. 15 per month as the maintenance payable by plaintiff in the maintenance case. On March 19, 1934, the defendant filed her answer, which merely traversed the plaintiff's averment that she was incapable of entering into the contract of marriage by reason of an incurable impotency. The case was fixed for trial and summons was issued on the two doctors. Dr. de Zilwa

was examined on November 27, 1934, and he testified to another strange occurrence. On the Saturday before he gave evidence, that is to say, November 24, 1934, the mother and the daughter again appeared before Dr. de Zilwa. He had already given his certificate on October 27, 1933, and had probably been summoned to give evidence on November 27, 1934, for the plaintiff, but instead of refusing to have anything further to do with either of the party in a matter which was *sub judice* he examined the defendant and found a laceration of the hymen which need not indicate sexual intercourse. He also listened to a statement from her that she and her husband had had sexual intercourse for several months after the marriage and that she was now living with her mother as she could not get on with her mother-in-law. The defendant and her mother have given evidence after this significant occurrence, that there was nothing abnormal about the defendant and that the husband and wife had had sexual intercourse freely and that the disagreement was due to the impossible conduct of the plaintiff's mother. This *volte-face* is directly opposed to Dr. Perera's evidence and the three visits to Dr. de Zilwa ; which must have cost these parties a considerable sum from their point of view owing to their admitted poverty. Nor does it explain why the defendant did not state this fact if it was a fact in her answer. Dr. Perera's evidence becomes of the utmost importance and yet the District Judge says nowhere that he disbelieves him.

He quite rightly said that Dr. de Zilwa was better qualified to express an opinion on a matter of this kind, but Dr. de Zilwa's evidence nowhere contradicts Dr. Perera's on the medical point. His certificate is clear enough and his own evidence when read as a whole is to the same effect. The following are extracts:—

"There is a spasm of the muscle by which intercourse is prevented.

Q.—As a result of some repulsion against a particular man ?

A.—It may be a particular male or it may be universal. It is possible for a person to suffer from vaginismus in respect of a particular male but not so with regard to others. It is really a physical condition producing a certain result when approached by the male. The patient would resist even the introduction of the finger. In the case of a person who only had this repulsion with regard to one particular male that position need not necessarily be as serious with others.

Q.—From all what you could have gathered from the examination last Saturday are you in a position to say whether she would be having any repulsion to any particular person?

A.—I cannot say. It is a physical condition. She may have had a repulsion to a particular individual which prevented intercourse. There is no physical condition that I could find out by examination.

Q.—You will not say now that she is suffering from any physical condition by which she could prevent intercourse with her husband ?

A.—I cannot say that. I am unable to say as a result of any examination whether the defendant is suffering from vaginismus in respect of her husband.

The District Judge was wrong in holding that on the first issue on the medical evidence the defendant was at no time incompetent to consummate her marriage with the plaintiff.

The District Judge was careful to say that he believed the defendant on one point, namely, that defendant left the house on February 27, 1933, because she was harassed by her mother-in-law. But this does not affect issues 1, 2, and 3 in this case.

I set aside the decree and allow the appeal with costs in this Court and the Court below. The case will go back for trial on the 7th issue. Costs of the further trial to be in the discretion of the trial Judge.

Appeal allowed.