[1988–90 Gib LR 227]

H. v. H.

COURT OF APPEAL (Spry, P., Fieldsend and Davis, JJ.A.): March 5th, 1990

Family Law—nullity—wilful refusal to consummate—delay between latest attempt to persuade spouse to consummate marriage and presenting petition not fatal if no change of heart shown by date of hearing—standard of proof no higher if parties have lived together as man and wife before marriage—husband to behave reasonably in attempting to persuade wife to have normal sexual relationship

The husband petitioned the Supreme Court for a decree of nullity of the marriage on the ground of his wife's wilful refusal to consummate it.

The husband and wife were married in March 1989. Before their marriage they had been living together for about three years, during which time the husband was still married to his previous wife; their sexual relationship, however, had ceased by consent about a year before the marriage, although they had continued to live together, sharing the same bed. Following the marriage, the husband repeatedly attempted to persuade the wife to consummate it. Following the last of these attempts, on May 4th, 1989, the couple had a discussion in which the wife made it clear that their sexual relationship would not re-start; she then left the matrimonial home, although they remained friends. The husband presented his petition on May 31st, 1989. The trial judge, refusing to grant a decree nisi of nullity, held that the facts did not show that the wife's refusal persisted up until the date of the presentation of the petition, and that the husband had adduced insufficient evidence that he had used the requisite tact and persuasion to attempt to consummate the marriage.

The husband submitted that (a) the evidence adduced showed clearly that the wife's refusal to consummate the marriage continued up until the presentation of the petition, as she had moved out of the matrimonial home and shown no change of heart; (b) some degree of delay between the respondent's refusal to consummate the marriage and the presentation of the petition was unavoidable as the petitioner had to take legal advice and allow time for the drafting of the petition; (c) the burden of proof of wilful refusal was no heavier to discharge when the couple had had sexual intercourse before marriage; and (d) he had behaved as a reasonable man would in attempting to persuade his wife to resume their sexual relationship.

Held, allowing the appeal and granting a decree nisi of nullity:

(1) While a wilful refusal to consummate the marriage had to persist up to the date of the presentation of the petition (and, indeed, the date of the hearing), this did not preclude any delay between the date of the last attempt to persuade the respondent to consummate the marriage and the presentation of the petition. Indeed, the practicalities of taking legal advice and of drafting and presenting a petition meant that some delay was inevitable; the delay of 27 days in the present case was not an unreasonable delay. The requirement was that the respondent show no possible change of heart between the last explicit refusal of sexual intercourse and the filing of the petition; the respondent's conduct in leaving—and staying away from—the matrimonial home showed clearly that her wilful refusal continued up to and beyond the date of the presentation of the petition (paras. 6–7).

(2) It was for the husband to behave as a reasonable man would in attempting to persuade his wife to return to a normal sexual relationship, and no evidence had been presented to suggest that he had not. In circumstances such as the present, where the parties had had sexual intercourse before marriage, it would be unrealistic to expect him to behave in the same way as the husband of a sexually-inexperienced woman who refused to consummate the marriage due to coyness, frigidity or nervousness. The burden of proving wilful refusal was no heavier to discharge in situations where the husband and wife had lived together and had a sexual relationship before marriage (paras. 8–9).

Cases cited:
(1) *Baxter* v. *Baxter*, [1947] 1 All E.R. 387; [1947] L.J.R. 785; (1947), 91 Sol. Jo. 220; 176 L.T. 368; 63 T.L.R. 169, *dicta* of Lord Greene, M.R. distinguished.
(2) *S.* v. *S. (orse. C.)*, [1956] P. 1; [1955] 2 W.L.R. 246; [1954] 3 All E.R. 736; (1954), 99 Sol. Jo. 80, explained.

E.C. Ellul for the appellant;
The respondent did not appear and was not represented.

1 **SPRY, P.,** delivering the judgment of the court: The appellant husband petitioned for a decree of nullity of marriage founded upon his wife's wilful refusal to consummate their marriage. The respondent did not defend the proceedings and the hearing was unopposed.

2 The learned trial judge refused to grant a decree nisi on two grounds, namely, (a) that the facts did not show that the wife's refusal persisted up to the date of the presentation of the petition; and (b) that there was insufficient evidence adduced that the husband had used such tact and persuasion as was required in the circumstances. It is against this decision that the appellant now appeals.

3 The facts are somewhat unusual. The husband had previously been

married to another woman, but during the subsistence of that marriage he had for about three years lived with the respondent. That marriage was dissolved on March 7th, 1989, and on March 8th the present parties were married.

4 The parties had lived happily together in the full sense of those words at the beginning of their relationship, but the delay in the divorce proceedings apparently created some cooling off of their relationship. For about a year before March 8th there had, apparently by consent, been no sexual intercourse between them, although they had shared the same bed and remained good friends.

5 On the night of the marriage, the appellant approached the respondent to consummate the marriage, but she declined, making an excuse. From then on until May 4th, he continued to try to persuade his wife, but without success. He had hoped that once they were married their relationship would improve and that they would be able to have a family. Matters came to a head on May 4th, 1989, when the appellant made his last attempt to persuade the respondent to accept his approaches. Her refusal on this occasion and the discussion which followed it made it clear to the appellant that despite his wishes the respondent would not consummate the marriage. She then left the matrimonial home, since when they have not lived together in any sense of those words although they are still friends. The appellant presented his petition on May 31st, 1989.

6 As to the learned judge's first ground for refusing relief, it is, of course, right that a wilful refusal must persist up to the date of the presentation of the petition and indeed up to the date of the hearing. But that does not mean that there cannot be a delay between the date of the last attempt to consummate the marriage and the date of the presentation of the petition. Indeed, of necessity there must always in practice be a delay to allow at least time for consulting a solicitor and for the drafting, signing and filing of a petition. The interval here of 27 days cannot be said to be unreasonable. On the facts, too, it seems to us that the respondent's conduct in leaving the matrimonial home as she did on May 4th and in staying away showed clearly that her wilful refusal continued up to and beyond May 31st.

7 The learned judge relied on a passage from *S.* v. *S. (orse. C.)* (2), a case which arose out of very different facts; with respect, we think that he misinterpreted it. We do not think that it means that a petition must be lodged immediately after an explicit refusal. What we think it means is that between an explicit refusal and the filing of the petition there must have been no indication of any possible change of heart.

8 As regards the second ground on which relief was refused, the learned judge relied on a passage in *Baxter* v. *Baxter* (1) ([1947] 1 All E.R. at 388), in which Lord Greene, M.R., after saying that what will amount to

wilful refusal depends on the facts of the case, went on to refer to the hypothetical case of a wife who, "through coyness, frigidity or nervousness," refuses to allow intercourse. The present case is totally different. Here, the parties had lived together for three years as if they had been man and wife, with a happy sexual relationship for at least the first year, deteriorating with the frustration of their intended marriage being delayed by difficulties he experienced in obtaining his divorce. They had had no sexual intercourse in the third year. It was a strange relationship in which to enter matrimony. It was, of course, for the husband to behave as a reasonable man would to persuade his wife to return to a sexual relationship and there is nothing in the record to suggest that he did not so behave.

9 It would be unrealistic to expect him to behave like the husband of a young and sexually-inexperienced girl. The learned judge suggested that the burden of proof of wilful refusal might be heavier to discharge when the parties had had sexual intercourse before marriage, but at least where cases such as this are concerned, we cannot agree. For these reasons, we set aside the judgment and substitute a decree nisi of nullity.

Judgment set aside; decree nisi of nullity granted.