

1983 August 9

[A. LOIZOU, J.]

SOCRATIS M. SOCRATOUS,

Petitioner,

v.

LINDA MARY EDWARDS,

Respondent.

(*Matrimonial Petition No. 6/83*).

Matrimonial causes—Nullity of marriage—Wilful refusal to consummate the marriage—Principles applicable.

Matrimonial causes—Practice—Petition for nullity on the ground of wilful refusal to consummate the marriage—Appropriate relief is a decree of nullity and not a declaratory judgment. 5

This was a husband's petition for a decree of nullity on the ground that the respondent wilfully refused to consummate the marriage. Following their marriage the parties went home when the respondent burst into tears refusing to consummate the marriage giving as a reason that she had made a mistake to go through it and that she was still in love with another man with whom she had a bond before meeting the petitioner and which was interrupted some three months before the marriage. Two days later the petitioner visited her once more, accompanied this time by the sister of his brother-in-law Maria Evripidhou, a Cypriot born in London, who was chosen as she knew her beforehand and she hoped, that as a woman she might persuade her to change her mind, but again they left without success. The petitioner then returned to Cyprus and the marriage has not been consummated ever since. 10 15 20

Held, that the consummation must be proposed to the refusing party with such tact, persuasion and encouragement as an ordinary spouse would use in such circumstances and the refusal must connote a settled and definite decision arrived at without just excuse, but no question of the mode of the persuasion arises 25

in this case as the respondent flatly refused any contact whatsoever with the petitioner, which refusal imported that the thing refused was proposed to her and her refusal implied a conscious act of volition; that, however, wilful refusal must proceed up to the date of the presentation of the petition and this is the situation in the present case and no doubt the burden of proof of wilful refusal to consummate the marriage is on the petitioner; that the petitioner has proved his case and accordingly he will be granted a decree of nullity nisi.

Held, further, that in cases such as the present one, which is a petition for nullity on the ground of wilful refusal to consummate the marriage, the appropriate relief is a decree of nullity and not a declaratory judgment, in spite of the wording of the prayer for relief.

Decree of nullity nisi granted.

Cases referred to:

Alexandrou v. Andreou (1963) 2 C.L.R. 488;

HjiJovanni v. HjiJovanni (1969) 1 C.L.R. 207;

Nahhas v. Nahhas (1982) 1 C.L.R. 126.

20 **Matrimonial petition.**

Petition by the husband for a decree of nullity on the ground of the wilful refusal of the wife to consummate the marriage.

E. Lemonaris, for the petitioner.

Respondent absent.

25 A. LOIZOU J. gave the following judgment. This is a husband's petition for a decree of nullity on the ground that the respondent wilfully refused to consummate the marriage. The respondent-wife, though duly served, failed to enter an appearance and defend the proceedings.

30 The petitioner, a Cypriot national domiciled in Cyprus - hence the jurisdiction of this Court - (see Rayden on Divorce, 8th Ed., p. 50), was married to the respondent on the 13th January, 1982, at the Registry Office of Liverpool in the United Kingdom. After their marriage they went home when the
35 respondent burst into tears, refused to consummate the marriage

giving as a reason that she had made a mistake to go through it and that she was still in love with another man with whom she had a bond before meeting the petitioner and which was interrupted some three months before the marriage. She asked the petitioner to leave her flat which was intended to be used as the conjugal home at the time and as his efforts to persuade her to change her mind failed, he left in order to return and make her change her mind the following day. She insisted, however, on her stand that she intended to go back to the man with whom she had broken temporary her relations and with whom she was still in love. 5 10

Two days later the petitioner visited her once more, accompanied this time by the sister of his brother-in-law Maria Evripidou, a Cypriot born in London, who was chosen as she knew her beforehand and she hoped, she stated in Court, that as a woman she might persuade her to change her mind, but again they left without success. The petitioner then returned to Cyprus and the marriage has not been consummated ever since 15

The wilful refusal to consummate a marriage is a ground that renders the marriage null. Section 8(1) of The Matrimonial Causes Act 1950 provides: 20

“In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground - 25

- (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage.”

The consummation must be proposed to the refusing party with such tact, persuasion and encouragement as an ordinary spouse would use in such circumstances and the refusal must connote a settled and definite decision arrived at without just excuse, but no question of the mode of the persuasion arises in this case as the respondent flatly refused any contact whatsoever with the petitioner, which refusal imported that the thing refused was proposed to her and her refusal implied a conscious act of volition. However, wilful refusal must proceed up to the date of the presentation of the petition and this is the situation in the present case and no doubt the burden of proof of wilful 30 35

refusal to consummate marriage is on the petitioner (See *Papa Alexandrou v. Andreou* (1963) 2 C.L.R., p.488; *HjiJovanni v. HjiJovanni* (1969) 1 C.L.R., 207; see also *Nahhas v. Nahhas* (1982) 1 C.L.R., p. 126, and Rayden on Divorce (supra) p.116).

5 The prayer for relief in this petition is as follows:

“(A) That his (the petitioner’s) said marriage may be declared void and dissolved on the ground that the respondent wilfully refused to consummate the marriage, and

10 (B) That the respondent does pay the petitioner’s costs of and incidental to these proceedings, and

(C) That the petitioner may have such further and other relief as may be just.”

This petition has been prepared along the same lines as the
 15 prayer of the precedent for a husband’s petition for nullity on the ground of wilful refusal to consummate, which is set out in Rayden on Divorce (supra) at p. 1470. The question, however, that arises in such cases is whether a declaratory judgment should be given or whether a decree of nullity nisi is the best
 20 course. As stated in Rayden on Divorce (supra) at p.612, if the case of the petitioner for dissolution of marriage is found proved and the Court is satisfied that there is no absolute or other bar to relief, the Court must pronounce a decree nisi as provided by section 12(1) of the Matrimonial Causes Act
 25 (1950), p.1182, which provides:

“Every decree for a divorce or for nullity of marriage shall, in the first instance, be a decree nisi not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the Court by general or special
 30 order from time to time fixes a shorter time.”

In cases such as the present one, which is a petition for nullity on the ground of wilful refusal to consummate the marriage, the appropriate relief is a decree of nullity and not a declaratory judgment, in spite of the wording of the prayer for relief to be
 35 found in the petition which follows and adopts the precedent hereinabove referred to. It is true that under section 41 of the Courts of Justice Law 1960 (Law No. 14 of 1960) and Order 27, rule 4, of our Civil Procedure Rules, which corresponds to the

old English Order 25, rule 5 (Annual Practice 1958), now Order 15, rule 16 (Annual Practice 1982), no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right where any consequential relief is or could be claimed or not. This provision has been the subject of judicial interpretation in a number of cases which I need not discuss here, nor do I intend to embark on an exposition of the law regarding the differences between a nullity decree and a declaratory judgment which are dealt at length by references to decided cases in legal textbooks, such as, Cheshire and North, "Private International Law", 4th Ed., p.423; P. M. North, "The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland", 1977, at pp. 67 and 86; Webb & Bevan, "Source Book of Family Law", 1964, p.195, and also expounded in an article by P. M. North in 1965, Vol.14, "International Comparative Law - Quarterly", p. 579.

It is enough, however, to stress that in the case of a nullity decree, the Court has power on the granting of such a decree to make various ancillary orders, such as, maintenance or custody orders, whereas once a declaratory judgment has been given, the Court is *functus officii* and can grant no other relief.

In view of the above, I grant to the petitioner a decree of nullity nisi on the ground of the wilful refusal of the respondent to consummate the marriage but there will be no order as to costs as none have been claimed.

Decree nisi granted. No order as to costs.