uplift the proceeds of the investments, the right of succession being to a Scotsman would have to be determined by Scots law. This is probably a difficult question that may have to be considered in some other case. In view, however, of the decision of the First Division in *Connell's Trustees* v. *Connell's Trustees* (13 R. 1175), I do not think that we could, without remitting the case to a larger Court, give effect to the contention of the next-of-kin. I agree, however, that Government Stock is in a special position and that it ought not to be treated in any different way from the Scots investments of the testator. This is what was done in *Drysdale's Trustees* v. *Drysdale* (1922 S.C. 741). Although no argument founded upon English law was advanced in that case, I have no doubt that the reason for this was, that the eminent counsel whose interest it was to plead the difference between English and Scots law, were satisfied that no argument based upon such distinction could be usefully presented to the Court. In my opinion the questions should be answered as proposed by Lord Ormidale.

LORD ANDERSON and the LORD JUSTICE-CLERK concurred.

The Court answered the questions of law as follows:—"A (1) sub-head (*a*) in the affirmative and sub-head (*b*) in the negative; (2) sub-head (*a*) in the negative, sub-head (*b*) in the affirmative, and sub-head (*c*) in the negative. B (1) in the affirmative and (2) in the negative. C (1) in the affirmative and (2) in the negative."

Counsel for the First Parties — G. R. Thomson. Agents — Bonar, Hunter, & Johnstone, W.S.

Counsel for the Second Party — Chree, K.C.—Morison. Agents—Scott & Glover, W.S.

Counsel for the Third Parties—Mackay, K.C.—Cooper. Agents — Dove, Lockhart, & Smart, S.S.C.

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# HOUSE OF LORDS.

*Friday, February* 8.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

G. *v.* G.

(In the Court of Session, December 7, 1922, 1923 S.C. 175, 60 S.L.R. 125.)

*Husband and Wife—Nullity of Marriage—Refusal of Connection by Wife—Inference—Incapacity.*

A woman, as a condition of her marriage, stipulated that for the first year after the marriage there should be no sexual intercourse, and her intended husband consented to the condition. The parties were married on 5th November 1913, the husband being then 29 years old and the wife 34. On the 16th November they went to India where they lived together till April 1914. During this period no intercourse was attempted, the bargain of abstention being kept by the husband. In April 1914 the wife returned to Scotland with her husband's consent. She rejoined her husband in India on 16th December 1914, and the parties again lived together in India till September 1915. During this period the wife, in spite of the fact that the period during which there was to be no sexual intercourse had expired, refused to consummate the marriage though the husband made repeated efforts to do so. In September 1915 the wife returned home to undergo an operation for appendicitis. The husband thereafter was called up for military service, and during the next five years the spouses were never together. In September 1920 the husband was released from military duties and rejoined his wife in Scotland on 13th November of that year when they came together at the house of the husband's father in Perth, sharing the same bed from the 15th to the 20th. During the period from the 15th to the 20th the husband again attempted to have intercourse, but his efforts were repulsed. On 20th November the wife left for Glasgow and thereafter the parties did not meet again. On 14th April 1921, after the marriage had subsisted for upwards of eight years, during which however, owing to war conditions and other reasons, there were only the three periods referred to of five months, nine months, and one week, during which the spouses lived together, the husband raised an action of nullity of marriage against the wife on the ground that she was incapable of consummating the marriage. Alternatively he asked for divorce on the ground of desertion, the desertion being qualified as a wilful and malicious refusal of carnal intercourse. There was no structural incapacity on the part of the wife, and it was not disputed that the husband was *vir potens*.

*Held* (*reversing* the judgment of the Second Division, Lord Anderson *dissenting*) that the inference from the facts was that the wife's refusal of sexual intercourse was due, not to wilfulness, but to incapacity on her part to consummate the marriage, arising from her invincible repugnance to the sexual act, and that accordingly decree of nullity fell to be granted.

A B *v.* C B, March 13, 1906, 8 F. 603, 43 S.L.R. 411 *approved*.

The case is reported *ante ut supra*.

The pursuer appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN — The pursuer in this case, Mr Graham, sues his wife Mrs Graham, asking for a declaration of nullity of the marriage on the ground of impotency, and alternatively for divorce upon the

ground of desertion, the desertion being qualified as a wilful and malicious refusal of carnal intercourse. The case was defended by the defender, who denied impotency, and contended that there was no relevant averment of desertion. The Lord Ordinary, after proof led, dismissed the action, and to this interlocutor the Second Division of the Court of Session adhered, one Judge dissenting and considering that decree of nullity ought to be pronounced.

A skeleton outline of the married life of the parties is as follows. They were married on the 5th November 1913 in Glasgow. On the 16th November they went to India where they lived together till April 1914. In that month the wife returned to Scotland to be present at the jubilee of her father, who was a minister of the United Free Church in Glasgow. She returned to India on the 16th December 1914, and the parties again lived together in India at Nagpur till September 1915. Then the wife returned to Scotland to undergo an operation for appendicitis. She did not return to India. The husband was called up for military service and sent to Mesopotamia, and he was not free till September 1920. He reached Perth, Scotland, on the 13th September 1920. The parties did not occupy the same house till the 13th November 1920, when they came together at the house of the husband's father in Perth. On the 20th November the wife went to Glasgow and since then the parties have not met. The present action was raised on the 14th April 1921.

In the case of *A B* v. *C B* in 1906 (8 F. page 603), while sitting as Lord President of the Court of Session, I had occasion to lay down what I considered the law of Scotland on the matter with which we have here to deal. Neither of the learned counsel who addressed your Lordships, and who on each side conducted this case with great carefulness and ability, attacked the statement of the law I then made, but as the matter has, so far as I know, never been actually dealt with in your Lordships' house, and as I still remain of the opinion then expressed, I think it advisable to repeat part of what I then said—"It has long ago been settled that impotency on the part of one spouse at the time of the marriage continuing thenceforth is a ground for the avoidance of the marriage at the instance of the other, which will be given effect to unless there is a personal bar to be drawn from the solemnisation of marriage in the knowledge of both parties of the defect, or to be inferred from the extreme age at which the marriage is contracted. Further, it is now well settled that a person is in law impotent who is *incapax copulandi*, apart from the question of whether he or she is *incapax procreandi*. The only difficulty, therefore, that arises is in the proof—a proof as to which the Court is bound to be satisfied, lest marriages should be avoided either by collusion or in cases where the fact that there has been no copulation is due to wilful refusal."

After pointing out that the cases are rare where in the case of the woman structural incapacity could be proved, I proceed to say that the question still undecided by this Court is "whether incapacity in the woman is to be confined to those cases, admittedly rare, where there is what has been termed structural incapacity." I continue—"I see no reason so to confine it, and I am content to adopt in terms the words of a very great authority on such subjects, the late Lord Penzance, in the case of *G.* v. *G.* He said—'The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted, but the basis of the interference of the Court is not the structural defect but the impracticability of consummation.'"

The learned Lord Justice-Clerk in this case has commented upon the use of the word "impracticability" as ambiguous. With great deference, he has missed the point of Lord Penzance's observation; he was speaking of structural incapacity on the part of the wife. The impracticability, therefore, that he was speaking of was impracticability from the point of view of the wife, not from the point of view of the husband, and therefore it is quite obvious that the use of the word excludes and does not admit, as he thinks, of the alternative of wilful refusal. I further quote with approval language which I borrowed from Sir Francis Jeune in the case of *F.* v. *P*: "that if it be satisfactorily proved that repeated endeavours of a potent husband, who has tried all means short of force, had been uniformly unsuccessful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife."

The wife here submitted herself for examination, and was examined by Dr Haig Ferguson, an eminent gynæcologist in Edinburgh. We have his report and it affirms that there is no structural incapacity in this lady's case which would prevent the consummation of the marriage. Further, it is not matter of controversy between the parties, first, that there is no want of potency on the part of the husband, and secondly, that there never has been actual consummation of the marriage.

In the case of *A B* v. *C B*, where decree of nullity was granted, I summarise the facts that I held as found as follows—"(1) That the marriage never was actually consummated. (2) That the husband was able and anxious to consummate, and had more than sufficient opportunities, free from any circumstances of a disturbing nature, either mental or physical. (3) That, short of physical force, he adopted all ordinary expedients to induce the wife to admit connection. (4) That no reason whatever is suggested for a wilful refusal on the part of the wife, and that the whole probabilities of the case point to an opposite conclusion."

The first three apply to this case. The real question arises on the fourth. The

facts of the case in *A B* v. *C B*, however, provide no assistance; the facts are not fully set forth in the report, but I have procured the Session papers in the case and after a perusal of them I arrive at the following conclusion. The wife defended, but after the husband (the pursuer) had been examined she made an offer through her counsel to adhere to and fulfil her conjugal duties. This offer was accepted by the husband and the case sisted till a date fixed to allow the parties to come together. Just before that date the husband presented a note to the Court setting forth that the wife had still failed and asking a further extension of the sist. The wife's counsel was instructed to oppose the motion and to ask the Lord Ordinary to fix a date for the continued proof. The Lord Ordinary accordingly fixed a date for the continuation of the proof. When the day arrived the wife's counsel said that he was instructed to watch the case, but that he would take no further part in it and lead no evidence. In these circumstances I think it can hardly be doubted that the fourth conclusion at which I arrived was well founded, but it is equally clear that the facts of that case give no help by way of analogy to the facts of this.

To determine, as we have to do, whether we are entitled to draw the inference that refusal has been due to incapacity and not merely to wilfulness is obviously a matter of delicacy and difficulty. None the less the difficulty must be faced and a determination come to according to the view that we take of the evidence. It necessitates, however, a somewhat minute examination of the married life of the parties, and I make no apology for having to bring before your Lordships the history in very considerable detail.

The witnesses examined for the husband were himself, his mother, and Dr Haig Ferguson. On the part of the wife only she herself was examined. As will be gathered from the skeleton account already given, that life divides itself naturally into four periods—(1) the period from the marriage in November 1913 till the wife went to Scotland in April 1914, during which they were together; (2) the period from April 1914, when they were apart till she returned to India in December 1914, on till September 1915, when she again left for Scotland; (3) the period from September 1915 till September 1920, during which they were apart; and lastly, the period extending from September 1920, when they met and were together at Perth for a week when she left, up to the date of the action. During all these periods of separation they corresponded, and there has been produced the correspondence so far as extant. It is not at all complete, but it provides a valuable commentary on the attitude of the parties. I shall deal with each of these periods in turn.

*First Period.*—The parties had previously met and made acquaintance in India, but the engagement was only arranged in October, about a month before the gentleman was bound to return to India. The wife explains that she was unwilling to enter into a hasty marriage, but gave way to his entreaties that they should be married so that she might accompany him to India. She had views on marriage which may be characterised as unusual without employing a more forceable term. To quote her own words—"My idea of marriage had been for a good many years something which was rather different to the sort of what is called physical union. I had a feeling that it ought to be a spiritual union first of all, and I intended that that sort of thing should grow in the time of our acquaintanceship in our living together before the physical side was developed."

In pursuance of these views she had a talk with her intended husband on or about the 1st November, in which she asked him to consent that there should be for some time no physical union between them. As to the duration of this arrangement the parties gave different accounts. He says that it was to be for one year certain. She says it was to be for "a year or two," which expression she interprets as meaning for one year and for something more, with an absolute limit of two years. Quoting again her own words, "he unwillingly consented to this condition." He says that there was no alternative between consenting and putting off the marriage, and that therefore he chose the former alternative. Having consented he kept his bargain, and it is common ground that for the first year, or in other words, for that part of the first year during which they were together—that is, from the marriage in November 1913 till April 1914—he although he occasionally got into bed with his wife in India, where they had two beds, not only did not have connection with her but made no attempt at doing so. He does not seem to have complained of the undertaking he had assumed. This ends the first period.

*Second Period.*—No correspondence has been produced covering the time when she left India in April 1914 till she returned in December 1914. The parties met at Bombay and stayed two nights in a hotel. They had a double bed which they occupied together. By this time the year which he said was the duration of the pact of abstention was out. Accordingly he depones that he at once tried to effect connection with her but was repulsed. On arriving at Nagpur, which was their home, they had separate beds, but he depones that on many occasions he left his own bed, entered that of his wife and attempted to have connection with her, but always without success. This continued during the whole period of residence at Nagpur till June 1915, when she had a threatening of appendicitis, and thereafter he desisted till she left for Scotland to be operated on in September. I do not think it is necessary that I should quote to your Lordships the exact terms in which he described his various attempts. It is sufficient to say that they were animated by such excitement of desire on his part as to entail on occasion *ejaculatio ante portam*, and conducted in such a manner as to leave no possible doubt as to his object. I would not have said so much had it not been that

the learned Judges in the Court below threw a doubt on whether these attempts were characterised by what they term a sufficient virility. It is indeed permissible to wish that some gentle violence had been employed. If there had been it would either have resulted in success or would have precipitated a crisis so decided as to have made our task a comparatively easy one. But the husband's answer to the complaint that he did not so act when put to him in cross-examination is that he was very anxious to awaken the sexual instinct, that he had found her on many occasions hysterical and tearful, and that he felt that any attempt with even mild and gentle force would only hinder and not help the end which he desired. Such a course of conduct may have been mistaken but it cannot be disregarded, or, I think, characterised as either want of eagerness or of determination on his part. The lady's account of what happened is somewhat peculiar. She began by saying that she was quite unaware of any advances made by him at Bombay, yet when it was put to her whether the husband's evidence as to the advances he made were true she replied—"Generally, I suppose it is true." In cross-examination she denies the frequency of the attempts but admits that there were attempts. When a particular method of effort is put to her she replies—"It is quite possible really; he says he had, so I suppose he did," and finally, asked whether on each and every occasion she resisted his attempts, she answers "Yes." It was suggested by her counsel and partly put to her—I say partly because the question referred rather to the first meeting at Bombay than to the further period—that her resistance was due to the fact that she contended that the pact was still in force. If that had been the real reason, I think it is inconceivable that she would not have met his attempts by a protest to that effect, but no word of protest was ever according to her own testimony uttered. It is put as a point against him that all these attempts appear to have been made in dumb show without a spoken word either of entreaty or expostulation. The fact is certainly peculiar, yet it is not out of keeping with the explanation already given as to why he did not use a little more force than he did. But though silent in the bedchamber they were not altogether silent on the topic concerned. Both concur in saying that there was a very earnest and prolonged discussion on the subject on or about March 1915, in Nagpur. This is so very important that I quote the account as given by each. By the husband —"(Q) What happened at the talk in March 1915?—(A) Well, the position was too much really for me, it was affecting me, and I thought that the best thing—as I had had no success by suggestion and action—was to talk the matter over. I began the conversation. During the course of that conversation I put it to the defender that in my opinion we were not properly married until the marriage had been consummated. I think I used the word 'legally'—that we had not been legally married until the marriage had been consummated. Well, we talked for about an hour on the question, and the defender said that she wanted the relations to continue as they had been during the first year. She took up a position with regard to the question of whether we were truly married or not; she argued that we were truly married—legally married. I asked her to agree to have intercourse; that was the whole point of the argument and was what I asked her. Her answer was that she did not want to have connection and that we were married.' And by the wife—"It is true that some time in March 1915 he had a discussion with me about my attitude towards this condition. In that discussion the pursuer referred to the question of whether, in view of my actions, we were legally married people. He said we were not. I differed from him, perhaps from ignorance, but I thought we were married. (Q) Did he emphasise the aspect of duty in this matter?—(A) Yes, very much so. That emphasis affected me rather badly because it was not at all my idea at the start; it may be duty, and I admit it is duty, but it was not from that point of view that I intended to enter into that closest of relations. I would have been very much more easily affected by an appeal to my affections than by a suggestion of duty. (Q) In this interview was any such appeal to your affections made?—(A) I have no recollection of any at all. (Q) Did you at that interview make it clear to the pursuer that he had not overcome your reluctance to have connection?—(A) Oh, I must have done so." After that, according to his testimony, he renewed his attempts and even more frequently than before, but always without success. The situation was, so to speak, put an end to by the development of appendicitis in June, which prevented him making further attempts.

I think it is necessary here to pause and weigh the evidence up to this point. I think it is certain that the pact of abstention was made for a year and for a year only. I am led to this conclusion by several reasons. First, what I have already mentioned, that admittedly when the attempts were made the lady never excused herself on the ground that the pact still subsisted, and secondly, that inasmuch as the husband is admitted loyally to have kept the pact during the first year, it is, I think, unlikely that he would at once have broken it when they met at Bombay if it had been for more than a year. Further, when the subject is admittedly discussed in March 1915, she argued about marriage and asked that the present state of affairs should continue, but did not allege that he was bound to desist his attempts. The question of with what degree of frequency the attempts were made (as to which there is controversy) is not very important; it is enough to say that they were made both before and after the discussion in March, and that they extended consequently over a very considerable period, a period too long to admit the idea of a temporary aversion. To what, then, is the wife's constant refusal to be attributed? Had the evidence stopped here

the question might have been doubtful, but this at least can be said, that the evidence is just as consistent with an invincible repugnance as it is with a mere obstinacy of denial, and it is in the light of that view that the further evidence now to be mentioned must be approached.

We now come to the third period, during which the parties are separated, and from this point we have the advantage of the correspondence. We must take it that she left India perfectly aware that her husband was still anxious for the ordinary rights of a husband, and that she had never gratified his wishes. Speaking generally, the correspondence on her side began by being affectionate, but soon got captious and tiresome, chiefly showing an exaggerated jealousy of his affection for his mother. His, on the other hand, is at once affectionate and temperate. There are not many letters in which the subject of conjugal relations is touched on—as I have already said, this correspondence is not complete—but it is certain that there was a renewal of discussion on the subject, which seems to have culminated in a certain letter of 17th February 1916. This letter is not extant, having been subsequently destroyed by the spouses, as will be hereinafter related. We have, however, the gist of its contents in the testimony of the spouses, who, although they do not exactly agree, yet have no doubt as to its main purport, and we have the immediate answer sent to it by the husband. Probably it is better to give this first. It begins—"The home mail came in at breakfast time to-day, and there were two letters from you written on the 17th and 23rd February. The second letter, which you warned me at the beginning that I would not like, was certainly far from nice." . . . "The question of maternity which you raise in your first letter is a serious one, and I have considered carefully what you say. The alternative proposal which you suggest I might adopt really leaves the main problem untouched. The main problem, and the one which causes me most sorrow, is that you should propose to do a thing that is not right. What I have got to do is to help you as much as I can, and I pray that I may be guided to do this. The main arguments which you use are serious ones, but do you still think they justify your decision? The cost of living will certainly advance after the war, in fact, the cost has already advanced, and people are meeting it by various economies. The general result has been for each class of middle-class society to move down one step. People are living in smaller houses than they did, and so can manage with one servant less than was considered necessary before the war. The wonderful thing about the change is that it has come about without the people, as it were, losing caste. There are ways and means of meeting the increased cost of living without endangering the future welfare of the State, and denying to married people their legitimate hopes. The introduction of a family undoubtedly means sacrifice for the parents, but where would we have been if our parents had refused to make the sacrifice? Your last reason, namely, the necessity of separation on the advent of a family, is a personal condition which is not at all essentially involved in the primary question. Many happy and healthy children have been brought up in India. When the time comes for a child to leave India for the sake of education, then it is time enough to consider which way duty lies. It is hardly possible to forecast what the conditions of life will be at home when the time for the decision should come. The other reason which weighs with you is a serious one, namely, heredity. It is, however, a subject upon which so little is really known that I think we can afford to dismiss it. The question of how much in character is due to heredity and how much is due to education and surroundings is one which has puzzled the wisest heads, and up to the present, practically speaking, no light has come. The real reason which lies at the bottom of all your trouble is your original disinclination and fear."

His account of the letter comes to this, that she made a request that the old arrangement of not having connection should be made perpetual, adding that if he did not agree he had better divorce her. This letter was followed next week by a letter of the 23rd February, which is extant, and begins—"I expect you won't like this letter very much, so that's a warning to begin with." It is full of nagging complaints intimating that their marriage is a failure, and there is a hint at possible suicide. She, on being asked about the letter of the 17th February 1916, said that she could not actually remember its contents, but in cross-examination she made the following admission:—"(Q) You know that you suggested either that he should refrain altogether from intercourse or that he should divorce you?—(A) Yes." After this time her letters become more and more petulant and jealous about his caring for his people, while his remained affectionate. After telling him plainly in a letter of 6th April 1916 that she considers his conduct is not at all likely to make her more anxious to accede to his desires, she repeats in her letter of 16th August 1916, "My mind is quite made up with regard to your feelings nowadays, where I am concerned and where your home people are concerned, and till I have definite proof that I am wrong I shall not change and things will not improve." By November she wrote, "I think that except for the time that you send me the monthly draft—which I'm sorry I cannot do without—it will really be better for you not to write to me, unless for anything special of course." After that he was sent to Mesopotamia, and his letters continue affectionate; but now we have little more correspondence extant till we come to his leaving Mesopotamia in 1920. On the 8th September he wires from Marseilles that he is on his way to Perth—and here begins the last period. He came back to this country, and then ensued a foolish contest between the spouses in which neither is free from blame. He

wished to go to Perth to his parents' house and that she should join him there. She wanted him to go to Glasgow, where she was residing. Neither would give way, with the result that they did not meet for nearly two months. After a futile meeting at Perth Station for a few hours she at last consented to go to Perth, and accordingly, on Saturday, the 13th of November 1920, he went to Glasgow and with her to Perth, and took her to his parents' house. They occupied separate rooms on the 13th and 14th. On Monday the 15th they had a long talk on the subject of coming together. It began by his complaining of the letter of February 1916, and the proposal contained therein. She said she did not remember the letter; he then went and fetched it and read it to her, after which she said she regretted having written it, and the letter was burned. The testimony of the husband and the wife here becomes divergent. His story was that the letter was burned in a sort of ceremonial way, each holding a bit and throwing it in the fire; that she expressed her willingness to cohabit in the fullest sense and, accordingly, believing all to be well, instead of occupying separate rooms they occupied a double-bedded room on the night of the 15th and slept in the same bed; that when in bed he attempted to have connection with her with the same insistency as he had in India, and he was met by a refusal. The next night again they occupied the same bedroom, but before coming to bed she had an hysterical *crise de nerfs* of such violence, raised by the question they discussed whether they should go to Glasgow or remain at Perth, that he thought it advisable not to try. On the 17th she had got over the *crise* by midday, and on the three following nights they again occupied the same bed, he each night attempting and she each night refusing. I quote from his evidence—"We slept together on the following three nights and each night I made endeavours, but these endeavours were unsuccessful, and on one of these nights—I don't remember which night it was—the defender told me that I had better get out and tie my pyjamas. I had on that occasion, as on other occasions, had my pyjamas open and down. Of course, in India the pyjamas were usually open in the front. On each of these nights, the 17th, 18th, and 19th I tried and was quite unsuccessful every time. (Q) Just the same experience as you had before?—(A) Never got any further. (Q) Did that very definitely discourage you?—(A) It seemed to me that, in spite of the understanding that I thought we had come to on the Monday morning, she was unable when it came to the point to put it into action." On the 20th she went back to Glasgow, his understanding being that she would come back, but this she never did. He asked her to come, but she would not. Eventually, in February 1921, feeling that the matter was hopeless, he raised the present proceedings.

Reverting to the arrival at Perth, the defender's account is to the following effect. She says, first, that a change had come over her and that she went to Perth determined to allow him his full marital rights. She admits that she said she regretted the letter of February 1916, and admits that it was burned on the morning of the 15th, though she denies that there was any ceremonial attitude in the burning. Her account of what followed had best be given in her own words—"I remember saying to the pursuer once the letter had been burned that I understood now that it had no further significance between us; and that was absolutely my understanding. Before we parted at the time this letter was burned the question of our married relations had made part of the subject of discussion. I told the pursuer that upon the question of the condition my wish had changed. (Q) What did you say you were prepared to do or wished to do?—(A) After we burned the letter we talked amicably for a few moments, and I suddenly said—I don't know what made me say it—'Do you still wish this kind of thing?' and he said 'No; besides that, I don't think it would be safe.' I said 'Why not safe?' and he said 'At your age,' and I said 'Lots of women have children when they are over forty.' I remember making it clear to the pursuer that on the question of willingness I now was willing to do what he wished. (Q) Did he say, when he was making this reference to safety, that he was satisfied now that you had given in on the question of will?—(A) He did. (Q) And did he introduce the question of your safety in the event of a child being born?—(A) Yes, after my asking that question. (Q) When you parted after that meeting did you understand that you had told him you were willing to do what he wished, that he had accepted that in full, and now, in the interest of your safety, did not desire that any connection should take place?—(A) I understood it like that, of course." She then admits being in bed on the night specified, but denies that any advances were made or repelled. When pressed with the pyjamas incident she admits that he loosened his pyjamas, but no more. She admits that she left for Glasgow and did not return. This ends the story except only as regards two matters. As to the hysterical *crise de nerfs* on the Tuesday at Perth there is corroborative testimony from old Mrs Graham. The other matter attains an importance which, frankly speaking, I do not think it deserves, from the fact that it greatly impressed the learned Judges of the majority. It it this—After her departure from Perth he wrote her a letter on the 20th November as follows—"My own wee girlie,—I wonder what sort of a journey you had to Glasgow to-day, and what sort of a day you have had there," and after some discussion as to other matters the letter continues—"I have been feeling rather miserable to-day. I have been wondering why you went away so soon. I hoped you would have told me before you went, and you gave me no idea when you would come back. It is such a waste of time your leaving me alone. The house is very quiet without you, and I have been missing you. Perhaps there will be a letter on Monday

from you. I hope there will be. You didn't even leave anything behind for me to take care of! It is silly having to say good-night with a pen when we don't need to. Good-night, wee girlie, sleep sound.—Your loving Robin."

I am now in a position, after this long recital, to state the conclusions at which I have been compelled to arrive after a careful consideration of the whole case, and the reasons for those conclusions. It is evident that everything turns on the view taken of the incidents at Perth, though one must approach those incidents with a mind informed as to the past history. Now what was that past history? I have already commented on the evidence as to the second period in India, but I so far repeat what I then said. Here was a husband who was obviously very anxious to obtain a husband's rights, a husband who had shown rare forbearance during the first year, but who had then tried to assert his rights in India without success. Then came a period of enforced separation, but during that period, in correspondence, her attitude had been discussed from time to time, and in particular her proposal of February 1916 that abstention should be perpetual had been received with sorrow and argued against. Then follows a series of petulant letters on her part, affectionate and forbearing letters on his. He comes home, and, after a foolish contest as to where they should meet, they do meet. The position is then made matter of grave debate on the Monday; the offending letter of February 1916 is produced, apologised for on her part, and then burned, and then, according to her own testimony, she expresses her willingness to be all that a wife should be and to do all that a wife should do. Then ensues her statement that the moment she had expressed that willingness she added the question, "Do you really wish this kind of thing"—there can be no doubt as to what that means—"to go on?" and that there and then he said that he was content with his moral triumph and would exact no such sacrifice. A more wildly improbable statement was never, I think, given in the witness-box. To suppose that this man, who had been all these years longing for one thing only, in so far as his conjugal rights were concerned, should, when at last he was told she would accede to his wish on that very point, turn round and say that he would be content with a moral triumph and not only give up his wish but abstain from doing what every natural feeling in a married man prompts him to do, is to my mind utterly beyond the bounds of credence. Why should they, after the interview, give up their separate rooms and betake themselves to another room and a double bed, if not to give her the opportunity of fulfilling her promise? And if she went to him with, as she herself says, the expressed intention of allowing him to possess her, is it credible at all that he should not behave as we know that she admitted that he behaved in India, and if, as she reluctantly admits, he loosened his pyjamas, from her Indian experience she knew well enough what that meant. We have then a repetition of all that happened in India, and a repetition by a woman who said that she had made up her mind to consent. I for myself can only come to this conclusion, that the reason she did not consent in fact, as she had in mind, was that she was unfortunately the victim of such an invincible repugnance to the physical act as to paralyse her will power to carry out what she had promised. The utter improbability of her story as to his renunciation of all he had striven for would strike, I think, every man. The learned Judges of the majority were undoubtedly affected by the same idea, but their idea was changed simply and solely by the affectionate terms of the letter of the 20th November. That letter enables them to say *credo quia incredibile*. With much respect, I draw no such deduction. On the contrary, it seems to me consistent with the man's whole conduct. He had been baulked and thwarted in India, yet he still continued to express the terms of affection. Even on this occasion, though doubtless bitterly disappointed, he thought she was coming back to Perth, and I can quite understand that, with his usual method, he did not wish by reproach or bitterness to spoil the chance which he always cherished of overcoming her obvious repugnance. Probably it was only after reflection that he came to the conclusion that, after all, it was sheer incompetency on her part that had led to all his failures.

Great stress was laid by counsel on the shortness of the period at Perth as inadequate to give a full trial, and we were reminded of the three years' period demanded by the canon law. Although in our law we have not adopted any rigid period, yet doubtless there must be a sufficiency of opportunity. Had the Perth episode stood by itself, I do not hesitate to say that I should have considered it to be too short. But it did not stand by itself; it cannot be dissociated from the former experiences in India.

I confess I have come without difficulty to the same conclusion, and for much the same reasons, as are so well expressed in the dissenting judgment of Lord Anderson. This woman begins with an antenuptial aversion to the sexual part of marriage, which finds expression in the promise she got from her husband as to the first year. Unfortunately as I think, for the happiness of all concerned, she chanced on a man who gave a promise which not one in a thousand would have given, and which, if given, not one in a hundred would have kept. Arrived in India, the promise no longer in force, she resisted every attempt on his part during a protracted period. When she goes home, and knowing from his letters that his desire remained unaltered, she began all sorts of objections and arguments, as to risk of child-birth, the inconvenience of children in India, &c., &c., which Lord Anderson well describes as camouflage to cover up her own aversion, and then when at last he comes home and she recognises that the time has come when she must fulfil her duty she signifies consent, and

yet at the last moment finds herself unable to make that consent good. I am of opinion that we may and must draw the inference that it was incapacity that prevented her, and I think that the pursuer is entitled to a decree. I therefore move your Lordships that the interlocutors of the Court of Session be reversed and the cause remitted with instructions to pronounce decree in terms of the first conclusion of the summons.

In these circumstances it is, I think, unnecessary, and would, I think, be improper that your Lordships should give any opinion on the plea of desertion; but this must not be taken as the slightest indication on my part that I disagree with the opinions expressed on that part of the case by the learned Judges of the Court of Session.

LORD ATKINSON—I have had the pleasure and advantage of reading the elaborate, illuminating, and convincing judgment that has just been delivered by my noble and learned friend on the Woolsack. I concur in it and I have nothing to add.

LORD SHAW—I need not say that I have found this case to be one of extraordinary difficulty. There are many passages in the judgments of the learned Judges in the Court below, to some extent reflecting upon the conduct of the appellant, with which I entirely disagree. While, upon the whole question of the behaviour of the respective parties, I think that Lord Anderson has taken much the sounder view. But these opinions do not lead me any length in the solution of the fundamental issue of this case. That issue, as I view it, is whether the refusal of the respondent to consummate the marriage can be ascribed to a cause which the law can hold to be such incompetence as can ground a degree of nullity of marriage.

After much reflection I agree with the judgment just read to the House by my noble and learned friend on the Woolsack.

So far as the law of this matter is concerned I feel much indebted to my noble friend for the exploration he has made of the facts in the case of *A B* v. *C B*. In my opinion that case, although, like the present, difficult and narrow, was correctly decided; and, taken along with the observations thereon just made in this House, it must, in my opinion, stand as a leading one in this branch of the law of Scotland. But of course its limits must be observed as an authority. I take these limits to be that it is now settled that courts have the power to annul the contract of marriage on the ground of incapacity, although that incapacity may not be structural; room is still left for a declaration of nullity although structural incapacity is not proved. There may be cases—rare and extreme cases they of course must be—in which incapacity is established *de facto* to exist, that incapacity not being a mere hostile determination of the mind arising from obstinacy or caprice, but such a paralysis and distortion of will as to prevent the victim thereof from engaging in the act of consummation. From this paralysis and powerlessness the incapacity arises. I have said that these instances are rare and most extreme, while of course courts of law must be alert to dissever them and differentiate them from cases arising from any minor cause such as the obstinacy to which I have referred. Otherwise the marriage tie could be severed by a thing which is the very opposite of incapacity, not a powerlessness of will but a resolute determination of will in the direction contrary to duty.

These are the considerations which make all such cases, and this case, raise one of the most difficult problems in law.

Upon the facts it need not be wondered at, after the convincing and cogent summary already announced to the House from the Woolsack, that I should avoid repeating anything. This is of course according to one's natural inclination, looking to the subject under discussion.

I desire to say specifically, however, with regard to Dr. Ferguson's evidence, that I accept it upon the point that there is no structural incapacity. Beyond that I have some doubt as to whether the evidence of that witness was competent. If, however, it be assumed to be competent I think it comes to no more that this, that it contains the expression of opinion of a thoughtful and reflective medical man upon a delicate question which is truly a question of law, and that the Court accordingly must decide the legal question for itself and apart from the shelter of a medical witness whose evidence, in that portion of it to which I refer, cannot be treated as an exposition of scientific reality. The Court must take this matter apart from such shelter.

On the general facts of the case I would only add, to the summary of and pronouncement thereon by Lord Dunedin, the following points.

I look upon the period from December 1914 to June 1915, when the parties resided in India, as one of crucial importance. The year of abstention, namely, from the marriage in November 1913 had come to an end. I have no doubt that the period over which the unfortunate and stupid bargain of abstention was made was one year and no longer. During, accordingly, these months from December 1914 to June 1915, at which latter date symptoms of appendicitis in the lady appeared, it is beyond question that frequent efforts by the husband were uniformly and steadily repulsed. I do not further advert to that fact, except to say that I think this case must be taken on a conspectus of the facts as a whole, and that it would defeat justice to exclude the experiences of those months in a consideration of what is the correct view of the still more crucial period when the attempts at consummation in Perth failed. I look upon the Perth incident from a point of view very different from that from which it was viewed by the majority of the Judges in the Court below. I think there has been no lack of effort, and that it is quite erroneous to construe in that sense the husband's excessive patience and his extreme desire, by the avoidance of force, to do nothing which should impair the

respect due to him from his wife and due to him from himself. All this I look upon as corroborated completely by the written letters in the case, none of which seem to me capable of a construction consistent with the absence of natural desire and even eagerness upon his part.

The important event that then transpired was, in my opinion, this, that the wife by letter had positively refused consummation; that she had considered the matter, and I do not doubt that she considered it very fairly, and that she came to the conclusion that her conduct was undutiful and wrong; that she then joined with the husband in burning that letter, and she offered to do her conjugal duty. I disbelieve the pretence that she made in the witness-box in answer to somewhat leading questions put to her, that when she had reached that stage, her husband, having conquered her will, released her from her duty. In a word, I am not so constituted in weighing legal evidence as to believe the incredible.

But there is one letter in the case written by this lady to her absent husband on the 6th April 1916, while he was on service abroad, in which she raised various questions with him, such as heredity, with its dangers, all of which I humbly think were mere sophistication in order, if possible, to justify to herself a refusal which she knew, as I say, to be undutiful and wrong. But with regard to consummation she concludes her long statement of reasons with this sentence—"I have no pleasure, but decided repulsion at the possibility of it."

I think this lady, in that blunt sentence, spoke the positive truth. It was this repulsion which throughout broke down all promises of amendment, all ideas of duty, all the regard, respect, and affection which she otherwise would have honoured by yielding to her husband's desires. And the pitiful truth is that this lady, in my opinion, was unable to consummate this marriage. It was, I have come to be of opinion, not a case of obstinacy arising from a capricious or wilful disposition, but it was a case of that powerlessness and distortion of will to which I have already referred, and which prevented her performance of her duty. It was not a case, therefore, at that stage of it, in which her conduct was blameworthy. I believe that she was incapable. This point is clearly brought out by the refusal at Perth, even while her vows were quite fresh, to yield to her husband's embraces. The invincible repulsion again appeared, and the whole sad story had, as it were, to begin again.

I may be asked, was this incapacity in the psychological or the physiological sphere? To this I reply that I do not know. The bounds between these spheres, as science advances, grow more and more difficult to determine. But in deciding this case affirming incapacity, I do so on the ground that the lady was afflicted with a repulsion (a term which she herself employs) so ineradicable and so invincible, as can only be explained by incapacity. It is on that ground—I admit, a rare and exceptional ground—that I think the facts proved in this case entitle the husband to the remedy sought.

LORD PHILLIMORE—If the happenings in the month of November 1920 should be resolved in favour of the pursuer, there would not be any serious difficulty in deciding this case.

The bargain upon which the defender insisted before marriage does not strike me as altogether unnatural. Her point of view was well put by her counsel at your Lordships' Bar. "You must still woo me before you win me." The marriage having been hurried on to suit the pursuer's engagements he was not to consider that he had thereby acquired at once and *de plano* the ordinary privileges which accrue to a husband, though it was not contemplated that there was any doubt but what he would acquire them some day.

Still, such a bargain made and adhered to by a grown woman showed some want of sexual instinct. It had, moreover, an unlooked for consequence. There grew up between the spouses with her sanction, a system of intimate caresses just falling short of sexual connection, which she found sufficient and satisfying, and which she came to regard as reaching the limit of their conjugal intimacy. From thenceforth she strove, while in India, that this limit should not be overpassed. She gave other reasons. People can always find reasons. People can often deceive themselves. But the real springs of her conduct during both the Indian periods were these two—desire for what I may call the symbols of affection striving with a repugnance to its sexual expression.

At times one motive was dominant, at times the other. During the first Indian period his chivalry was such as to cause her, being what she was, little trouble. During the second period there were disturbing passages. And after she returned to England for the second time, at any rate after she had had some trouble with his parents over small money matters, the shrinking from sexual union almost wiped out the desire for his companionship in any form.

But as time went on and she became lonely and her husband was about to return home, possibly with some of the halo which encompassed everyone returning from having done his duty in the war, she felt some craving for his presence, and much pique at his refusal to come straight to her. I notice the gradually increasing warmth of her letters. Thus in the letter of September 12, 1920, she writes — "When you receive this will you wire or write to Glenarden, Crianlarich, where I go to-morrow (I should have waited on here, but it seems useless to wait on indefinitely), telling me if you will come out to C. sometime this week. We can give you a room at the digs where we are, so you could stay a night or two if you wished. If you could arrange to come between Monday & Friday if possible, as we had some time ago invited a friend to spend the week-end with us. I wd. like to discuss with you what

is to happen next, and what I had previously planned to do, by way of a holiday till the end of the mo.—With love,—JEAN." But on September 22—"Dear R.,—I cannot tell you how surprised and vexed I am that you have now been over for a week in Scotland & yet you have never come to see me, nor made any attempt to do so. Why is this? Of course you have spoken of my coming to Perth, which is not possible for me to do meantime, not at least before we have met by ourselves first of all. When & where will you come to meet me? I shall be at home & alone next week, in Glasgow. Will you come to me there, say on Thursday, & stay a few nights with me? As I have said, I can't understand the reason of this delay in our meeting, but whatever it is I am perfectly certain that nothing will be cleared up till we see each other face to face, & that not in the presence of others. Surely, Robin, you are sensible enough to see the wisdom of this. So please arrange to come to me soon, as I am longing to see you." And on October 7—"My Dear Robin, —If you can't come here before Sunday, please come on Monday or Tuesday at latest, for at least a week. I don't know how much or how little you are wanting me, but I do know that I am wanting you very badly. So please come as soon as you can.—Your loving JEAN."

Then on October 10 after the infructuous meeting at Perth Station—"Certainly my affection for you is not dead, and you can therefore understand what pain I am enduring." Lastly on November 4—"(Dear R.), —As you gave me no address I cannot send a letter with the certainty that it will reach you on the 5th. I can't say how disappointed I am that we are not to spend that day together — the first opportunity we might have had since our wedding-day. However, if you do not very much mind, I suppose it doesn't matter that you are in London & I am here. . . . I do think, Robin, that as I have decided to come to Perth, it is surely not too much to ask of you to come & fetch me.—Yours, JEAN. *P.S.*— This is the 5th and there is no word from you.—Oh Robin, what has happened to you?"

I couple with this statement in her evidence that she had thought matters over, and was coming to see them in a new light, and to feel a real regret.

Then when she comes to Perth she notes that, for the first time in her married life, they were to occupy separate rooms, and immediately inquires why she was to be left to herself. Whether she expected sexual union that night, or at a later stage, or merely the old caresses, does not matter. At the least she expected the least of these, and if after all that had happened she expected her husband to be content with the least of these, it indicates a remarkable absence of what I may call "sex-consciousness." However, she is pointedly shown that she must take all or none. Her husband will not sleep with her till he has had an explanation. Then comes the explanation on the Monday, the burning of the letter, and as both agree, her consent to perform her full wifely duty, and finally her reception of him into her bed without protest and without expression of surprise. And the result that night and other nights is the same as in time past — no objection to a certain amount of bodily contact or to certain caresses, no expression of aversion, but just an escape from or evasion of the complete act. Putting together his statements and her admissions, I am clear that he attempted to have sexual intercourse on four of the five nights during which they slept together. But she remained a virgin, and after the fifth night went back to Glasgow for some engagements, giving him the impression that she would return but never afterwards offering to return, nor, as far as the correspondence shows, repeating her invitation to him to come to Glasgow.

I must now go back to the happenings on Monday the 13th of November, when the spouses had an explanation and reconciliation and the obnoxious letter written by her on the 17th of February 1916 was solemnly burnt, and the wife expressed herself as willing to consummate the marriage. So far the two spouses agree, and they also agree that some mention was made of the question of childbirth, and some fear expressed by one or the other as to the consequences at her age.

Then comes the divergence. His account is that she asked what would be his feelings if they never had children, and he replied in substance that if they did their best the matter was in God's hands. Her account of the matter is that upon the question of non-intercourse her previous wish had changed; that then a thought came into her mind and she suddenly asked him if he still wished that kind of thing; that he said No, and besides he did not think it would be safe; that she asked him why, and he said because of her age; then she replied, lots of women had children at forty; and that finally after she had made it clear to him that she was willing to do as he wished, he said he was satisfied now she had given in on the question of will.

This was her account in Court, but her precognition must have differed, because the story put to her husband on cross-examination was a less extravagant one, that the suggestion of fear of childbirth came from her, and then he said he would not insist but be satisfied with her having given in.

The Lord Ordinary says that though the defender gave every appearance of speaking the truth, the story would be incredible if there were not other evidence. By this I take him to mean that it was a story which could not be accepted even in the mouth of an apparently trustworthy witness without corroboration. But he finds this corroboration in two points, with which I will deal in a moment.

The Lord Justice-Clerk on the whole concurs with the Lord Ordinary, but he puts his judgment in an alternative form. Lord Hunter makes no pronouncement. Lords Ormidale and Anderson do not believe the defender's story.

The two items of corroboration which the

Lord Ordinary finds are (1) that which he conceives to be an uncertainty or hesitation in the husband's denial of the wife's story when put to him, and (2) his letter of November 20th.

As to the first item, I think that Lord Anderson has put the matter neatly when he says that the Lord Ordinary has decided the case "mainly on the turn of a phrase." I do not think that the husband realised, or that the tenor of the cross-examination was such as to make him realise, that it was being suggested that he had given up his hard-won marital rights. He thought it was a sort of argumentative item or a stage in a long and complex conversation which he was being asked to recall and which he was doing his best to remember and could not.

As to the letter, it does require consideration. But it is of a piece with his whole treatment of the case. He would not regard himself as "tricked"—the phrase used by the Lord Justice-Clerk—or as having been "deceived and disappointed," as the Lord Ordinary puts it.

"Disappointed" he may have been, but not altogether hopeless of future success, and after all he was tied to her, and his only hope was that he might by slow degrees bring her to overcome her repugnance. Lord Ormidale thinks that if they had remained under the same roof he might yet have succeeded.

On the other hand your Lordships have the fact that he did attempt to have intercourse and no suggestion that he was then reproached for going back on his word, unless it be in one curious unexplained phrase used by the wife in the record when in answer to a question whether he did not on the first night following attempt intercourse she said—"No, and moreover, you are omitting the conversation which we had the same morning when I asked him did he still want to do it and he said no. Wouldn't that put one off their guard to begin with?"

Then your Lordships have her letters in February 1921 after he had announced his intention to sue for nullity. The first letter of February 8th is captious, but neither in it nor in the later one of the 12th, which is of a more entreating tone, does she set up the alleged renunciation of his marital rights.

I do not accept this statement of hers, and then the matter rests on her having agreed to give way to his wishes and on his having attempted sexual intercourse and yet having failed.

The Lord Justice-Clerk alternatively thinks that the time was not long enough, for he will not couple with it the incidents of the second period in India. Lords Ormidale and Hunter think he did not pursue his advances far enough. I think it is impossible to sever the two periods, and I feel satisfied that the husband's advances were sufficient to awaken any sexual instinct that there was in the wife. I can put it further. They were sufficient to show her his desires, which she should if she could gratify, and which she had intended to gratify. The alternative then is between wilful refusal and sexual incapacity.

It seems to me that the wife never disliked her husband, nor was she repelled by his physical proximity, that at anyrate during the latter part of the second period in India she knew what he wanted and had no reason for refusing him. Furthermore, that at Perth she was very desirous to please, and was aware that the only way in which she could please was by submitting to his desires, and yet she could not manage it. It was not a case of persistent refusal, but at first of unwillingness caused by her sexual defect, and finally of direct physical incapacity.

This brings this case under the same line of that of *A B* v. *C B* in the Court of Session (8 Fraser 603), and of the judgment of the noble and learned Lord who was then Lord President. That case will now receive confirmation at your Lordships' hands.

I should like also to rely on the judgment of Sir James Hannen in *P.* v. *L.* (reported as a note in L.R., 3 P.D. 73, particularly as explained by him in his later judgment in *S.* v. *A.* (L.R., 3 P.D. 72), when he says—"There was no physical impossibility in the grosser sense of that expression, but it was proved to my satisfaction that the respondent was not really and truly in nature a woman, . . . and that therefor being entirely free from the passions of women in that respect she resisted the action of her husband as though it were something unnatural." Conformably to this is the decision of Sir Francis Jeune in *F.* v. *P.*, 1896, 75 L.T. 192.

The evidence here seems to me to prove "invincible repugnance"—"invincible" in the full sense of unconquerable, an uncontrollable nervous condition which is physical and which creates nullity. I therefore agree with the rest of your Lordships that this judgment should be reversed.

LORD BLANESBURGH—I, too, have in this case reached the conclusion in favour of the appellant at which all your Lordships have arrived. But I have found the problem presented to the House a very perplexing one, beset with difficulty at almost every turn. In view, however, of the speeches already made, I propose in what follows to direct attention mainly to certain aspects of the case which appear to me to support the view of the appellant, but which have not been fully discussed in any of the judgments below. In doing so, I will avail myself of the very full statement of the facts just made by the noble Lord on the Woolsack.

In this case physical capacity on both sides being admitted or established, and the sole issue at the moment before the House being whether the refusal of the respondent to consummate her marriage with the appellant was due to wilfulness or to invincible repugnance, it must be of first importance to ascertain, if possible, the real temperament and disposition of the parties, and, in particular, of the respondent.

Now her mentality as disclosed in the correspondence is a highly complex thing.

It is not the least of the difficulties in the appellant's way that the respondent with, I think, clearly only a weak sexual instinct, stands revealed in her letters as somewhat imperious and very determined, at times exacting, hypersensitive, jealous and unreasonable, a lady, in other words, who might be quite capable of wilfully refusing herself to her husband over almost any period of time if such an attitude was in accord with her humour.

But that is not a complete statement of her disposition. The respondent's letters show her to be capable of ardent affection. Her devotion to her father is very marked. That devotion and her love for her mother are notable traits in her character. More important still, she was always, I am satisfied, genuinely in love with her husband—jealously in love with him, indeed, in the later years of the marriage. This conclusion seems to me to have so important a bearing at almost every stage of the case that it is convenient to give my reasons for it at once, although in doing so I may have to anticipate a little.

And, first of all there can, I think, be no doubt that probably before the appellant's return to England in 1920, but certainly after his meeting with the respondent at Perth Station on the 6th of October, the respondent's feelings towards him were deeply engaged. There is a genuine *cri de cœur* in her letter of the 7th of October, already read by my noble friend Lord Phillimore, and written after that meeting, the first for five years—"If you can't come here before Sunday, please come on Monday or Tuesday at latest for at least a week. I don't know how much or how little you are wanting me, but I do know I am wanting you very badly, so please come as soon as you can."

The feeling is even more poignantly indicated in the letters written after the appellant threatened proceedings, letters in which the respondent expressed her eagerness to live with him as his wife at Perth, or anywhere else he might appoint.

Yet what was the standard by which she measured the depth of her affection, even at that time when she professed herself ready to yield everything? It was the intensity of her affection at the time of the marriage. In her letter of February 8th, 1921, she writes—"I can only add, Robin, that my love for you is the same as it was seven years ago."

In her evidence also the respondent strongly insisted upon her love for her husband at the time of the marriage, and I see no reason to doubt the correctness of either assertion. For it is not improbable. The appellant and respondent were no strangers at the time of their marriage. Although it is true that in November 1913 the actual ceremony was hurried in order to enable the appellant to return to India in due time, there had been a close understanding between the parties, if no actual engagement, for over two years. If we may accept the respondent's statement in her letter of July 19, 1916, the appellant's protestations of affection for her never at any time exceeded those written by him in 1912. In the result I conclude that not only was there on the part of the respondent a genuine love for her husband—jaundiced later on by jealousy and self-consciousness I do not doubt, but still sincere and strong all through, and existing from before the marriage onwards. We must, I think, interpret the occurrences with which we are now concerned in the light of that all-important fact.

And the first of these occurrences is the promise insisted upon by the respondent as a condition of the marriage taking place at all, that there should be no intercourse between the spouses for a year. I accept without hesitation the appellant's statement as to the duration of the promise which was exacted from the appellant a few days before the marriage ceremony.

Now the fact that the lady, without any previous warning, in love at the time with her intended husband, days after the wedding had been fixed and almost on the eve of its celebration, should have exacted such a promise under such a penalty is, I think, the most striking fact in the case when regard is had to her age—she was 34 and five years older than the appellant—and to her experience. Some explanation is required, and three or more are put forward.

The facts last stated dispose, as it very respectfully appears to me, of that favoured by Mr Moncrieff. The lady required, he suggested, that she should be wooed before she could be won. That will not do, I think. She had been long wooed and she was won.

Her own explanation is also, I think, inadequate. It is that she was at the time, although she did not say so, moved more by the spiritual than the carnal side of marriage. Her fear was that the ideal of the first might be lost if the second were allowed to obtrude itself before that ideal had been realised.

Now I cannot think that a time limit is appropriate to a renunciation imposed for such a reason. But the insufficiency of the explanation is perhaps more clearly shown by this, that the feeling of spiritual exaltation underlying the demand — a feeling which presumably continued so long as intercourse was refused—would have been as much offended by what I may call the marital familiarities which the lady permitted as it would have been by the exercise of marital rights. As to this, Mr Moncrieff's only suggestion, as I understood him, was that the lady took a decadent satisfaction in the embraces which she permitted. I can find in the papers no warrant for that explanation. I think it is only fair to the lady to say that nowhere is there to be found any indication of what may be described as decadent views on this delicate subject.

This explanation of the strange bargain being, like the other, rejected, it must be looked for elsewhere. And it is, in my judgment, to be found either in that given by the appellant in his letter of April 17, 1916, where he says — "The real reason which lies at the bottom of your trouble is your original disinclination and fear"; or

it was due to the respondent's apprehension that she might feel—as later on she said she did feel—"decided repulsion at the possibility of it."

This explanation alone, as I think, squares with all the facts. First of all it accounts for the limit of time. The lady was in love with her intended husband. She hoped that any repugnance she might at marriage feel to the sexual act would disappear after a term of close association which, so far as cohabitation was concerned, she never objected to but indeed encouraged.

It accounts strikingly also for one occurrence—I might say two—which, strangely enough, is said to support the lady's case, but which, to my mind at least, is strongly confirmatory of the appellant's. I refer to the occasion, apparently in July 1915, when she sought her husband's bed. That was, it seems, one of two on which the same thing happened, although, with reference to the second, all that the lady says is this—"I rather think I did once in the first year but I won't say anything about that act."

Now the suggestion on behalf of the respondent, very strongly urged in the Court of Session, less strongly before this House, was that these were overtures by the wife for sexual relations to which there was no response on the part of the husband. If so, one may ask, why were they made with such timidity that in the case elaborated in evidence the husband was left under the impression that the gesture was no more than an offer of peace after a slight quarrel, while the other overture was not apparently brought to his notice at all? Why were they made so timidly? What is still more important—Why were they on neither occasion repeated? The lady was in love with her husband. This fact is again important. Is it likely if, as the suggestion is, she desired or was ready for marital relations with him, who, she knew, was eager for them, that she would have left him in any doubt as to her desire, and would so quickly have desisted from her purpose? Surely not. But if on the other hand the position was that the respondent, desirous of overcoming this constitutional aversion on her part had, as she thought and hoped, so far succeeded that she could venture to make the advance, how natural that that advance should be timid and unconvincing, and if she found that she was not equal to the effort, how necessary that on neither occasion should it have been repeated. In these two strange incidents therefore I find striking confirmation of the appellant's case.

The conclusion therefore at which I may, I think, properly arrive as to this pact viewed in the light of later events is that it was imposed by this lady because of her fear that she might be afflicted with an invincible aversion to the sexual act if she were at once required to submit to it. She imposed the ban rather than renounce altogether the marriage she desired, because she hoped that after the lapse of a year's intimate association the repugnance she apprehended would be overcome if it had not by that time disappeared.

And when we come to what my Lord has called the second period that conclusion is confirmed, because the relations of the spouses during it can, I think, be explained only on the ground that the physical aversion was felt and still continued.

But for an admission of the respondent I might, I admit, with reference to this period, have reached the conclusion that the appellant had not made it clear to the respondent that the relations between them now that the pact was at an end were no longer what they had been during its continuance, and that it had not been shown that the endearments in which he indulged during this second period differed in kind from those permitted to him during the first. His operations were all conducted in complete silence and their intent might have been misunderstood.

But such a conclusion would not be proper in view of the respondent's admissions. The appellant's evidence with regard to this period is, she supposes, correct, and she admits that on every occasion on which he made the advances to which he deposes she invariably turned away. These are very important admissions. The relations between the spouses were not, it must be remembered, during this period disturbed by outside influences. They were not embittered to any extent by jealousy of the appellant's parents. This feeling on the part of the respondent reached its ultimate intensity only after she had left India and returned to Scotland. There is therefore no sufficient explanation of her refusal to be found in this direction, and my conclusion in view of the respondent's admissions is that the whole story is consistent only with inability on her part to respond to the appellant's overtures, and that if the appellant had been conscious of the real cause of her refusal and had then and there instituted proceedings in nullity, his evidence even so far available would have sufficed to secure him a decree.

But to my mind that evidence is greatly strengthened and a clearer light is thrown upon the cause underlying the respondent's refusal during this period by her letters to her husband from this side during 1916, most, if not all, of them written in anticipation of his early return home.

It is in these letters that the mentality of the respondent to which I have already alluded is so clearly disclosed. It is, I agree, clear from the appellant's letters in answer that he had little understanding of his wife's temperament, and in complete unconsciousness succeeded in aggravating her when his only object was to soothe. But, making every allowance for this lack of perception on his part, these letters of the respondent can, I think, only be explained by the view that, possibly unconsciously she seized upon any grievance, nearly always imaginary and invariably trivial, as a justification for her continued aversion to the sexual act, an aversion which indeed she referred to in so many words in the passage I have already quoted. In these letters she went almost so far as practically to sever all relations with the appellant. Her

strictures on his habits were disparaging and insulting. Her latent affection only leaks out in occasional outbursts of violent jealousy.

We have before us none of the correspondence between 1916 and October 1918, but there can I think be no doubt that the 1916 letters made their permanent mark upon the appellant, nor is it surprising that they did. They were never withdrawn or qualified by the respondent in any communication produced; the appellant's letters became visibly colder, and until after the visit to Perth and the appellant's letter of 20th November 1920, he never got beyond the "My dear Jean" form of address to which the lady so violently objected.

The position when the appellant returned to England in 1920, I think, on his side clearly was that his affection had cooled as the result of his wife's outbursts in 1916, but he was ready and I think desirous to start entirely anew if his wife would submit to his inflexible condition that their matrimonial residence while he was here should be at his parents' house at Perth and nowhere else.

If it was the appellant's desire that they should begin life anew, I agree that no other condition would have been so likely to defeat it, and I cannot myself doubt that it was only the respondent's real affection for him, which after two years of war service had recovered the 1916 eclipse, that at length constrained and enabled her to go to Perth.

And here in the last stage of the case I am of opinion that the appellant's account of what happened is on the whole to be preferred to the respondent's. It is indeed more amazing than ever that again the appellant's silence was unbroken. But on the other hand his account is in entire accord with everything that happened throughout their married life — and, if accepted, leads to the conclusion that the respondent, try as she might, could not bring herself to the marital act.

The Lord Ordinary would have accepted this conclusion emerging from the Perth visit but for the appellant's letter of November 20. In my judgment that letter is on a par with his undated letter of 1916; he was ready to give his wife when he wrote it another chance; his patience was not yet exhausted. That he sent such a letter has given me no difficulty. What has caused me trouble was the attempt made by the appellant in the witness-box to explain away its terms. That attempt was, in my judgment, a complete failure, and I do not know that the fact that it was made would not have fatally discounted in my eyes the reliability of the appellant's evidence as to the course of events at Perth had it not been for the respondent's letters written after the final breach between the parties. In these letters, while she offers submission in the fullest terms and begs for another favourable opportunity for demonstrating her sincerity, she nowhere suggests that the appellant at Perth dispensed her from all further marital compliance as has, in these proceedings, been suggested on her behalf.

These letters, to my mind, re-establish the substantial correctness of the appellant's evidence which accepted satisfies me that as in India so at Perth, with every desire in the world, the respondent found herself incapable of performing the sexual act with the appellant.

I think therefore that his case for a decree of nullity has been made good.

Their Lordships ordered that the interlocutors appealed against, except in so far as they find the defender entitled to expenses, be reversed; that the cause be remitted to the Court of Session with instructions to pronounce decree in terms of the first conclusion of the summons; and that the respondent have her costs in this House.

Counsel for the Appellant — Macmillan, K.C. — Scott. Agents — Bonar, Hunter, & Johnstone, W.S., Edinburgh — Crusemann & Rouse, London.

Counsel for the Respondent—Moncrieff, K.C. — Keith. Agents — Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

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*Monday, February* 11.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

## PACIFIC STEAM NAVIGATION COMPANY (OWNERS OF S.S. "BOGOTA") *v.* ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY, LIMITED (OWNERS OF S.S. "ALCONDA").

(In the Court of Session, March 1, 1923 S.C. 526, 60 S.L.R. 333.)

*Ship—Collision—Contributory Negligence—Subsequent and Severable Negligence—Vessel Emerging from Dock into River—Disregard by Approaching Vessel of Signal that River Blocked—Clyde Navigation Bye-laws, Nos.* 3, 18, *and* 19.

The "Bogota," a steamer 415 feet long, was being towed out of a graving dock on the north bank of the Clyde, stern first, by a tug, the width of the river *ex adverso* of the dock being about 500 feet. When she was about two-thirds out of the dock and still athwart the river, her tug being about mid-channel, she sighted the "Alconda" three-quarters of a mile away coming up the river under her own steam with two tugs attached. The "Bogota" had steam up but was not using it, her intention being not to use it until she had been straightened out in the river preparatory to proceeding up stream. On sighting the "Alconda" she gave four blasts of her steam whistle, twice repeated, to show that the river was blocked, and continued her manœuvre. The master of the "Alconda" heard