[HIGH COURT OF AUSTRALIA.]

ADKINS . . . . . APPELLANT;
PETITIONER,

AND

ADKINS . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1948.

HOBART, *Nov.* 4.

SYDNEY, *Dec.* 6.

Latham C.J., Rich and Dixon JJ.

Divorce—Desertion—Wilful or non-justifiable refusal to permit marital intercourse—Agreement that wife shall not be required to have intercourse—Consent to agreement—The Matrimonial Causes Act 1860-1940 (*Tas.*) (24 *Vict. No.* 1—4 *Geo. VI. No.* 57), *ss.* 7, 8.*

A wife having refused marital intercourse since October 1942 left the matrimonial home in October 1944. By an agreement made on 14th December 1944 (one of the terms of which provided that the wife should not be "required to live with her husband as his wife") the wife agreed to return to the matrimonial home for one year. In 1946 a petition for dissolution of marriage issued by the husband on the ground of desertion for three years by refusal to permit marital intercourse was dismissed. The trial judge held that during the subsistence of the agreement, the refusal of marital intercourse was not non-justifiable within the meaning of s. 7 of *The Matrimonial Causes Act* 1860-1940 (Tas.). The trial judge's decision was affirmed by the Full Court of the Supreme Court (*Clark* J., *Hutchins* J. dissenting). On appeal to the High Court,

Held that the petition was properly dismissed.

Decision of the Supreme Court of Tasmania (Full Court) affirmed.

* *The Matrimonial Causes Act* 1860-1940 (Tas.) provides by s. 7: "'Desertion' means desertion without the consent or against the will of the other party to the marriage, and without reasonable cause; and wilful or non-justifiable refusal to permit marital intercourse shall be treated as equivalent to desertion." And by s. 8 (2) provides: "Any husband . . . may present a petition . . . praying that his marriage may be dissolved on one or more of the grounds following—1. That his wife has, without just cause or excuse, deserted the petitioner, and without any such cause or excuse left him continuously deserted during three years and upwards."

H. C. OF A. 1948. ADKINS v. ADKINS.

APPEAL from the Supreme Court of Tasmania.

On 15th February 1946 Thomas Sinclair Adkins petitioned the Supreme Court of Tasmania for a decree that his marriage with Thelma Leila Adkins be dissolved on the ground that in the month of October 1942 the respondent at Launceston in Tasmania wilfully and unjustifiably refused to permit the petitioner to have marital intercourse with her and thereby without just cause or excuse deserted the petitioner and wilfully and unjustifiably refused during three years and upwards to permit him to have marital intercourse with her and thereby without any such cause or excuse left him continuously deserted during three years and upwards.

The parties were married in October 1934 and there were three children of the marriage. Marital intercourse did not take place between March 1941 and July 1942 or from October 1942 onwards, because the respondent would not permit it, giving as her reason that she did not wish to have more children. In October 1944 the respondent left the home, threatening proceedings under the *Maintenance Act* 1921-1942 (Tas.). The respondent did not return despite frequent requests from the petitioner. The petitioner took proceedings under the *Maintenance Act* 1921-1942 to obtain custody of the children, whereupon the respondent took the proceedings which had been threatened by her. Before the hearing of either of these proceedings the parties and their legal representatives conferred and an agreement was entered into of which the following are the material parts :—1. That the complaints made by both parties in the court of petty sessions at Launceston be adjourned *sine die*. 2. That Mrs. Adkins with the three children return to her home at Trevallyn forthwith. 5. That Mrs. Adkins be not required to live with her husband as his wife. 6. That at any time during the subsistence of this agreement Mrs. Adkins be at liberty to leave the matrimonial home and take the children with her. 10. That this agreement to operate and remain in force for one year from the fourteenth day of December 1944.

The respondent having left the matrimonial home on 26th December 1945 a petition for dissolution of marriage was filed in February 1946. The respondent did not appear nor defend. *Morris* C.J. dismissed the petition on the ground that refusal of marital intercourse was not non-justifiable during the subsistence of the agreement of December 1944, which agreement was not contrary to public policy, and refusal during that period could not be counted to make up the requisite three years. The trial judge's decision was affirmed by the Full Court of the Supreme Court (*Clark* J., *Hutchins* J. dissenting).

The petitioner appealed to the High Court.

R. R. Sholl K.C. (with him *N. L. Campbell*), for the petitioner. The real cause of the wife's refusal was not the agreement. The refusal was due to a predetermined resolve not to have intercourse. The petitioner was not barred by acquiescence. There were repeated requests after the agreement. [Counsel referred to *Baxter* v. *Baxter* (1); *Synge* v. *Synge* (2); *Smith* v. *Smith* (3)]. The agreement to relieve the wife from the obligation of intercourse should not be held to be valid and is therefore no justification at all. It is void as against public policy.

R. K. Green, for the respondent, appeared to admit service of the notice of appeal.

Cur. adv. vult.

Dec. 6.

The following written judgments were delivered :—

LATHAM C.J. In *Maude* v. *Maude* (4) it was held that the persistent refusal of sexual intercourse did not in itself amount to desertion so as to entitle a person to a divorce on the ground of wilful desertion without just cause or excuse. The law has been declared in the same manner in Great Britain : *Jackson* v. *Jackson* (5); *Weatherley* v. *Weatherley* (6). The law was altered in Tasmania by an amendment made by *The Matrimonial Causes Act* 1919 (Tas.), s. 2, as a result of which s. 7 of the principal Act, *The Matrimonial Causes Act* 1860-1940 (Tas.), now contains the following provision :—" ' Desertion ' means desertion without the consent or against the will of the other party to the marriage, and without reasonable cause; and wilful or non-justifiable refusal to permit marital intercourse shall be treated as equivalent to desertion." Section 8 (2) provides that a husband may present a petition to the court praying that his marriage be dissolved on (*inter alia*) the following ground :—" I. That his wife has, without just cause or excuse, deserted the petitioner, and without any such cause or excuse left him continuously deserted during three years and upwards." In the present case the husband petitioned for divorce upon the ground :—" That in the month of October 1942 the respondent at Launceston aforesaid wilfully and unjustifiably refused to permit your petitioner to have marital intercourse with her and thereby, without just cause or excuse, deserted your petitioner and

(1) (1948) A.C. 274.
(2) (1900) P. 180.
(3) (1945) 61 T.L.R. 568.
(4) (1919) 26 C.L.R. 1.
(5) (1924) P. 19.
(6) (1947) A.C. 628.

H. C. OF A. 1948. ADKINS v. ADKINS. Latham C.J.

wilfully and unjustifiably continued during three years and upwards to refuse to permit him to have marital intercourse with her and thereby, without any such cause or excuse, left him continuously deserted during three years and upwards."

The petition was undefended. The evidence of the husband showed that the parties were married in 1934 and had three children, the last child being born in March 1941. The wife was unwilling to have children and after the third child was conceived she refused intercourse. Intercourse between husband and wife finally ceased in October 1942. In 1944 the wife left home without telling her husband and took the children with her. Cross-proceedings were taken by the parties against each other in the court of petty sessions, the husband claiming the custody of the children and the wife apparently claiming maintenance. Neither summons was heard, but the parties met and made an agreement in writing. The agreement provided for the wife to take a holiday and for the husband to have his business at Hobart taken over by a company in which the wife was to have one-third of the shares with a guaranteed annual income of at least £156. The agreement contained the following provisions:—"5. That Mrs. Adkins be not required to live with her husband as his wife. 6. That at any time during the subsistence of this agreement Mrs. Adkins be at liberty to leave the matrimonial home and take the children with her. . . . 10. That this agreement to operate and remain in force for one year from the fourteenth day of December 1944." The wife returned to the home. The husband made approaches to her for the purpose of resuming intercourse, but the wife always refused. In December 1945 she finally left the home. The home was in her name and she threatened to sell it unless the husband paid her a sum of £600, which he did.

The petition was presented on 15th February 1946—i.e., before three years had elapsed after December 1945. Accordingly the husband relied upon refusal to permit sexual intercourse since October 1942 as equivalent to desertion continuing since that date.

The petition was heard by *Morris* C.J. and was dismissed upon the ground that the husband had agreed that he should not require sexual intercourse and that he should not be allowed to repudiate this term of the agreement under which he had received the consideration constituted by his wife returning to live with him so that there might be a chance of reconciliation. The refusal to have sexual intercourse, therefore, was held not to be non-justifiable and, as such refusal had not continued for three years after the

expiry of the agreement in December 1945, the petition was dismissed. Upon appeal to the Full Court *Clark* J. agreed with the decision of the Chief Justice, in particular dealing with the contention that clause 5 of the agreement was void as being contrary to public policy. He pointed out that the parties were living apart and that clause 5 was one of the terms upon which they re-established their home and therefore that it should not be held that clause 5 was a provision for future separation opposed to the policy of the law. I agree with *Clark* J. that the agreement was an attempt to obtain reconciliation on the best terms available and that it was not void as contrary to public policy. *Hutchins* J. was of opinion that the appeal should be upheld because a married person had no right to " require " his spouse to have sexual intercourse, and that therefore clause 5 did not affect the legal rights of the husband. It was an agreement not to do something which the husband had no power to do. In my opinion the word " require " in clause 5, read in relation to the subject matter with which it deals, should in the context of the agreement be interpreted as meaning that the husband would not request his wife to live with him as his wife. The agreement provided that they should share the same home and, accordingly, the meaning of clause 5 is that nevertheless he would not ask her during the term of the agreement for sexual intercourse.

The desertion upon which the petitioner relies is " wilful or non-justifiable refusal to permit marital intercourse." Section 7 of the Act provides that such refusal " shall be treated as equivalent to desertion." " Desertion " is defined in the same provision as desertion without the consent or against the will of the other party to the marriage and without reasonable cause, and s. 8 (2) I., which establishes desertion as a ground for divorce, provides that such desertion must be " without just cause or excuse."

If the refusal of marital intercourse by the wife in the present case was refusal with the consent of the husband, it did not amount to desertion (s. 7). The agreement shows that during the period of twelve months up to December 1945 the refusal was a refusal to which the husband had given his consent. He had bound himself in respect of that period to agree to absence of intercourse. It was argued, first, that such an agreement was void as against the policy of the law. But the phrase " non-justifiable refusal " in s. 7 itself shows that the legislature considered that a refusal might be justifiable. It was further contended that the husband did not really consent to absence of intercourse. But he signed the agreement. His consent, though reluctant, was real.

H. C. OF A. 1948. ADKINS v. ADKINS. Latham C.J.

Further, clause 5 of the agreement was in my opinion a just cause or excuse (see s. 8 (2) I.) for the wife refusing intercourse during the twelve months of the currency of the agreement. It was argued, however, that the wife had a deep-rooted objection to sexual intercourse and that this, and not the agreement, was the reason which operated upon her mind in refusing intercourse. There is no doubt that the evidence shows that the wife did have a very strong objection to becoming pregnant and to sexual intercourse which might make her pregnant. But the agreement gave effect to this objection during this period and provided both an objective and a subjective justification for her action during that period in refusing intercourse.

It is unnecessary for the purposes of this case to consider the difficulties of construction involved in the application of the words " wilful or non-justifiable " to the word " refusal." It may be that " wilful " should be understood in the sense in which a child is described as wilful, that is to say, as indulging in behaviour without reason, and that " non-justifiable " should be applied to cases where there is a reason for the refusal, but not a good reason. But, however this may be, in the present case the refusal was justifiable according to any relevant standard during the period of the agreement. The question is whether the refusal can be justified or not as against the husband. The fact that he had agreed, in an endeavour to conciliate his wife, to abstain from insisting upon intercourse during a limited period, provides full justification for her attitude. In refusing intercourse during this period the wife was doing no more than asking him to keep the agreement which he had made with her.

The husband denied allegations contained in the particulars of misconduct delivered on behalf of the wife, and there was no evidence to show that the refusal of intercourse after the period of the agreement was justifiable ; but the necessary period of three years had not been completed, and accordingly, the petition was rightly dismissed.

The appeal should be dismissed.

RICH J. The agreement between the spouses entered into after the proceedings before the magistrates interrupted the period of three years' desertion necessary for the foundation of the appellant's claim for divorce. The question whether a provision against intercourse is contrary to the policy of the law does not enter into the consideration governing the case. For the real question is whether

there was reasonable cause or justification to be found in the provisions of the agreement. Up to the time of interruption the period had been made up partly of statutory desertion consisting of refusal of intercourse and partly of actual desertion. For a time I thought it might be possible to treat the agreement as no more than a concession by the wife, a concession mitigating her actual desertion and reducing that state of desertion to one of statutory desertion, namely, refusal of intercourse. But this appears to me a strained and artificial treatment of a clause which the plain man would say was a plain consent on the husband's part to the wife's having her way. As she came back to the house on the promise that she should have her way it ceased in my opinion to be possible to say that she had no justification for her continuing her refusal.

For these reasons I agree that the appeal should be dismissed.

DIXON J. In Tasmania desertion by a wife without just cause or excuse for three years and upwards is a ground for divorce upon the petition of the husband: *The Matrimonial Causes Act* (Tas.) s. 8 (2) I. There is a definition of desertion: s. 7. The word means desertion without the consent or against the will of the other party to the marriage, and without reasonable cause; and wilful or non-justifiable refusal to permit marital intercourse is to be treated as desertion. It will be noticed that in this definition the first part requires the absence of reasonable cause, notwithstanding that the substantive statement that desertion shall be a ground of divorce requires that there shall be an absence of just cause or excuse. Further in the same part of the definition there is the requirement that desertion shall be without the consent or against the will of the other party. This seems to mean that there shall be neither consent nor acquiescence, though it is curiously expressed using, as it does, the alternative "or."

It will also be seen that refusal of marital intercourse is introduced as a statutory form of desertion, as an instance or description of desertion, and that again there is an exclusion of justification, and again there is a dubious use of the alternative "or." It can hardly mean that it is wrongful desertion, notwithstanding that it is justifiable, if it be intentional. Perhaps wilful means perverse or perhaps ultroneous.

At all events I think that the result of these provisions in combination is that refusal of marital intercourse, to constitute desertion and amount to a ground of divorce, must be without consent and without any other just cause or excuse.

H. C. OF A. 1948. ADKINS v. ADKINS. Dixon J.

In the present case the wife refused matrimonial intercourse without consent and no just cause or excuse was made to appear. That went on for two years. Then she left the matrimonial home and probably deserted her husband in the ordinary sense. They proceeded against one another before magistrates. An effort was made to compromise these proceedings and patch up their relations. An agreement was made under which the wife returned to her home. The agreement dealt with a number of topics of domestic discord and discontent and was expressed to operate and remain in force for a year. Among other things it provided that the wife should not be required to live with her husband as his wife. After a separation of ten weeks she returned home where she remained for the agreed year, still refusing intercourse. At the end of the year she again left her husband. His petition is founded on desertion consisting in the refusal of intercourse but he cannot make up the necessary three years of desertion without including part of the period covered by the agreement. During that period he requested intercourse and thereby withdrew his consent, if it was competent for him to do so. The question is whether the agreement prevents his reliance upon this statutory form of desertion. *Morris* C.J. and *Clark* J. have held that it does so and I think that there is no escape from that conclusion.

The agreement provided the wife with a continuing justification during the year in which she resided with her husband in pursuance of its terms. I do not think that to ask whether an agreement between husband and wife containing a provision against intercourse is contrary to the policy of the law is to start a relevant inquiry or one that has any real meaning. We are not here concerned with an enforceable legal obligation. It is of no importance whether it was intended to create a legal obligation or whether it could do so. We are concerned with the sufficiency as an excuse or justification of a promise or condition obtained by a wife as a term upon which a common domestic establishment was resumed for an experimental period.

It is true that the term was unwillingly conceded by the husband and only as a means of bringing to an end what he must have considered conduct amounting to actual desertion. But it was for him to decide whether he would make the concession for the purpose. It was for her to decide whether in reliance on the promise or condition conceded she would change the situation and return home. Unless she returned home no question of intercourse could arise. It was said that her refusal of intercourse had preceded the arrangement by two years and that it was not based on the condition and

that it was not the cause of her refusal. But it was the cause of her returning to live under the same roof and exposing herself thus to his demand for intercourse. Then it was said that his was no true acquiescence; that she insisted on the condition and that he agreed only in the sense of promising or conceding a recognition of her refusal. The answer once more is that her justification rests upon the fact that she changed her position and exposed herself to the possibility of her husband requiring intercourse on the faith of a condition that he would not do so. Having done this it enured to her advantage as a justification or excuse while she remained in that situation.

I think that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Archer, Hall & Campbell*, Launceston, by *Johnson, Mitchell & Laughton.*

Solicitors for the respondent: *Ritchie & Parker, Alfred Green & Co.*, Launceston, by *Simmons, Wolfhagen, Simmons & Walch.*

R. C. W.