IN THE HIGH COURT OF AUSTRALIA.

NICHOLSON

V.

NICHOLSON

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on TUESDAY, 26th FEBRUARY, 1946.

H. J. Green, Govt. Print., Melb.

C.2774

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ORDER.

The appeal is dismissed; the order of the Full Court is affirmed; and there is no order as to the costs of the appeal to this Court.

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REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal from a judgment of the Supreme Court of Tasmania in a divorce proceeding by a husband against a wife. The petition was based upon the ground of desertion.

Sec. 8(2) of the Matrimonial Causes Act 1919 provides as a ground of divorce in the case of a husband domiciled in Tasmania for two years and upwards that his wife has, without just cause or excuse, left him continuously deserted during three years and upwards. Sec. 7 of the statute as it now stands contains this 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." The effect of these provisions, in my opinion, is that when there is a wilful or non-justifiable refusal to permit marital intercourse, then desertion within the meaning of the section begins. In order to be a ground of divorce, that desertion must continue for three years, that is to say there must be a continuous wilful or non-justifiable refusal to permit marital intercourse for that period.

It is a question of fact whether a refusal to permit such intercourse is continuous during a particular period. If it is shown that frequent requests were made throughout the period and that they were always met with refusals, that would be a plain case to which these provisions would apply. If it were shown that a refusal to permit intercourse was of such a character as to indicate a permanent and fixed intention with reference to the future, such evidence, again, would be sufficient to establish what the section requires, unless that attitude were changed. That attitude might be changed by the refusing spouse consenting to intercourse, or by the other spouse stating that intercourse was not desired. It must depend, in my view, upon all the circumstances

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whether a refusal is of this nature. Here it is found that there were repeated requests from May to December 1936, and possibly throughout 1937, although as to that the finding is not in my opinion perfectly clear; that these requests for intercourse were always refused and that on one occasion the refusal was accompanied by a statement that the wife did not wish to have anything to do with her husband. There is no evidence that this attitude was ever changed. There is evidence (which was accepted) that intercourse did not take place after about May 1936. The proper inference from these facts, in my opinion, is that which I regard the Full Court as having drawn, namely that the respondent continued in an attitude of wilful refusal from May 1936 to the date of the petition. Upon this view it is unnecessary to consider the other question raised, namely whether a period of desertion under sec. 7 must be a period immediately preceding the presentation of the petition.

The order of the Full Court is that the suit be sent back to His Honour the learned trial Judge for pronouncement of decree nisi. It being my opinion that the appeal should be dismissed, the order which I would make would be an order dismissing the appeal, affirming the judgment of the Full Court, and making no order as to the costs of this appeal.

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JUDGMENT. STARKE J.

I agree.

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ORAL JUDGMENT — DIXON J.

I feel somewhat uneasy about the conclusion of the Court in this case. As I read the judgment of the Chief Justice of the Supreme Court of Tasmania, I think that His Honour did not mean to draw for himself the inference which Mr Justice Clark had not expressly stated. Further, in looking at the formal order I am rather struck by the fact that the unusual and I imagine purposeless course is taken of referring the matter back to the primary Judge for the pronouncement of the decree nisi. Then, there is the further fact that the order was treated as interlocutory. That possibly it may be in form upon any view. But it would only be interlocutory in susbtance if it had been intended to remit a real question for Mr Justice Clark's re-consideration.

For myself I should not be prepared to draw an inference as to what was the understanding of the parties in the intervening years without seeing them. It appears to me that this very difficult provision cannot, except in rare cases, be administered by mere presumptions and that to ascertain whether there was an implied refusal or an implied continuance or maintenance of a refusal once expressed, it is necessary to see the parties and form some estimate of what was their mutual understanding of the situation.

In any relation or situation between the sexes a presumption of the continuance of conduct is particularly unreal and artificial, an observation which is no less applicable to a woman than to a man and perhaps demands special consideration in the case of a woman at the time of life of the respondent at the critical period.

I am content with the judgment of the Chief Justice of Tasmania upon the interpretation upon which I place it, but I would amend the order of the Full Court as drawn up by striking out the words " for pronouncement of decree nisi."

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JUDGMENT. McTIERNAN J.

I agree with the reasons for judgment of the Chief Justice.

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REASONS FOR JUDGMENT. WILLIAMS J.

I think that the appeal should be dismissed, and I agree with the order proposed by the Chief Justice.

The Act, it seems to me, refers to any period of three years, and in this case the material years are the three years from May 1936. The question whether there is a wilful or, in other words, a non-justifiable refusal to permit marital intercourse during the statutory period is, I think, in each case a question of fact.

Here, it seems to me, the only reasonable inference from the evidence which His Honour accepted, and particularly the evidence that the husband made frequent requests and was invariably refused (even if the period is confined to the year 1936, as the Chief Justice has said, and does not include, as I think the learned trial Judge intended, the period up to January 1938) is that the wife was in fact maintaining an attitude of refusal over the whole period and that she intended her husband to understand that her refusal was not temporary but would continue.