# United Kingdom House of Lords Decisions



01 December 1949

Lennie

v.

Lennie

At delivering judgment on 1st December 1949,—

**LORD SIMONDS** .—My noble and learned friend the**LORD CHANCELLOR** , who cannot be here to-day, has asked me to say that he concurs in the opinion of my noble and learned friend Lord Normand which will presently be read.

My noble and learned friend Lord Merriman is also unable to be here and has asked me to read his opinion.

**LORD MERRIMAN** .—I have had the advantage of reading the opinion prepared by my noble friend Lord Normand and am so completely in agreement with it that I have little to add. The one question about which I have felt any difficulty is whether the Divorce (Scotland) Act, 1938, must be interpreted in light of the decision in *Goold v. Goold*, that malicious denial of carnal intercourse persisted in for four years may constitute desertion within the meaning of the Act of 1573. But in *Burrell v. Burrell* the Lord President said that he had difficulty in appreciating certain of the implications of what he called "this recent innovation upon our law," and in reconciling them with the essentials of desertion. Lord Russell concurred with the Lord President, while Lord Carmont's acceptance of *Goold v. Goold* was no more than formal. In these circumstances I do not think that this House is bound to hold that the doctrine for which the appellant contends was accepted as being settled law in Scotland at the time of the passing of the Act of 1938. In my opinion it is open to this House to overrule *Goold v. Goold*, and I would do so.

In the course of the argument it was suggested that it would follow from the dismissal of her appeal that, when the consortium was actually ended by the appellant wife's withdrawal from cohabitation because, as has been held in her favour, she found that the conditions imposed by the respondent during the

relevant triennium were intolerable, she became, *ipso facto*, the deserting spouse. I am by no means satisfied that this is the case, and wish expressly to reserve my opinion on the point.

I would dismiss the appeal.

**LORD SIMONDS** .—Speaking for myself, I also concur in the reasons and the conclusions which have been reached by my noble and learned friends, Lord Normand and Lord Reid, and I would concur in dismissing the appeal.

**LORD NORMAND** .—This undefended action of divorce involves the question whether refusal of sexual intercourse without any overt act of desertion is "desertion" within the meaning of section 1 (1) (*a*) of the Divorce (Scotland) Act, 1938. It has already been decided in *Bell v. Bell* that the Act of 1938, though it reduces the period of desertion necessary to found a right to divorce, does not qualify or modify the conception of desertion built up by judicial interpretation of the Act of 1573. But the appellant submits that mere refusal of intercourse had been finally accepted as a ground of divorce before 1938.

This issue, which has never till now been brought before this House, was not discussed in the Courts below, because both the Lord Ordinary and the learned Judges of the Second Division treated it as determined in favour of the appellant by *Goold v. Goold* .The judgments of the Lord Ordinary and of the Second Division were therefore concerned with other issues, of competency and sufficiency of evidence and of acquiescence. On these issues the Lord Ordinary decided against the appellant and his judgment was affirmed by a majority of the Second Division, the Lord Justice-Clerk dissenting. But none of these issues arises unless it is established that the refusal of sexual intercourse is *per se* desertion, according to the Scottish law of divorce.

The appellant's evidence was accepted by the Lord Ordinary as truthful. I will assume that it was sufficiently corroborated by competent evidence. On that footing, the facts relevant to the present issue can be briefly stated. [His Lordship gave the narrative quoted *supra*, and continued]—

Divorce for desertion was introduced into the law of Scotland by the Act of 1573, and it may be pertinent to remember that from the first the elements of desertion were diversion by one spouse from the other's company without reasonable cause and remaining in malicious obstinacy continuously for four years. There is till at least 1881 no trace of any action, successful or unsuccessful, where the desertion alleged consisted only of refusal of intercourse, and in the period of three centuries between the passing of the Act and the first case of this sort there is a great dearth of any authority. Neither Stair nor Erskine nor Bell says anything of the matter. Bankton (I, v, 132) merely records that he has no knowledge of any case in which divorce had been attempted solely on the ground of refusal of intercourse. Of lesser authorities Lord Fraser—Husband and Wife, (2nd ed.) vol. ii, p. 1209—expresses the opinion that it is desertion if the defender refuses carnal intercourse. But the authorities which he cites are not convincing. Sir George MacKenzie is cited as saying "it may be doubted if a wife, remaining in her husband's house, but refusing him all access to her, may be said to have diverted; and I conceive she may, for all the reasons in the one case, conclude against the other" (Obs. on Act 1573, cap. 55). This hesitating expression of opinion lends little support to the opinion of Lord Fraser, since there may well be refusal of adherence both at bed and board though the spouses are living in the same house. Lord Elchies (Annot. on Stair, p. 8) comes nearer to the point, but then his opinion is that "there is the same reason for dissolving a marriage for wilful abstinence, as for non-adherence. Voet., *Comment. ad ff. ad tit. de Divort. et Repud*., section 7, *in fine*. Though I am afraid our law would not sustain it, since it is not contained in the Act." Lord Fraser relies on the old case of *Graham v. Buquhanane* That was an action for adherence, brought before the Act of 1573, and the facts were not such as to raise the question on which Lord Fraser expressed his opinion. Though the parties were living under the same roof there was a complete break of the conjugal consortium, for the husband kept his wife segregated in a locked room and refused to entertain her either

at bed or board. Lord Fraser also cites the English case of *Fitzgerald v. Fitzgerald*, but it has been pointed out—Walton on Husband and Wife, (2nd ed.) p. 62—that he has misunderstood the observations of Lord Penzance in that case. Moreover this House has now decided that mere refusal of intercourse does not constitute desertion according to the law of England—*Weatherley v. Weatherley* —and it has approved *Jackson v. Jackson*, in which the same conclusion was reached before the date of the Matrimonial Causes Act, 1937. Lord Fraser's opinion is therefore largely based on an imperfect appreciation of the only Scottish case cited by him and on a misunderstanding of the English law.

In 1881 *Forbes v. Forbes* came before Lord Fraser as Lord Ordinary. The pursuer had herself been in desertion but she had offered to resume cohabitation. The defender answered that he would not cohabit with her by occupying the same bedroom, but that she might occupy a separate room in his father's house where he himself was residing. The pursuer for a time agreed to this and occupied the room assigned to her, but she was ignored by the defender and his family, who refused to speak to her; she therefore left the house and sued the defender for divorce on the ground of desertion. These circumstances at least suggest that the defender's conduct went beyond refusal of carnal intercourse, and that there was on his part no genuine acceptance of the pursuer's offer but a refusal of cohabitation in any form; for, though the parties lived under the same roof, they were still living apart and there was no consortium. Lord Fraser in granting divorce did not, as I read his judgment, proceed on this broad ground, but on the ground that refusal of carnal intercourse is enough to establish desertion and again he supported this opinion by references to *Graham v. Buquhanane* and to the opinion of Sir George Mackenzie already cited.

The next case to be considered is *Stair v. Stair* . The pursuer sued for divorce on the ground of desertion. She had been living separate from her husband, and for a time the separation had been by mutual consent, and the parties had executed a deed of separation. But that deed had been revoked, and the pursuer had offered to return to live with her husband on condition that he did not insist on sexual intercourse. The husband had refused to renew cohabitation on these terms. This refusal was founded on as desertion. Lord Ardwall dismissed the action as irrelevant. He said:

> "It is apparently an open question in the law of Scotland whether refusal of carnal intercourse is itself desertion sufficient if persisted in to be the foundation of an action of divorce."

He then referred to Lord Fraser's opinion and continued:

> "But however that question may be decided … I am of opinion that a husband is legally entitled to refuse to live with a wife who makes it a condition of their living together that there shall be no carnal intercourse between them."

Lord Ardwall referred in support of this proposition to the opinion of the Lord Chancellor in *Mackenzie v. Mackenzie*, and to the law of England on this point, which he took to be the same as the law of Scotland. It is clear that neither the decision in *Stair v. Stair* nor Lord Ardwall's observations afford any support to the proposition that mere refusal of intercourse is a sufficient ground of divorce for desertion. In the same year Lord Ardwall allowed a proof in a case—*A v. B 1905 13 SLT 532* —in which the pursuer alleged that the defender had told her that he had resolved to treat her as his wife no longer, and that thereafter he had for three years occupied a separate bedroom and declined to have marital relations with her and had finally left her and lived in a separate house. In this case it appears that for part of the four years there was no averment of diversion from the pursuer except the use of a separate bedroom and the refusal of intercourse. In 1914 Lord Hunter had before him a case—*X v. Y* —in which the present issue was raised in its simplest and clearest form, for the pursuer, the husband, alleged that since the birth of the child of the marriage the defender had refused wilfully and without reasonable cause to allow the pursuer to have intercourse with her, though they had usually slept in the same bed. Lord Hunter

dismissed the action. He said:

> "It has never, so far as I know, been decided in any case that, where both spouses are residing in the same house and occupying the same bed, one may be held guilty of wilful desertion because of refusal without reason to fulfil the duty of marital intercourse."

He reviewed the authorities, and of *Graham v. Buquhanane* he observed:

> "Assuming that it is an authority for holding that one spouse may divert from the other's company within the meaning of the Act although they are resident in the same house, I do not think that it is any justification for the Court entertaining a suit for desertion where admittedly the spouses have resided in the same house and occupied the same bed."

Lord Hunter was therefore careful to avoid laying down the proposition for which the appellant contends. In 1921 Lord Anderson—*C v. D* —had to deal with a case which on the facts cannot be distinguished from *X v. Y*, and he followed the precedent set by Lord Hunter and dismissed the action. He observed "it has never been decided that, on an issue of desertion, cohabitation at bed involves marital intercourse."n

The question came before the Inner House for the first time in *G. v. G* . The parties had occupied the same bed for part of the period of alleged refusal of intercourse. The conclusions were for nullity and alternatively for divorce. The Court refused to grant a decree of nullity because the circumstances did not warrant the inference that the defender was incapable of the sexual act, and it refused to grant a decree of divorce on the ground that, assuming refusal of intercourse might be desertion, it had not been persisted in for the necessary four years. The Lord Justice-Clerk (Alness) said (at p. 194):

> "To say that a woman who lives at bed and board with her spouse has ‘divertit’ from his company is manifestly extravagant. The unbroken usage of three hundred years raises a strong presumption against the contention."

Lord Ormidale reserved his opinion on the question whether the refusal of a spouse to permit intercourse is relevant to instruct desertion within the meaning of the statute. Lord Hunter observed that he saw no reason to alter the view which he had expressed in *Xv. Y*, that divorce on the ground of desertion will not be granted if the spouses have admittedly resided, during the whole or part of the statutory period, in the same house and occupied the same bed, whether there has been intercourse or not. Lord Anderson referred to the reasons he had already given in *C v. D. Goold v. Goold* is the next Inner House case. The desertion complained of consisted in the refusal by the wife of intercourse for a period of twenty years after the birth of the second child of the marriage. In all other respects the consortium was unbroken. Lord President (Clyde), after a brief and cursory reference to the previous authorities, said (at p. 181):

> "An undefended action such as this provides no suitable opportunity of reviewing the law on this difficult topic. But I think it must be accepted as part of the law of Scotland that denial of carnal intercourse by one of the spouses (unaccompanied by any further—or overt —‘diversion from the other's company’) *may* constitute non-adherence within the meaning of the Act. The denial must of course, in any view, be ‘malicious,’ and it must have been persisted in for four years."

He also observed (at p. 182) that "The difficulties which undoubtedly arise out of the recognition of a denial of carnal intercourse (without any overt act of desertion) as constituting non-adherence must, I think, be met by insisting on a somewhat exacting standard of proof, both with reference to the denial itself and with reference to the absence of consent on the part of the offended spouse." Lord Sands was of opinion that persistent refusal of sexual intercourse for four years without better reason than

disinclination or distaste, and without acquiescence on the part of the other spouse, may be a relevant ground for divorce for desertion. His main reason for coming to this conclusion is that sexual intercourse is the distinctive element in marriage, and that the spouse who refuses it diverts from the other's company as spouse. He disposed of one of the resulting difficulties by holding that the evidence of spouses who have continued to occupy the same bedroom ought not to be received as sufficient, and that the evidence of the spouses ought not to be received as sufficient when there were opportunities of intercourse and no corroboration by way of evidence of such strained and distant relationship as confirmed the story of non-intercourse. I must confess that I do not understand how evidence of strained and distant relationship should point to the malicious refusal of one party rather than to mutual dislike and to abstinence by consent, or to some other cause not connected with their intimate sexual life. Lord Blackburn did not doubt that it was competent to entertain an action of divorce for desertion where the ground of divorce was that the defender had without a reasonable cause refused to have carnal connexion with the pursuer, and had persisted in the refusal obstinately and maliciously for a space of four years. But he also felt some of the difficulty that is inherent in this view, for he said (at p. 186):

> "Where one spouse has diverted from the other by refusing bodily intercourse, acquiescence by the deserted spouse in the situation which is created may be plainly indicated by the spouses continuing to live together, and may suffice to prevent the desertion being characterised as malicious."

In this passage what is in question is the malice during the four (now three) years, and I find great difficulty in supposing that the complaining spouse could refuse within that period to live with the other spouse and yet claim that the other spouse was in desertion. Lord Ashmore followed the opinion of Lord Fraser cited above. All four members of the Court found that there had been acquiescence on the part of the pursuer.

The question again came before the Inner House in *Burrell v. Burrell* . The First Division unanimously assoilzied the defender on the ground that the pursuer had failed to prove during any period of three years a refusal of intercourse to which he had not been a consenting party. Lord President Cooper, with whom Lord Russell concurred, dealt with the law as follows (at p. 576):

> "In *Goold v. Goold* it was held that the malicious denial of carnal intercourse persisted in for four years may constitute desertion within the meaning of the Act 1573, cap. 55, but that the standard of proof, both of the denial itself and of the absence of consent by the offended spouse, must be exacting. I have had difficulty in appreciating certain of the implications of this recent innovation upon our law and in reconciling them with the essentials of desertion. But it is unnecessary to examine the matter narrowly, since, even accepting the rule in *Goold v. Goold* at its face value as applicable to the post-1938 law of divorce, I am clearly of opinion that this action fails."

Lord Carmont accepted the reasoning in *Goold v. Goold* as binding on him with, I think, some reluctance.

We were told by Mr Guest in his careful and candid argument that *Goold v. Goold* had been followed in several Outer House cases. That was to be expected. But in the single instance to which he referred —*Macdonald v. Macdonald* —the facts went far beyond mere refusal of sexual intercourse and amounted in the view of the Lord Ordinary to overt diversion from the injured spouse's company at bed and board.

I will say at once that until *Goold v. Goold* there was no sufficient warrant for the proposition that the refusal of carnal intercourse is in itself and without any other evidence of non-adherence sufficient to

establish desertion. Lord Fraser's opinion in his work on Husband and Wife is, as I have endeavoured to show, based on misconceptions. His judgment in *Forbes v. Forbes* carries the matter no further; at best for the appellant it is a repetition of what he had written in his book. In *A v. B 1905 13 SLT 532* Lord Ardwall certainly gave some support to the proposition, for he held that there was a relevant averment of desertion though the only non-adherence distinctly averred for a large part of the four years consisted of refusal of intercourse without any overt diversion from the pursuer's company. But in *Xv. Y* and in *C v. D*, Lord Hunter and Lord Anderson gave no new and independent approval to either of these cases and no approval can be inferred from *G v. G.* In that case the express reservation of opinion by Lord Ormidale was, I think, justified by the existing state of the authorities. The opinion of Lord President Clyde in *Goold v. Goold* is expressed in terms which indicate that the question was not treated with the full consideration which it deserved, if it were intended to accept finally this innovation on the law of divorce. I find it significant that the approval given in that case to the proposition for which the appellant contends is hedged about by safeguards which show that, if the new doctrine had been received into the system of Scots law, it had not been fully assimilated. The Courts have always exacted strict proof in all actions of divorce, but the newly recognised ground of divorce is to be subject to some still more exacting standard of proof; the evidence of the spouses is not to be accepted when they occupy the same bedroom, and it is not to be regarded as sufficient when there are opportunities of intercourse and no corroboration by way of evidence of such strained and distant relationship as confirms the story of non-adherence. I do not repeat the comment which I have already made on the last of these admonitions, but I emphasise that we have to deal with a new doctrine calling for novel rules of evidence. In *Burrell v. Burrell* the Lord President expressed misgivings which were shared by other learned Judges of the First Division. He pointed out that the standard of proof both of the refusal and of the absence of consent must be exacting. The cited cases illustrate how this rule operates to defeat the pursuer's action when acquiescence is in issue. But there must be proof that the refusal was without reasonable cause and that it was maliciously persisted in for the statutory period, and I find it difficult to imagine how these requisites are to be proved in accordance with some specially exacting standard of proof if the evidence of the spouses themselves is to be either disregarded or heavily discounted. This difficulty must arise in every case when the new doctrine is invoked, for *ex hypothesi* there is no evidence of overt desertion, and the issue depends solely on the intimate life of the spouses. In this very case the. Lord Ordinary's finding that the defender had an aversion from the sexual act which was partly moral and partly oesthetic or physical would inevitably raise a question whether the refusal was voluntary or the result of an inhibition beyond his control; and, if it was not voluntary, it was not malicious. One more complication of this novel ground for divorce must be noticed. If it were to be accepted, we should have to consider whether it could be held that there was desertion if sexual intercourse were tolerated only on rare and exceptional occasions. Mr Guest's position was that a single act of connexion in the period of three years of desertion founded on would destroy the right of action. I think that no other answer would have been consistent with the requirement that desertion must be obstinately persisted in for three years continuously. But it seems to me that this is the *reductio ad absurdum* of the proposition contended for. The question in the appeal is a question of Scots law, and it must be decided in accordance with the principles and precedents of Scots law. But before coming to a decision it is necessary that the House should be satisfied that the principle of statutory construction, common both to the law of England and to the law of Scotland and applied in *Weatherley's* case,is not applicable here. In *Weatherley* it was held that the Legislature must have intended the word "desertion" in the Matrimonial Causes Act of 1937 to bear a meaning consistent with the law expounded by the most recent judicial decision. So here it might be said that the Legislature intended the word "desertion," in the Divorce (Scotland) Act, 1938, to bear the meaning put upon it by *Goold v. Goold* . To that there is, I think, a complete answer. The Matrimonial Causes Act, 1937, for the first time made desertion a ground of divorce, and it necessarily involved a definite conception of desertion, which it did not itself define. The conception of desertion could only be found in the jurisprudence as it existed at the date of the Act, and it could only be definite if the latest decided cases were treated as closing past controversies. But the Divorce (Scotland) Act, 1938, did not fix the legal

meaning of desertion either by a new statutory definition or by reference to existing decisions. It was not indeed concerned with the legal content of the conception of desertion and it employed the word only as a descriptive term of common usage. The Act is therefore no hindrance to the overruling of decisions upon what constitutes desertion which on later and fuller consideration appear to be erroneous.

I would therefore overrule *Goold v. Goold* and *A v. B 1905 13 SLT 532*, and I would disapprove the reasoning of Lord Fraser in *Forbes v. Forbes* and dismiss the appeal.

On the question mentioned by my noble and learned friend Lord Merriman at the end of his speech I would reserve my opinion.

**LORD REID** .—This appeal cannot succeed unless refusal of sexual intercourse by one spouse, without any other conduct on the part of that spouse of which complaint can properly be made can be desertion within the meaning of section 1 (1) (*a*) of the Divorce (Scotland) Act, 1938. It was not and could not be argued that the provisions of this Act would warrant such refusal being held to be desertion, if such refusal could not have been a sufficient ground for divorce under the earlier law of Scotland. It is therefore necessary in the first place to determine what was the law of Scotland in this matter before 1938. The appellant relies principally on the decision in *Goold v. Goold* . Before examining that decision I think that it is necessary to examine the earlier authorities.

The remedy of divorce for desertion was introduced into the law of Scotland by the Act of 1573, cap. 55. The word "desert" is not used in that Act. That Act applies if a "persoun, or persouns, joynit in lauchful matrimonie, husband or wife, divertis fra utheris companie, without ane reasonabil caus alledgeit, or deducit befoir ane Judge, and remainis in thair malicious obstinacie, be the space of foure yeiris," and it enacts "the malicious and obstinat defectioun of the partie offendar to be ane sufficient caus of divorce." I shall have to make some reference later to the preliminary steps which that Act required to be taken before an action of divorce on this ground could be brought in the Court of Session.

For at least three centuries after the passing of that Act there appears to have been no reported case in which it was even argued or suggested that refusal of intercourse was by itself a sufficient ground for divorce. I shall refer later to the case of *Graham v. Buquhanane* which was an action of adherence decided before the passing of that Act. The question is not mentioned by Stair or Erskine, but there is a passing and inconclusive reference to it in Sir George Mackenzie's Observations (1686), quoted in Fraser, Husband and Wife, vol. ii, p. 1209. The earliest passage that I need quote occurs in Bankton (1.751, I, v, 132):

> "It is a malicious desertion, according to some learned authors, if the one party, tho' cohabiting, obstinately refuses the other the rights of the marriage bed: for that such person is guilty of deserting the conjugal society and conjunction, which is the only reason that divorce proceeds upon wilful absence and desertion but such ground of divorce has not been attempted with us, so far as I know."

Bankton cites Huber but no Scottish writer.

In Elchies' Annotations on Stair there occurs this passage (at pp. 7–8):

> "As an incapacity to procreate would make a marriage null *ab initio*, so, where there is such a capacity, a wilful abstinence should, a *paritate rationis*, be a ground for dissolving the marriage; and though the Act of Parliament, Ja. VI, p. 4, cap. 55, speaks only in general of desertion and not adhering, which would scarcely comprehend this wilful abstinence, yet there may be an argument (even in our law) drawn for it from Sir George Mackenzie's

> observations on that Act. … And truly I am of opinion, there is the same reason for dissolving a marriage for wilful abstinence as for non-adherence: … Though I am afraid our law would not sustain it, since it is not contained in the Act; and if our law did sustain it, the probation would be very difficult."

Lord Fraser took a different view; in his work on Husband and Wife, (2nd ed. 1878) at vol. ii, p. 1209 he discussed the question "whether it is desertion if the defender merely refuse carnal intercourse," and after citing the earlier authorities expressed the opinion "It would seem, however, that it is desertion." He appears to have based this opinion largely on the decision of the Commissary Court in *Graham v. Buquhanane* . In that case the husband not merely refused sexual intercourse; he confined his wife in an upper chamber of his house and refused to release her. In an action of adherence the Commissaries ordered him "to adheir as a man aucht to do to his wyff." The husband's offence in that case was much more than refusal of intercourse, and I cannot regard that case as an authority that mere refusal of intercourse would warrant a decree of adherence; some remedy would have been necessary on the other facts if nothing had been said about refusal of intercourse. I think therefore that Lord Fraser was under some misapprehension about this case, and that this may well have led him to form his view that refusal of intercourse could amount to desertion. It is worth noting that in an earlier chapter of the same work Lord Fraser says (at vol. ii, p. 869):

> "If the husband allow his wife to reside in the same house with him, it is said that she cannot bring an action of adherence against him on the ground that he excludes her from his bed —*Orme v. Orme* . But this is doubtful law, and it will be seen that there is authority for holding that such abstinence from conjugal duty is malicious desertion, warranting divorce."

The authority to which he there refers can, I think, only be the case of *Graham v. Buquhanane* .

Apart from the case of *Forbes v. Forbes*, where Lord Fraser gave effect to the opinion which he had expressed in his book on Husband and Wife, the first reported case on the subject is *Stair v. Stair* . In that case Lord Ardwall held that a wife, who was living apart from her husband and who had offered to cohabit at board only but not to allow intercourse, was not ready and willing to adhere; an offer to cohabit on those terms was not an offer to adhere according to consistorial law and practice. Accordingly he refused to grant decree of divorce, holding that the husband was not bound to accept that offer and was not in desertion because he refused to allow her to return on those terms. In the same year in *A v. B 1905 13 SLT 532*, Lord Ardwall held the libel relevant in an action of divorce for desertion in which it was averred by the wife that her husband not only refused to have intercourse with her but also, while living in the same house, refused to remain in her company at any time except when that was absolutely necessary. In *X v. Y* the spouses had slept together in the same bed, but it was averred that intercourse had been refused. Lord Hunter held that in such a case an action of adherence would not have been maintainable; as an action of adherence was, before 1861, an essential preliminary to an action of divorce for desertion, and it is well established that the Conjugal Rights Act, 1861, in abolishing this preliminary procedure did not extend the scope of the Act of 1573, it followed that there could be no divorce. In *C v. D*, Lord Anderson also refused divorce when the spouses had slept in the same bed.

The first case to come before the Inner House which involved this matter was *G. v. G.* This was an action by a husband concluding alternatively for declarator of nullity on the ground of impotence or for divorce on the ground of desertion. The Second Division refused to grant decree. In that case the marriage had never been consummated and the wife had repeatedly refused to permit intercourse. The main question was whether this refusal was deliberate or involuntary and comparatively little attention was given to the case for divorce, but with regard to that matter the Lord Justice-Clerk (Alness) said (at p. 194):

> "It is, I think, quite unmaintainable. To say that a woman who lives at bed and board with

> her spouse has ‘divertit’ from his company is manifestly extravagant. The unbroken usage of three hundred years raises a strong presumption against the contention."

Lord Ormidale found it unnecessary to consider the general question and Lord Hunter and Lord Anderson adhered to the views which they had expressed in the Outer House cases cited above. On appeal to this House it was held that the husband was entitled to decree of nullity of the marriage and their Lordships therefore did not deal with the case for desertion.

I have cited the earlier authorities at some length because in *Goold v. Goold* the Lord President (Clyde) said (at p. 181):

> "I think it must be accepted as part of the law of Scotland that denial of carnal intercourse by one of the spouses (unaccompanied by any further—or overt—‘diversion from the other's company ’) *may* constitute non-adherence within the meaning of the Act."

After consideration of the earlier authorities I can only say that, with the greatest deference, I am driven to an opposite conclusion. The only clear expressions of opinion in favour of the doctrine are those by Lord Ardwall and Lord Fraser, and, as I have said, Lord Fraser's opinion appears to be based largely on a misapprehension. I think that the matter was then at best an open question with a preponderance of opinion against the doctrine. Writing in 1926 Lord Wark went farther. In the article on adherence which he wrote in the Encyclopædia of the Laws of Scotland he stated:

> "Non-adherence is the refusal to live in family with the other. It is not non-adherence to refuse sexual intercourse. Where the spouses are living together at bed and board it cannot be said that either ‘divertis fra utheris companie’ in the sense of the Act 1573, cap. 55, and accordingly the remedy of divorce for desertion introduced by that Act does not apply to such a case"

(vol. i, para. 291). Lord Wark's opinion is valuable because he was very familiar with the authorities on the law of husband and wife. In *Burrell v. Burrell* the Lord President (Cooper) referred to the decision in *Goold's* case as "this recent innovation upon our law." I think that that decision was an innovation and that it is right that the grounds on which it is based should now be closely scrutinised.

Before 1861 a spouse could not obtain a decree of divorce for desertion without having first obtained a decree of adherence. "The Courts of Scotland have never attempted to enforce a decree of adherence by means of civil process. The only remedy provided by Scotch law, where the offending spouse persists in avoiding cohabitation after decree, is to be found in the Act of 1573. Decree of divorce under that Act is, in my opinion, nothing else than a penalty for obstinate non-adherence. Accordingly the older statute requires, as the first step towards obtaining the remedy, that the deserted spouse shall raise and obtain decree in an action of adherence, the decree to be followed by a charge of horning; and as the second step, that application shall be made to the Ecclesiastical Court for the admonition, and if that be not obeyed, for the excommunication of the offender, who, if he or she failed to resume cohabitation within the period allowed by the Act, after these preliminaries had been observed, could not resist a decree of divorce. … After the final establishment of presbytery the ecclesiastical procedure enjoined by the Act became, in course of time, a mere formality, because the Church Courts generally, if not invariably, declined either to admonish or to excommunicate. The Civil Courts ceased, in consequence, to regard admonition and excommunication as an essential preliminary. … Then came the Act of 1861, which provides ‘that it shall not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, nor to any other judicature, to admonish the defender to adhere.’ In my opinion, the object of that enactment is, not to alter the substance of the older

statute by giving any new right of action to the pursuer, or any new ground of excuse to the defender, but to simplify procedure by allowing the pursuer to prove non-adherence in his suit for divorce, and dispensing with the necessity for a separate action of adherence and all other preliminaries"—*Mackenzie v. Mackenzie* . I think it useful to recall those facts because I find it very difficult to suppose that that lengthy and complicated procedure could have been applied when the spouses were living an apparently normal life together and the only ground of complaint by the pursuer was that the defender refused to have intercourse. Moreover, if decree of adherence were granted in such circumstances, it could only be in general terms requiring the defender to cohabit at bed and board, and extremely difficult questions might arise as to whether such a decree had been obeyed or not. Would one act of intercourse be sufficient? And is it to be supposed that a Court must consider the validity of reasons offered for failing to have intercourse after such a decree in order to determine whether failure to obey it has amounted to "malicious and obstinat defection"? There is certainly no indication anywhere that Scottish Courts ever had to undertake such tasks. In *Paterson v. Paterson*, an action for aliment on the ground of desertion, Lord Justice-Clerk Inglis said (at p. 217):

> "Until now I certainly never heard of the relations of a husband and wife being settled in a Court of law, on the ground that one was unwilling to have sexual intercourse."

I think that it was then the law and is still the law that unwillingness on the part of a defender to have sexual intercourse is not by itself a good ground of action.

In *Goold's* case Lord Blackburn and Lord Ashmore were content to accept as authoritative the Outer House cases to which I have referred and the opinion of Lord Fraser, but Lord Sands stated (at p. 184) the reasons which led him to form the opinion "that persistent refusal of sexual intercourse for four years without any better reason than disinclination or distaste, and without acquiescence therein on the part of the other spouse, may be a relevant ground for divorce for desertion." He pointed out that there are many degrees in the measure of separation of two spouses. They may live separately but appear together as spouses on certain ceremonial or social occasions; their only association may be spending a few days in the same hotel in separate apartments; or they may have separate living and sleeping rooms in the same house. Lord Sands thought that it would not be possible to rule out all such cases and to hold that there must be diversion from every form of personal or local contact. So, as sexual intercourse is the distinctive element in marriage, he thought (at p. 183) that "a spouse who ‘diverts’ from what is distinctive in matrimony is obnoxious to the provisions of the statute, even though he or she may be willing to maintain such company or association as is compatible with the single state."

I cannot accept this reasoning as sound. I would not agree that, if the law affords no remedy for refusal of intercourse, it necessarily follows that there can be no remedy for anything short of diversion from every form of personal or local contact. It is not difficult to distinguish a case where there is open but not complete separation from a case where the only fault alleged is refusal of intercourse, but it is not necessary in this case to express any opinion as to what measure of separation is necessary to constitute non-adherence.

In my opinion the reasons which I have already stated are sufficient to establish that *Goold's* case was wrongly decided. But there is one other matter to which I would refer. It was recognised in *Goold's* case and in other cases which have followed on it, including the present case, that, if it be accepted that refusal of intercourse can by itself be a ground for divorce, it would be necessary to have a very high standard of proof that there had been such refusal, that it had been malicious and obstinate in the sense that there had been no good reason for it, and that there had not been acquiescence by the pursuer. In a case where there was no overt separation, this burden of proof would be so great as to be almost impossible to discharge, and the law would be left in the very unsatisfactory position of affording a remedy in theory which it denied in practice. I agree that this appeal should be dismissed.

[1950] SC(HL) 1