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Taylor J.

it is clear that the outbreak of war in 1939 resulted in the suspension of negotiations between the applicant, the American Viscose Co. and the International Rayon Corporation, it seems equally clear that the International Rayon Corporation never at any time contemplated undertaking manufacturing processes in Australia pursuant to its Australian letters patent. On the contrary, the evidence establishes that its intention was to dispose, by sale, of its patent rights in the invention in this and other countries. This it did in 1945 when it sold to the applicant the whole of its patent rights to this and other inventions in European countries and in the countries of the British Commonwealth of Nations. The consideration for the sale was the sum of 5,000,000 dollars. The International Rayon Corporation did not join in making and was not otherwise a party to these proceedings, but it was conceded that the applicant had used its best endeavours to place before the Court the evidence relevant to a consideration of the activities of that corporation during the war years and there was a considerable body of such evidence. From this it is quite apparent that as early as 1941 the invention was a proved success and that its employment, at that time, in the production of rayon yarn by continuous process was not only useful but constituted an extremely substantial contribution to that industry. Reviewing the facts as best I can, I find that no other conclusion is open than that there was a delay of at least four years during which the International Rayon Corporation was prevented by hostilities of the nature specified in s. 84 (6) from selling or otherwise exploiting its Australian patent. I should add that it was not suggested that this period of delay or frustration was caused by hostilities other than hostilities between His Majesty and other foreign States. The original negotiations were suspended before the entry of the United States of America into the war, and even if other factors began to contribute to the delay after that event, the period of suspension was materially determined by circumstances as they existed in the United Kingdom and in Australia and which resulted directly from hostilities of the nature specified in s. 84 (6).

From the evidence to which I have made a brief reference, I think I am bound to conclude that the right to the Australian letters patent were no less valuable in 1940 than they were in 1945. In the former year the invention was already a proved success on a commercial scale, and, since the letters patent then had a longer residual term, it may be proper to say that a sale at that time, quite apart from its earlier completion, would have been more beneficial to the International Rayon Corporation than the result

of the sale which took place in 1945. There are, however, a number of circumstances which make it difficult to conclude that this would probably have been so. But the circumstance that the International Rayon Corporation was for at least four years virtually prevented from selling its Australian letters patent and thereby suffered a corresponding delay in the receipt of such of the purchase money as was attributable to the Australian letters patent is, I think, sufficient to require an extension to the letters patent for that period. I should add that in the course of their addresses counsel reviewed the annual financial statements of the International Rayon Corporation published during the war years, and it was contended on behalf of the commissioner that any loss to the International Rayon Corporation under the heading to which I have referred was more than offset by profits attributable to the invention made by the corporation in the United States out of war activities. It is, I think, sufficient to say that there is nothing in the evidence which leads me to this conclusion. On the contrary, I am disposed to think, upon the evidence, that if war had not intervened, the employment by the International Rayon Corporation of the invention in the course of its manufacturing processes would have resulted in greater profits than those which it, in fact, achieved.

At one stage of the case it was suggested that the loss and damage which was sustained by the International Rayon Corporation was not appropriate to found an application by the applicant as the assignee of the International Rayon Corporation for an extension of the term of the letters patent. This contention is, of course, in conflict with the authorities on the earlier part of s. 84 and, in my view, is disposed of by the observations of *Sargant* J. in *In re Summers Brown's Patent* (1).

Nor do I think that the absence of representation on behalf of the International Rayon Corporation in this application in any way affects the matter, although it has been the practice in applications of this kind to join the original patentee. I see no reason why an application made by an assignee should not be allowed to proceed whereas in the present case notice of the application has been expressly given to the original patentee and for some not readily apparent reason the original patentee has refused to join in the application. Perhaps I should add that no submission contrary to this view was advanced on behalf of the commissioner.

An additional period of one year should also be allowed upon the third ground upon which an extension is sought. It was

(1) (1922) 2 Ch. 759.

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not suggested that the applicant's evidence to the effect that circumstances arising directly out of the war operated to delay the establishment of its undertaking in Australia should not be accepted, though it was contended that the applicant's own estimate of the period of delay was based, in part, upon circumstances which should be regarded as too remote from hostilities "between His Majesty and any foreign State". I think that this may be so, but nevertheless, I am satisfied that the applicant was occasioned some delay, amounting at least to a period of one year, by circumstances arising directly out of hostilities.

In the circumstances I am of opinion that the term of the letters patent should be extended for a period of five years from 17th November 1952 and I so order. I further order that the applicant pay to the commissioner his costs of and incidental to the application, including costs of the summons for directions, and I direct that the exhibits in the case, including that attached to Mr. Sheldon's affidavit of 30th July 1952 may be taken out of Court.

Orders accordingly.

Solicitors for the applicant, *Allen, Allen & Hemsley.*

Solicitor for the Commissioner of Patents, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

[HIGH COURT OF AUSTRALIA.]

WATKINS . . . . . APPELLANT ;
PETITIONER,

AND

WATKINS . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1952.

MELBOURNE, *Oct.* 14, 15 ; *Nov.* 3.

Dixon C.J., McTiernan and Taylor JJ.

Matrimonial Causes—Dissolution of marriage—Desertion—Parties living in same house—Parties occupying same bedroom for portion of relevant period—Conduct of respondent—Whether terminating matrimonial relationship—Marriage Act 1928 (*Vict.*) (*No.* 3726), *s.* 75 (*a*).

In a suit by a wife for dissolution of marriage on the ground of desertion for the statutory period it was proved that the husband formed a definite determination at least three years before the filing of the petition to treat his wife as a stranger and to exclude her entirely from his society and that subsequently he acted in accordance with that intention. To this end he did not speak to her, and failed to answer her when she spoke to him, except that occasionally, if the only answer required was a negative or affirmative, he so answered. But in spite of this the parties lived under the same roof, sharing it with relatives, and the husband made an allowance to the wife out of which she bought food which she cooked, and which when cooked the parties ate at the same table, although in silence. In addition the wife performed the ordinary domestic services, and, although sexual intercourse did not take place during the relevant period, the parties slept in the same room until two years prior to the issue of the petition.

Held, that the factum of separation requisite to the proof of desertion had been established.

Drake v. *Drake*, (1896) 22 V.L.R. 391 ; *Simons* v. *Simons*, (1898) 24 V.L.R. 348 ; *Power* v. *Power*, (1944) V.L.R. 247 ; and *Campbell* v. *Campbell*, (1951) 51 S.R. (N.S.W.) 158 ; 68 W.N. 174, applied.

Held, further that to so find was not contrary to such decisions as *Hopes* v. *Hopes* (1949) p. 227 and *Walker* v. *Walker* (1952) 2 All E.R. 138.

Decision of the Supreme Court of Victoria (*Dean* J.) reversed.

H. C. OF A. 1952. WATKINS v. WATKINS.

APPEAL from the Supreme Court of Victoria.

Evelyn Joyce Watkins presented a petition dated 12th December 1951 praying that her marriage with Kenneth Lawton Watkins be dissolved on the ground that the respondent did without just cause or excuse wilfully desert her and did without any such cause or excuse leave her continuously so deserted during three years and upwards. The suit was not defended. The facts appear sufficiently in the judgment hereunder.

The trial judge (*Dean* J.), following *Wilson* v. *Wilson* (1) (a decision of the Full Court of the Supreme Court of Victoria), was of opinion that since the respondent took his meals together with the petitioner and made her an allowance in order to provide at least for his own maintenance, and since the ordinary domestic services were performed by the petitioner, the respondent had not so completely severed the matrimonial relationship that what was left could not be said to be such a relationship at all, and he accordingly ordered that the petition be dismissed.

From this decision the petitioner appealed to the High Court of Australia.

E. H. E. Barber (with him *S. Wilson*), for the appellant. The extent of the duties performed by the wife for the husband is important only if she is alleged to be the deserter. It is submitted that it does not matter if she is the petitioner. The real case here is that the conjugal society of the spouses has been abandoned. There are two lines of authority, each having a different approach, which bear on the problem. In Victoria the Courts have adopted the view that the marriage relationship consists of a number of elements such as sexual intercourse, social relations, conversation, domestic duties, the sharing of common rooms, &c. The Courts examined the particular marriage and if there was nothing substantial left, then there was desertion. The approach of the Victorian Courts is illustrated by *Power* v. *Power* (2); *Drake* v. *Drake* (3); *Simons* v. *Simons* (4); *Tulk* v. *Tulk*; *Hoffmeyer v. Hoffmeyer* (5); *Timms* v. *Timms* (6); *Jackson* v. *Jackson* (7); *Campbell* v. *Campbell* (8); *Cooke* v. *Cooke* (9). On the other hand in England the view taken recently is that before a finding of desertion may be made there must be two quite separate households.

(1) (1951) (unreported).
(2) (1944) V.L.R. 247.
(3) (1896) 22 V.L.R. 391.
(4) (1898) 24 V.L.R. 348.
(5) (1907) V.L.R. 64, at p. 65.
(6) (1925) V.L.R. 597.
(7) (1951) V.L.R. 24.
(8) (1951) 51 S.R. (N.S.W.) 158; 68 W.N. 174.
(9) (1943) 17 A.L.J. 274.

This approach is illustrated by *Smith* v. *Smith* (1); *Hopes* v. *Hopes* (2); *Walker* v. *Walker* (3); *Baker* v. *Baker* (4); *Littlewood* v. *Littlewood* (5). It is submitted that the approach of the Victorian Courts is supported by the dictum of the High Court in *Baily* v. *Baily* (6), where it is said " For the fundamental idea is that desertion is essentially not a departure from a place but a departure from a state of affairs ".

There was no appearance for the respondent.

Cur. adv. vult.

Nov. 3.

THE COURT delivered the following written judgment :—

The appellant, a wife, petitioned for the dissolution of her marriage with the respondent on the ground that since the celebration of the marriage he had without just cause or excuse deserted her and without any such cause or excuse left her continuously so deserted during three years and upwards. It is s. 75 (*a*) of the *Marriage Act* 1928 (Vict.) which provides that the court may dissolve a marriage upon this ground. The respondent entered no appearance to the petition. The cause was tried by *Dean* J. It was an undefended cause. After hearing the appellant's evidence and the evidence of other witnesses called on her behalf *Dean* J. dismissed the petition. She appeals as of right to this Court in pursuance of s. 35 (1.) (*a*) (3) of the *Judiciary Act* 1903-1950. The appeal is both upon law and fact.

The case is a difficult one because it presents an example of an intentional termination by a husband of the whole state of things which constitutes the matrimonial relationship or consortium without, for a portion of the required period, the outward *indicia* of the amount of physical separation which would enable strangers to the menage to conclude from observation that the relationship had ceased.

The respondent formed a definite determination at least three years before the filing of the petition to treat his wife as a stranger and to exclude her entirely from his society. To this end he ignored her existence. He did not speak to her. He failed to answer her if she persisted in speaking to him except that occasionally, if she asked a question requiring nothing but a negative or affirmative, his system broke down to the extent of saying yes or no. Otherwise all communications with her were made through third persons notwithstanding that she was present. But, in spite of this effective

(1) (1940) P. 49.
(2) (1949) P. 227.
(3) (1952) 2 All E.R. 138.
(4) (1952) 2 All E.R. 297.
(5) (1943) P. 11.
(6) (1952) A.L.R. 715, at p. 716.

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Dixon C.J. McTiernan J. Taylor J.

exclusion of her from the position of a wife, they lived under the same roof, sharing it with relatives; she cooked meals, did the washing, received a small allowance for housekeeping and at the commencement of the required period had her bed in the same room as his although at the other end of the room.

The marriage was celebrated on 25th March 1944. The petitioner and respondent were then both twenty-four years of age. The only child of the marriage was born on 8th May 1945.

Not only did the parties for the period of three years and upwards prior to the petition live in the same house but they were still living in it when the cause was being heard. *Dean* J. found that the respondent by his conduct had almost destroyed the matrimonial relationship but that sufficient of it remained to preclude his making the decree sought by the appellant.

After the marriage the parties lived at Toowoomba. Their child was born there. The respondent began ill-treating her before the birth of the child. He was annoyed because she was disabled from giving parties in the home for his friends. The respondent's resentment at the cessation of these parties was displayed by ignoring her and refusing to speak to her for hours at a time and by going out at night and leaving her alone in the house. It became a practice of his to drink the family supply of milk and compel her, even although she was ill, to go messages for more milk. Her mother came from Essendon to help her and returned home in 1945.

In July 1945 the appellant went to live in her parents' home at Essendon. She took the child with her. In August the respondent was discharged from the Air Force. Then he joined his wife, who was living in her parents' house at Essendon. In September 1947 the parents moved to another house. The appellant's brother who had been living in the house at Essendon remained there. In April 1950 he married and he and his wife lived in the house. It was not divided into flats. There was one dining room and the four people living in the house dined at the same table. There was one kitchen. The respondent paid one-half of the rent and the appellant's brother the other half. Each of them also paid a half of the bills for light and power.

After the parties came to live at Essendon, the respondent persisted in his ill-treatment of the appellant and it became worse. No evidence of physical violence was given. At Christmas 1947 he made it clear that he intended to end co-habitation and took effective action to carry out his intention. Formerly they slept on twin beds adjoining each other. He moved his bed to the

opposite end of the room. Since he did this sexual intercourse has never taken place. The appellant said in evidence that she asked him why he moved his bed and he replied that he did so because he ceased to love her and he did not want to have anything to do with her. The appellant said that her husband repulsed any advances she made to him and that since Christmas 1947 they lived "as complete strangers". He refused to have any converse with her. The respondent endured this state of affairs as long as she could, hoping it might end. At length she moved her bed into another room and slept there for a period of two years before she petitioned. Since Christmas 1947 he has refused to speak to her at meals or at any other time. It became his practice to convey anything he had to say through the appellant's brother or his wife. It was his practice to turn his back on the appellant if she attempted to speak to him. He displayed no affection for the child and took no interest in either of them. He brought his friends to the house. In the appellant's presence he introduced them to her brother and his wife, but he did not introduce them to the appellant. For more than four years he owned a motor car but never took the appellant anywhere. He used the car for his own pleasure and took his friends out in the car. Ordinarily he gave the appellant an allowance of £3 10s. 0d. per week. He gave her no such recognition as might be involved in handing the allowance to her personally. It was left for her. In November 1951 he went on holidays for three weeks but left no message with the appellant that he had gone away. Until a month before the petition she did his washing. She stopped doing it because he threw his soiled linen at her when she complained of the inadequacy of the allowance. The appellant had need of placing the child in her parents' care. Out of the allowance she paid her parents for maintaining the child and other expenses incurred for the child's benefit. Only £1 was left to buy food for the appellant and the respondent. She prepared the meals which he ate in the house. But he very rarely dined there. At times she would ask him if he would be in for a particular meal. He might answer yes or no. He has during the period announced that he would be in. But the evidence is that he never spoke "a full sentence" to her. She incurred debts in getting furniture for the house. In order to obtain more money for such necessaries, she went to work. The appellant instructed a solicitor to demand adequate maintenance. The respondent replied through his solicitors that he would increase the allowance to £5 per week if she complied with certain terms which implied fault on her part. There was no foundation for any