[HIGH COURT OF AUSTRALIA.]

THOMSON . . . . . , . APPELLANT;
PETITIONER,

AND

THOMSON . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 28, 29; *June* 1.

SYDNEY, *Aug.* 18.

Webb, Fullagar and Taylor JJ.

Matrimonial Causes—Dissolution of marriage—Desertion—Continuance—Onus of proof—Animus deserendi—Termination of desertion by resumption of cohabitation—Marriage Act 1928 (*Vict.*) (*No.* 3726), *s.* 75 (*a*).

In a suit by a husband on the ground of desertion for the statutory period of three years and upwards, it was proved that the wife had deserted the husband but that after a period of fifteen months, at his request, she had returned to the matrimonial home, where, for the following three years, she performed in varying degree her normal domestic duties in a situation between her and the husband which became increasingly bitter. Sexual intercourse did not take place between the parties after the return of the wife. The trial judge found that at the time of her return the wife was prepared to, and intended to, resume her place as mistress of the house and to care for her husband and children as such, but he was unable to find either that the wife positively then intended to resume sexual intercourse or that she positively then intended never to do so.

Held, that the onus of establishing the continuance of the elements of desertion for the statutory period was on the petitioner.

Pratt v. *Pratt* (1939) A.C. 417 and *Crowther* v. *Crowther* (1951) A.C. 723 discussed.

Held, further, that, in the circumstances, desertion for the statutory period had not been established.

Mummery v. *Mummery* (1942) P. 107; *Bartram* v. *Bartram* (1950) P. 1, and *Jackson* v. *Jackson* (1951) V.L.R. 24 distinguished.

Decision of the Supreme Court of Victoria (*Sholl* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Donald Finlay Fergusson Thomson, D.Sc. (hereinafter called the petitioner) presented a petition, dated 8th January 1951, to the Supreme Court of Victoria, praying that his marriage with Gladys Winifred Thomson (hereinafter called the respondent) might be dissolved on the ground that she had without just cause or excuse wilfully deserted him and without any such cause or excuse had left him continuously so deserted during three years and upwards.

On 18th February 1952, being the eighth day of the hearing of the petition, the respondent, by leave, presented a counter-petition to the Court praying that her marriage might be dissolved on the same ground as that relied on in the petition.

The suit was heard before *Sholl* J., when evidence was called on behalf of each of the parties. On 19th February 1952 and 24th March 1952 *Sholl* J. delivered judgment dismissing the petition and the counter-petition. The trial judge found the following facts relevant to the appeal, which should be read with the facts set out in the judgment hereunder (*a*) that the respondent deserted the petitioner at or very shortly after May 1946; (*b*) that early in August 1947 the respondent returned to the matrimonial home pursuant to agreement with the petitioner that she was to return to him without terms and without recrimination and on the footing of complete reconciliation; (*c*) that from August 1947 to 1949 the respondent performed the ordinary domestic duties of the home; (*d*) that sexual intercourse did not take place between the parties after the time of the respondent's return, although the petitioner made some approaches with a view to intercourse. On the occasion of some of these approaches the respondent reviled him over a past affair. If the respondent did not always refuse intercourse in so many words, her usual attitude discouraged it. Probably there were times when she was lonely and repentant and would have been receptive of tenderness but on which the petitioner would not risk further humiliation by offering affection.

From the decision of *Sholl* J. the petitioner appealed to the High Court.

P. E. Joske Q.C. (with him *S. H. Collie*), for the appellant. There are two questions for the decision of this Court: (*a*) whether the agreement for reconciliation was carried out by the respondent so as to terminate her existing state of desertion; and (*b*) whether the onus was on the appellant of proving the continuance of all the elements of desertion for the whole period of three years, or

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whether it was on the respondent of proving that her desertion had come to an end before the expiration of the period of three years. Desertion, if there be an original intention to desert, continues until it is brought to an end : see *Bowron* v. *Bowron* (1) ; *Crowther* v. *Crowther*, per Lord *Porter* (2). *Bartram* v. *Bartram* (3) is authority for the proposition that it is not ended without a full resumption of cohabitation in circumstances such as exist in this case : see per *Bucknill* L.J. (4) ; per *Denning* L.J. (5). Whether there is a true or full resumption of cohabitation depends on many things including the age, circumstances &c. of the parties. The state of cohabitation is in contrast with the position where a wife returns as housekeeper or lodger. [He referred to *Mackrell* v. *Mackrell*, per *Denning* L.J. (6).]

[FULLAGAR J. Is sexual intercourse between the parties necessary for a resumption of cohabitation ?]

In this case we say it is. The parties were of an age at which sexual intercourse could be expected to take place. In 1947 they were both aged forty-five years. When they agreed to become reconciled no stipulation was made by the respondent that intercourse was not to take place. Yet the trial judge finds that when the appellant approached her for sexual intercourse she reviled him over matters which had occurred in the past in consequence of which intercourse did not take place. Its failure to take place is to be attributed to the refusal of the respondent although she did not refuse in so many words.

[FULLAGAR J. Suppose the following facts exist. A wife commits adultery. Her husband says, " I will take you back and treat you as my wife, but I will not have sexual intercourse with you." The wife is taken back on those terms. The adultery would be condoned, would it not ?]

Yes, but it is not relevant to the present case, because the arrangement would be by consent of both parties, whereas here there was no consent given by the appellant to the respondent's failure to carry out the agreement for reconciliation. [He referred to *Cook* v. *Cook* (7).] Desertion may continue notwithstanding that the parties have come together and re-established the outward manifestations of consortium. [He referred to *Perry* v. *Perry* (8) ; *Lane* v. *Lane* (9) ; *Jackson* v. *Jackson* (10) ; *Hillary* v. *Hillary* (11) ;

(1) (1925) P. 187.
(2) (1951) A.C. 723, at p. 731.
(3) (1950) P. 1.
(4) (1950) P., at p. 5.
(5) (1950) P., at pp. 6, 7.
(6) (1948) 2 All E.R. 858, at pp. 860, 861.
(7) (1949) 1 All E.R. 384.
(8) (1952) P. 203.
(9) (1952) P. 34.
(10) (1951) V.L.R. 24.
(11) (1941) V.L.R. 298.

Casey v. *Casey* (1); *Slawson* v. *Slawson* (2); *Synge* v. *Synge* (3); *Watkins* v. *Watkins* (4).] The trial judge was wrong in holding that it was upon the appellant to show that desertion continued after evidence had been given of the agreement for reconciliation. Once the appellant proved that the respondent had deserted him, he had satisfied the burden of proof, because desertion, once commenced, is presumed to continue until it is shown to have been terminated. The onus of proving that it has been terminated is upon the party who alleges it. That onus was not discharged by the respondent showing something less than a full resumption of cohabitation between the parties. [He referred to *Winks* v. *Winks*; *Ex parte Winks* (5); *Ware* v. *Ware* (6); *Monckton* v. *Monckton* (7); *Drummond* v. *Drummond*, per *Stawell* C.J. (8).]

Trevor Rapke (with him *H. G. Ogden*), for the respondent. The onus of proving that the desertion continued without interruption for the statutory period was on the appellant: see *Pratt* v. *Pratt* (9); *Crowther* v. *Crowther* (10). Desertion ends the moment some form of consortium appropriate to the circumstances and character of the parties commences unless the party previously in desertion is proved by the party seeking the decree to retain an *animus deserendi*. *Mummery* v. *Mummery* (11) and *Bartram* v. *Bartram* (12) and *Perry* v. *Perry* (13) only apply where, on the whole of the case, the petitioner has satisfied the Court that the deserting spouse retained an *animus deserendi* throughout the resumed cohabitation. There is no case which requires the Court to hold that desertion continues after one household is set up. [He referred to *Brown* v. *Brown* (14).] The absence of sexual intercourse is not relevant if all the other elements of the consortium are present, as in this case. Sexual intercourse is not an essential element in the consortium. [He referred to *Jackson* v. *Jackson*, per *Duke* P. (15); *Weatherley* v. *Weatherley*, per Viscount *Jowitt* L.C. (16); *Singleton* v. *Singleton*, per *Lowe* J. (17); *Maud* v. *Maud* (18).] Facts sufficient upon which to hold that adultery has been condoned by analogy are sufficient to prevent the continuance of desertion. [He referred to *Dobson* v. *Dobson* (19).]

(1) (1952) 1 All E.R. 453.
(2) (1942) 167 L.T. (N.S.) 260.
(3) (1901) P. 317.
(4) (1952) 86 C.L.R. 161.
(5) (1911) Q.S.R. 41.
(6) (1942) P. 49.
(7) (1942) P. 28.
(8) (1876) 2 V.L.R. (I. P. & M.) 78, at p. 81.
(9) (1939) A.C. 417.
(10) (1951) A.C. 723.
(11) (1942) P. 107.
(12) (1950) P. 1.
(13) (1952) P. 203.
(14) (1951) N.Z.L.R. 715.
(15) (1924) P. 19, at pp. 22, 23.
(16) (1947) A.C. 628, at p. 633.
(17) (1946) V.L.R. 31, at p. 33.
(18) (1919) 26 C.L.R. 1.
(19) (1947) V.L.R. 244.

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P. E. Joske Q.C., in reply. *Whitney* v. *Whitney* (1) which the learned trial judge took as being overruled by *Viney* v. *Viney* (2), was cited with approval by *Evershed* M.R. in *Perry* v. *Perry* (3). The intention of the respondent is to be judged by her acts. It does not matter that on occasions, she had an undisclosed desire for sexual intercourse if, on the occasions on which the appellant approached her for sexual intercourse, she reviled him and otherwise rebuffed him.

Cur. adv. vult.

Aug. 18.

THE COURT delivered the following written judgment :—

This is an appeal from an order of the Supreme Court of Victoria dismissing a petition by the appellant for the dissolution of his marriage with the respondent on the ground of her desertion. The parties were married in 1925 and lived together in the course of a normal married life until 1940 when war service undertaken by the appellant necessitated long absences from home on his part. This state of affairs continued until the end of 1944 or the beginning of 1945. It is apparent that early in the latter year a great deal of unhappiness had developed in the home and the cause, or causes, of this was the subject of a great deal of evidence upon the hearing of the suit. It is, we think, unnecessary to refer to this evidence in detail for the learned trial judge found as a fact that the respondent deserted the appellant in May 1946 and there is not the slightest ground for doubting the validity of this finding.

The parties had separated some few months previously to May 1946, and following that separation they agreed upon a " reconciliation " from which, however, the respondent withdrew and she, being then absent from the home, determined without just cause or excuse to remain permanently away from the appellant. So much was expressly found by the learned trial judge, but some fifteen months later, in August 1947, the respondent returned home. This she did in response to the requests of the appellant who appears to have been anxious to make every attempt to resume a normal married life with his wife. But for reasons which appear from the evidence the attempt at re-establishing normal marital relations seems to have been foredoomed to failure. The respondent's frame of mind did not permit her to allow by-gones to be by-gones or to shape her conduct on any foundation of ready forgiveness. It may be that her attitude to the respondent was, in some measure, affected at this time by the appellant's conduct towards

(1) (1951) P. 250.
(2) (1951) P. 457.
(3) (1952) P. 203, at p. 218.

her which did not entirely escape criticism at the hands of the trial judge. But whatever was the initial cause for the subsequent complete failure of the marriage, it is clear that as time progressed the relations between the parties became more strained and bitter. Upon this aspect of the case the learned trial judge said: "It is not surprising I think that in the atmosphere of unhappy recollections, financial stringency, hard work, and impaired health on both sides, which existed in that household, initial constraint and reserve gave way to more and more frequent quarrels and recriminations. I think the respondent's bitter thoughts, offensive tongue, and attitude of injured saintliness were principally, though not entirely, to blame for the deterioration of relations, and the failure to restore the harmony of earlier years. She told me that 'almost as soon as she got into the house', she felt that the marriage was unlikely ever to be successful".

After discussing some of the particular matters which had led to quarrels between the parties his Honour proceeded: "Whatever the cause, I have no doubt the respondent did say to the petitioner over the years 1947-1950 a number of the things which the petitioner has alleged in his affidavit and in the witness-box—very offensive, hurtful, and humiliating things, which belied her air of fastidiousness in the witness-box. I have equally no doubt that at times she said such things in the presence of the boys, well knowing the humiliation which they would inflict on the petitioner, and how they would undermine his authority as their father. That conduct, in my opinion, was at least as contemptible as anything the petitioner had ever done to her. She allowed herself to become a miserable, narrow, cheerless woman, who got the maximum of unhappiness out of a situation which she might well, by different tactics, have overcome".

In November 1950, the parties, as might be expected, again separated. This took place in circumstances which it is not material to set forth and on 8th January, 1951, the appellant's petition was filed. The ground alleged in the petition was that the respondent had without just cause or excuse wilfully deserted the appellant and without any such cause or excuse had left him continuously so deserted during three years and upwards. From this it is apparent that, in order to succeed, it was incumbent upon the petitioner to prove a period of desertion which embraced, in part at least, the period during which she had, in the circumstances briefly adverted to above, resided in the common home. This issue the appellant sought to establish by proving desertion from a date anterior to August 1947 and by contending that the respondent's

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return to the home in that month and the subsequent events of the next three years did not operate to terminate the desertion antecedently commenced. In support of this contention, it was established that at no time between August 1947 and November 1950 did sexual intercourse take place and other circumstances were relied upon to show that the respondent either did not return to the home as a wife or, having returned, did not conduct herself as a wife. In the result, it was said, there was no reconciliation and no end to the desertion already antecedently commenced.

In support of this proposition counsel for the appellant relied strongly on the observations of *Denning* L.J. in *Bartram* v. *Bartram* (1) where his Lordship said : " Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time. That was laid down by Lord Merriman P. in *Mummery* v. *Mummery* (2) and has never been doubted since. Indeed, I would say in such a case the period of desertion does not cease to run unless and until a true reconciliation has been effected. Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the attempt at reconciliation was unsuccessful " (3).

But the basis of the decision in *Bartram* v. *Bartram* (1) was that there had never been any resumption of cohabitation and, indeed, no intention on the part of the deserting wife to resume cohabitation. If there had been a resumption of cohabitation it would have been impossible to conclude that desertion on the part of the wife continued, even if the resumption did not result, ultimately, in a " true reconciliation ". No doubt attempts at reconciliation should be encouraged but in *Pratt* v. *Pratt* (4) which was subsequently referred to by his Lordship, the desertion was held to have ceased, not because there had been a reconciliation between the parties, but because of the husband's rejection of his deserting wife's overtures for a reconciliation. The acceptance of such overtures as genuine was quite inconsistent with a finding of a continuing intention on the part of the wife to desert her husband and this resulted in the desertion coming to an end. As Lord *Macmillan* said : " The deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfilling its duty of determining whether on the evidence a case of desertion without cause has been proved the Court ought not, in my opinion,

(1) (1950) P. 1.
(2) (1942) P. 107.
(3) (1950) P., at pp. 6, 7.
(4) (1939) A.C. 417.

to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion " (1).

Lord *Romer*, with whom Lord *Wright* and Lord *Porter* agreed, said: " It is plain, therefore, that before the respondent could return there would have to be some sort of discussion between her husband and herself in person or by letter. It could not be expected that she should suddenly make an unheralded entry into his house. But even so, it was argued, it was necessary in order to put an end to her desertion for the respondent to take some active step towards returning to the matrimonial domicil. This, no doubt, is true. But in writing the letters of September, 1936, she did take such a step, and the only one that she could reasonably be expected to take in the circumstances. Whether the meeting for which she asked would have brought about a reconciliation between the two is a question that must ever remain unanswered. The respondent never in fact returned to her husband. But in view of his refusal to allow a meeting to take place, her continued absence thereafter cannot without an utter misuse of language be called a desertion " (2).

Bartram v. *Bartram* (3) was an entirely different type of case. There was no evidence in that case of any intention on the part of the respondent to terminate the desertion. What the respondent's intentions were could only be ascertained from her conduct and her conduct clearly negatived any abandonment of her intention to remain withdrawn from a state of cohabitation. Her return to the common home took place more or less under compulsion and she returned and remained there not in the capacity of a wife, but, in effect, as a lodger. Such conduct on her part was consistent only with a continuing intention to desert her husband. As *Bucknill* L.J. said: " The question is, do the facts proved establish that it " (the desertion) " was brought to an end ? In my view, it can only be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home with the husband—quoting the words of the President in the two cases to which I have referred. If the facts do not establish any intention on the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she came to live under the same roof as her husband, because she

(1) (1939) A.C., at p. 420.
(2) (1939) A.C., at pp. 428, 429.
(3) (1950) P. 1.

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had nowhere else to go, does not remove the desertion which she had already started and which continued to run " (1).

Asquith L.J. said : " It is clear that the husband, by selling the original matrimonial home ' Penlan ' over the wife's head, meant to force her, and did succeed in forcing her, to leave that house and to go to Farland Street, which was the only other accommodation available within reach of her work. Having regard to those and other proved circumstances in the case, it seems to me wrong to hold that the three years' period was interrrupted by any resumption of cohabitation, for such resumption involves, in the language of Lord Merriman P. in *Mummery* v. *Mummery* (2) cited by my Lord, a bilateral intention on the part of both spouses to set up a matrimonial home together. In my view, the facts proved in this case negative any such intention on the part of the wife who was not a free agent, but was acting under the spur of necessity " (3).

Jackson v. *Jackson* (4) is a further example of a case where a deserting wife returned to live under the same roof as her husband, but she returned and remained in such circumstances as to indicate a continuance and not an abandonment of the *animus deserendi*. Similarly, in *Mummery* v. *Mummery* (2) Lord *Merriman* was emphatic that the fact that a deserting husband had spent the night with his wife did not, in the circumstances of that case, interrupt or terminate an existing period of desertion for the evidence clearly established that the husband at no time intended to resume cohabitation. In that case Lord *Merriman* said : " Clearly, it can be nothing but praiseworthy on the part of a deserted wife to make every legitimate attempt to regain her husband's affection, company and support ; and obviously the fact that during a period of desertion the parties met by arrangement to talk over their difficulties and the deserted wife did her best to persuade her husband to return to her while he remained obdurate, would not compel the court to hold, however protracted the meetings and even if they involved the parties spending the night or several nights under the same roof, that the state of desertion was brought to an end. Why then should a wife who goes a step further in the hope of effecting a reconciliation and allows her husband to sleep the night with her be held to have condoned the offence and to have resumed cohabitation *when it is clear beyond doubt that the husband had no intention of resuming cohabitation* ? " (5).

(1) (1950) P., at pp. 5, 6.
(2) (1942) P. 107.
(3) (1950) P., at p. 6.
(4) (1951) V.L.R. 24.
(5) (1942) P., at p. 110.

The italics are ours and serve to indicate what we conceive to be the critical part of his Lordship's observations. What the facts revealed in *Mummery* v. *Mummery* (1) according to Lord *Merriman's* observations in *Cook* v. *Cook* (2) was that the husband and wife "had slept together that night and had sexual intercourse, she fervently desiring reconciliation, and the husband making it as plain as words could possibly make it the next morning that he had not, and never had had, the slightest intention of contemplating reconciliation" (3). It may equally well be said that the facts in *Bartram* v. *Bartram* (4) and *Jackson* v. *Jackson* (5) and other similar cases not only showed that there had never been a resumption of cohabitation but emphatically proclaimed the continuance of an *animus deserendi* on the part of the deserting spouse.

In the present case the learned trial judge found a number of facts proved but in the final result his decision was founded upon considerations related to the onus of proof. His Honour took the view that the onus of establishing "the continuance of the elements of desertion for the period of three years and upwards" lay upon the appellant and with this view we agree. We do so not because we think it is the result of any legal presumption or presumptions arising upon proof of facts which show a withdrawal of cohabitation *animo deserendi* but because proof of these matters, coupled with proof that the withdrawal from cohabitation has extended over the statutory period, must in the absence of any other facts, lead to the inference that the *animus deserendi* has continued during the same period. The inference is drawn because it is probable on such facts that the *animus* did so continue and in such circumstances the petitioner establishes by evidence the issue which he affirms. But other facts may appear which render this inferential conclusion doubtful or, indeed, impossible. The latter type of case is exemplified by cases where, by reason of unsoundness of mind, the deserting spouse becomes incapable of maintaining such an intention; the former is illustrated by the circumstances in *Crowther* v. *Crowther* (6) where the evidence as to the mental condition of the respondent raised a doubt whether a continuing intention should be attributed to him. *Pratt* v. *Pratt* (7) is another example of circumstances which may preclude the conclusion that the *animus deserendi* has continued for the necessary period. The remarks of their Lordships in that case, which we have already quoted, make it clear that an intention

(1) (1942) P. 107.
(2) (1949) 1 All E.R. 384.
(3) (1949) 1 All E.R., at p. 387.
(4) (1950) P. 1.
(5) (1951) V.L.R. 24.
(6) (1951) A.C. 723.
(7) (1939) A.C. 417.

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to continue to desert her husband could not be attributed to the wife in the circumstances to which their Lordships had referred. But, whether the facts of any particular case are simple or not, the question of the intention of a deserting spouse, must, in many cases, be determined as a matter of inference from the proved facts and we see no reason why, either upon principle or authority, the onus of proof should not in all such cases rest upon the petitioner. Nor, of course, is the position any different where it is alleged that the deserting spouse has expressly declared his or her intention. In the course of *Pratt* v. *Pratt* (1) Lord *Macmillan* also said that: " what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent has without just cause been in desertion " (2). There is ample authority for the proposition so stated by Lord *MacMillan* and we are of the opinion that the trial judge was clearly right in the view which he took on this point. Counsel for the appellant, however, contended that *Crowther* v. *Crowther* (3) decided otherwise, but in our view it is clear authority for the proposition stated by Lord *Macmillan*. The order which was made in that case was that the case should be remitted and, after expressing his view on the substantive matters raised by the case Lord *Porter* said: " If in fact a petitioner is unsuccessful in proving that the lunatic was capable of forming an intention, or if no evidence is called, in my opinion the court is not entitled to draw an inference of continued desertion from the intention shown in the pre- and post-certification periods " (4); whilst Lord *Reid*, with whom Lord *MacDermott* agreed, said: " There are many degrees of mental incapacity and there appears to be no definition of that degree of mental incapacity which is necessary to justify a reception order. In the absence of any such definition it is not obvious to me that there cannot be a case where a reception order is justified but where nevertheless the person detained still has a mind capable of maintaining an animus deserendi; and therefore I am of opinion that this petitioner ought to be allowed to prove, if she can, that this is such a case " (5).

After discussing the question of onus the learned trial judge observed: " It remains to apply to the present case the propositions which I have stated that I regard as established. Assuming that the ultimate onus is on the petitioner to prove the continuance of the elements of desertion for a period of three years and upwards,

(1) (1939) A.C. 417.
(2) (1939) A.C., at p. 420.
(3) (1951) A.C. 723.
(4) (1951) A.C., at p. 733.
(5) (1951) A.C., at p. 736.

expiring at some date before the filing of the petition, it is impossible, in the first place, to hold that I am satisfied on the balance of probabilities that the respondent did not intend, when she returned to 'Worlingworth' in August 1947, to resume within a reasonable time all the normal incidents of the matrimonial relationship. At some time, before the beginning, I think, of 1950, she had probably determined never to permit intercourse again, and to do much less for the petitioner than she had done; and she was by that time encouraging the boys to deny the petitioner's authority as head of the household. But otherwise I am not satisfied that at any time after August 1947 she intended to withdraw from the normal incidents of the marriage relationship between these parties. Accordingly I am not satisfied that there has been proved by the petitioner the element of *animus deserendi* on the part of the respondent for any continuous period of three years expiring before the filing of the petition. In the second place, I am not satisfied, having regard to the proportion of the normal incidents of consortium between these parties which was re-established from August 1947 up to at least the year 1950, that the *factum* of sufficient withdrawal by the respondent from consortium to constitute the necessary element is proved by the petitioner to have continued for any such three year period".

This was enough to dispose of the petition and accordingly it was dismissed, and, we think, rightly dismissed. But there was another feature of the case which, in our view, made the dismissal of the petition inevitable. As we have already said, the trial judge made a number of findings of fact and some of them were expressly concerned with the circumstances in which the respondent returned home in August 1947. On this aspect of the matter his Honour said: "The question of the intention of the respondent in August 1947 has given me more difficulty. I find affirmatively, upon the basis of her instructions to Mr. Benson to destroy the copies of the Henderson letters, and upon the basis of so much of her evidence on the subject as I am disposed to accept, that when she returned she was prepared, and intended, to resume her place as the mistress of the house, and to care for her husband and children as such; to do her best not to revert to the Henderson matter—though I believe it was still the subject of bitter resentment on her part—and to see whether propinquity and association would re-establish in time the old affection and respect which she had once had for the petitioner. I do not think she at that stage had formed an intention to alienate the boys from him. I am unable to find either that she positively then intended to resume sexual intercourse,

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or that she positively then intended never to do so. I think common sense would lead to the conclusion that that matter she was leaving for the future to work out".

These findings seem to us to be quite inconsistent with the continuance of an *animus deserendi* on the part of the respondent and emphasise the clear distinction between this case and cases such as *Mummery* v. *Mummery* (1), *Jackson* v. *Jackson* (2) and *Bartram* v. *Bartram* (3) where the facts were not only consistent with but, as we have already said, emphatically proclaimed, the continuance of such an *animus*.

Accordingly, it seems to us, a finding that the respondent had not maintained the necessary *animus* for the statutory period was not only justifiable but inevitable, as, we think also, was a finding that the parties resumed cohabitation.

We were invited to review the findings of fact made by the learned trial judge and to hold that the respondent merely came back in the capacity of an "honorary charwoman" or "mere housekeeper", which terms she later used to describe herself as the matrimonial relationship further deteriorated, but we see no reason whatever for disturbing the findings of fact which were made. Accordingly we are of the opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Arthur Robinson & Co.*
Solicitors for the respondent, *A. C. Secomb & Tibb.*

R. D. B.

(1) (1942) P. 107.
(2) (1951) V.L.R. 24.
(3) (1950) P. 1.