[HIGH COURT OF AUSTRALIA.]

WIRTH . . . . . APPELLANT;
PETITIONER,

AND

WIRTH . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 26; *Dec.* 5.

Barton, Gavan Duffy and Rich JJ.

Husband and Wife—Restitution of conjugal rights—Discretion of Court—Existing separation deed—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *secs.* 5, 6, 7, 11.

Sec. 5 of the *Matrimonial Causes Act* 1899 (N.S.W.) provides that in all suits and proceedings other than proceedings to dissolve any marriage the Supreme Court in its matrimonial causes jurisdiction "shall proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts of England acted and gave relief before the passing of the Imperial Act twentieth and twenty-first Victoria chapter eighty-five but subject to the provisions herein contained and to the rules and orders under this Act." Sec. 6 provides that "Application for restitution of conjugal rights may be made by either husband or wife by petition to the Court." Sec. 7 (1) provides that "The Court on being satisfied of the truth of the allegations contained in the petition and that there is no legal ground why the same should not be granted may decree restitution of conjugal rights accordingly."

Held, that, where there is an existing deed of separation between husband and wife containing mutual covenants not to institute proceedings for restitution of conjugal rights, the Court has a discretion to refuse restitution of conjugal rights notwithstanding that the respondent to the suit has not set up any defence and has not pleaded as a bar the covenant in the deed.

Decision of the Supreme Court of New South Wales (*Gordon* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

A petition for restitution of conjugal rights was instituted in the Supreme Court in its matrimonial causes jurisdiction by Sarah Jane Wirth against her husband, Philip Wirth, alleging that on 1st June 1908 he had without just cause withdrawn from cohabitation with the petitioner and had kept and continued away from her thenceforward and had refused to render to her conjugal rights. The respondent did not file any answer to the petition. At the hearing it appeared that there was a deed of separation existing in which the petitioner and the respondent mutually covenanted not to institute proceedings for restitution of conjugal rights. The cause was heard by *Gordon* J., who dismissed the petition.

From that decision the petitioner now appealed to the High Court.

The material facts are stated in the judgment hereunder.

Ralston K.C. (with him *T. P. Power*), for the appellant. The husband not having defended this suit and not having raised the deed of separation existing between the parties as a bar, that deed is not legal ground why restitution of conjugal rights should not be granted within sec. 7 (1) of the *Matrimonial Causes Act* 1899, and the Court should have made a decree in the appellant's favour. The effect of sec. 5 is that the Court must act on the principles which prevailed in England before the *Judicature Act*, one of which was that the Court would not have regard to a deed of separation which was not pleaded. See *Browne & Powles on Divorce*, 5th ed., p. 141.

[RICH J. Does not the word " may " in sec. 7 (1) give the Court a discretion by virtue of sec. 23 of the *Interpretation Act of* 1897 ?]

The discretion is a legal one, and if everything required to be proved is proved restitution must be granted. In England the Courts have held that the existence of a deed of separation is not by itself a ground for refusing to decree restitution of conjugal rights (*Tress* v. *Tress* (1); *Marshall* v. *Marshall* (2); *Beauclerk* v. *Beauclerk* (3); *Gill* v. *Gill* (4); *Looker* v. *Looker* (5); *Phillips* v. *Phillips* (6)).

(1) 12 P.D., 128.
(2) 5 P.D., 19.
(3) (1895) P., 220.
(4) 34 T.L.R., 17.
(5) 34 T.L.R., 270.
(6) (1917) P., 90, at p. 92.

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[RICH J. referred to *Russell* v. *Russell* (1); *Roe* v. *Roe* (2); *Brooking-Phillips* v. *Brooking-Phillips* (3).]

The proper course to raise the deed of separation is by proceeding in the Equity Court to stay the suit for restitution (*Sawyers* v. *Sawyers* (4)). The principle is put too broadly in *Russell* v. *Russell*, and should be limited to the facts of that particular case.

Cur. adv. vult.

DEC. 5.

The judgment of the COURT, which was read by RICH J., was as follows :—

This was a petition for restitution of conjugal rights presented to the Supreme Court of New South Wales in its matrimonial causes jurisdiction by the appellant against her husband. The latter filed no answer to the petition, but was represented by counsel at the hearing. In the course of the proceedings before *Gordon* J. a deed of separation dated 1st November 1908 was put in evidence, which contained the following covenant: "Neither of them the said Philip Peter Jacob Wirth or Sarah Jane Wirth shall molest interfere or disturb the other of them or any member of his or her family or compel or endeavour to compel the other of them to dwell or cohabit with him or her or bring any suit or proceeding at law or otherwise for restitution of conjugal rights or otherwise howsoever."

The evidence given by the petitioner showed that the payments stipulated by the deed had been regularly made by the respondent, and there was no evidence of any repudiation by him or that the deed was not then subsisting and operative. It was contended before *Gordon* J. that "because the husband does not set up any defence to this suit, and does not plead the covenant by the petitioner as a bar to that suit, the Court must disregard the existence of that covenant and must in the result grant a dissolution of the marriage on the ground that the husband has wrongfully refused to live with his wife, whereas in fact he has a perfectly good ground for so refusing and a ground which if raised in a Court of equity would entitle him to an injunction against the further prosecution of this suit."

(1) (1895) P., 315, at pp. 331, 333.
(2) (1916) P., 163.
(3) (1913) P., 80, at pp. 84, 90.
(4) 28 N.S.W.W.N., 63.

His Honor dismissed the petition, following the decision of *Gorell Barnes* J. in *Kennedy* v. *Kennedy* (1), rather than the decision of *Low* J. in *Phillips* v. *Phillips* (2), and that of *Horridge* J. in *Gill* v. *Gill* (3).

The relevant sections of the New South Wales *Matrimonial Causes Act* 1899 are :—Sec. 5, which is adapted from sec. 22 of the English *Matrimonial Causes Act* 1857 and is in these terms :—"In all suits and proceedings other than proceedings to dissolve any marriage the Court shall proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts of England acted and gave relief before the passing of the Imperial Act twentieth and twenty-first Victoria chapter eighty-five but subject to the provisions herein contained and to the rules and orders under this Act." Sec. 6 :—"Application for restitution of conjugal rights may be made by either husband or wife by petition to the Court." Sec. 7 :—"(1) The Court on being satisfied of the truth of the allegations contained in the petition and that there is no legal ground why the same should not be granted may decree restitution of conjugal rights accordingly. (2) A decree for restitution of conjugal rights shall not be enforced by attachment." These sections are compounded of sec. 17 of the English Act already mentioned and sec. 2 of the later English Act 47 & 48 Vict. c. 68. Sec. 11 :—"(1) If the respondent fails to comply with a decree of the Court for restitution of conjugal rights such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause and a suit for dissolution of marriage or for judicial separation may be forthwith instituted and a decree *nisi* for the dissolution of the marriage or a decree of judicial separation may be pronounced on the ground of desertion although the period of three years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights. (2) Such decree *nisi* shall not be made absolute until after the expiration of six months from the pronouncing thereof unless the Court fixes a shorter time." This section and the section of which it is a consolidation are taken from sec. 5 of the later English Act of 1884 (47 & 48 Vict.

(1) (1907) P., 49. (2) (1917) P., 90. (3) 34 T.L.R., 17.

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c. 68) with this important difference, that non-compliance with a decree for restitution entitles a petitioner forthwith to institute a suit for divorce *a vinculo* whereas the English Act only provides in a similar case for a suit for judicial separation unless in the case of a husband who has also been guilty of adultery.

Counsel for the appellant contended before us that the effect of sec. 5 is to confine the Divorce Court to the same principles and rules which prevailed in the Ecclesiastical Courts before the Act, and that notwithstanding the deed the Court has here no discretion to refuse restitution of conjugal rights, and urged that the principle of *Kennedy* v. *Kennedy* (1) cannot be applied here because the Supreme Court of New South Wales in its matrimonial causes jurisdiction has no right to enjoin the petitioner from pursuing her remedy.

A similar argument found no favour with the majority of the Court of Appeal in *Russell* v. *Russell* (2). In that case *Lopes* L.J., for himself and *Lindley* L.J., says (3) :—"It becomes most important, therefore, to consider what is the effect of sec. 5 of the Act of 1884. In our judgment, it has materially altered the old law as to the restitution of conjugal rights, and has given the Court a power to refuse a decree which it had not before. By sec. 16 of the *Matrimonial Causes Act* of 1857 desertion is for the first time made a ground for judicial separation, and is not governed by the old ecclesiastical law ; but it is no ground for a sentence of judicial separation unless the desertion is without cause. If the wife were petitioning for a judicial separation here on the ground of desertion against her husband, her conduct towards him would disable her from contending that the desertion was without cause, and she would fail in her suit. By sec. 5 of the Act of 1884 disobedience to a decree for restitution of conjugal rights is made equivalent to desertion without cause. If, therefore, the petitioner obtains a decree for restitution of conjugal rights, she will be at once entitled to institute a suit for judicial separation for the statutory desertion created by the Act of 1884, although she could not, under sec. 16 of the *Matrimonial Causes Act* 1857, have obtained such a decree unless

(1) (1907) P., 49.
(2) (1895) P., 315
(3) (1895) P., at p. 333.

it had been desertion without cause. We cannot think that such a result was ever intended, or that the necessity of proving absence of reasonable cause was intended to be taken away. It seems to us that since 1884, and by necessary implication, the Court must have power to refuse a decree for restitution wherever the result of such a decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case."

This construction has been followed and the existence of a discretion in the Court recognized in later cases: See *Oldroyd* v. *Oldroyd* (1), at p. 181; *Brooking-Phillips* v. *Brooking-Phillips* (2), at p. 89, per *Buckley* L.J. (now Lord *Wrenbury*), and at pp. 84 and 90, where *Hamilton* L.J (now Lord *Sumner*) says:—"It was decided in *Russell* v. *Russell* (3) that the *Matrimonial Causes Act* 1884 has materially altered the old law as to restitution of conjugal rights, and has given the Court a discretion to refuse the decree. . . . It is true that in his opinion in the House of Lords on the husband's appeal from the Court of Appeal Lord *Halsbury* expressed his dissent from the view taken in this Court of the Act of 1884, but as the wife had abandoned her appeal the matter was not before the House, and the decision of this Court remains binding upon us. . . . *Russell* v. *Russell* (3) decided that legislative changes have since 1857 removed the exclusive opposition of restitution and of judicial separation, and since 1884 have given the Court a discretion which enables it to refuse restitution to the one spouse, even though it also refuses judicial separation to the other."

The construction placed upon the sections by the Court of Appeal accords with the statutory interpretation given by sec. 23 of the New South Wales *Interpretation Act of* 1897, which in this particular re-enacts sec. 8 of the Act 22 Vict. No. 12, that "wherever in an Act a power is conferred on any officer or person by the word 'may,' such word shall mean that the power may be exercised, or not, at discretion."

The observations quoted from the judgment of *Lopes* L.J. apply with much greater force to the case under consideration, because

(1) (1896) P., 175. (2) (1913) P., 80. (3) (1899) P., 315.

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here an endeavour is made to prevent the Court from considering the fact that the respondent did not in fact desert the petitioner while in that case the defence sought to be shut out was that although there was a desertion it was justified by the conduct of the petitioner. Desertion is a question of fact. A suit for restitution is based on the separation of the spouses being without good cause. That is the allegation contained in par. 6 of the petition: "That the said Philip Wirth did on the first day of June in the year of our Lord one thousand nine hundred and eight without just cause withdraw from cohabitation with your petitioner and has kept and continued away from her and from thence hitherto hath refused and still refuses to render her conjugal rights." That allegation is, when the provisions of the deed are looked at, unfounded "and contrary to the real truth of the case."

It would place the Court in an anomalous and absurd position if, when so far from "being satisfied of the truth of the allegations contained in the petition" (sec. 7 (1)) it knows that the allegations are untrue, it is nevertheless bound to hold that there has been desertion without reasonable cause although the deed of separation is inconsistent with such an offence. Fortunately, it is unnecessary so to construe the sections.

Having regard to the fact that one of the consequences of disobedience to a decree for restitution of conjugal rights may be divorce *a vinculo*, the Court is bound to consider the real facts because the interests of the public are involved and no admission or omission in the pleadings and, speaking generally, no private transaction between the parties can entitle them to a decision contrary to the truth. There can be no estoppel in such a case.

The appeal must be dismissed.

Appeal dismissed. Respondent to pay appellant's costs of appeal.

Solicitors for appellant, *Minter, Simpson & Co.*

B. L.