H. C. OF A. 1925.

BRITISH IMPERIAL OIL CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

exceeding £10,000 per annum, appropriated for the remuneration and travelling allowances of tribunals established in violation of the Constitution.

Case struck out.

Solicitors for the appellant, *Gillott, Moir & Ahern.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B.L.

[HIGH COURT OF AUSTRALIA.]

ARTHUR DOUGLAS WOODLANDS . . . APPELLANT;
PETITIONER,

AND

CLARA WOODLANDS . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1924.

SYDNEY, *Nov.* 21.

KNOX C.J. ISAACS and STARKE JJ.

Husband and Wife—Restitution of conjugal rights—Sincerity of petitioner—Matrimonial Causes Act 1899 (N.S.W.) (*No.* 14 *of* 1899), *secs.* 4, 5, 11—*Rules of the Supreme Court of 27th March* 1902 (*N.S.W.*), *r.* 4.

On a petition for restitution of conjugal rights under the *Matrimonial Causes Act* 1899 (N.S.W.) the petitioner must satisfy the Court that he or she has a sincere desire for a real restitution of those rights and a corresponding willingness to render them to the other spouse.

Harnett v. *Harnett*, (1924) P. 126, followed.

Decision of the Supreme Court of New South Wales (Full Court): *Woodlands* v. *Woodlands*, (1924) 42 N.S.W.W.N. 67, affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit for restitution of conjugal rights was instituted in the Supreme Court in its matrimonial causes jurisdiction by Arthur Douglas Woodlands against his wife Clara Woodlands.

The suit was heard by *Langer Owen* J., who found the following facts:—" (1) The petitioner and the respondent were married on 10th July 1909. (2) The petitioner was at the time of the institution of the suit domiciled in the State of New South Wales. (3) The respondent has withdrawn from cohabitation with the petitioner and has kept and continued away from him without any just cause whatsoever and without any such cause has refused and still refuses to render to him conjugal rights. I am satisfied that there has not been at any time such conduct by the husband towards the wife as justified her in withdrawing from cohabitation and refusing to return and render him conjugal rights. (4) I am satisfied that since the parties separated there never has been, and there is not now, any sincere wish on the part of the petitioner for restitution of conjugal rights; nor has there been, nor is there now, any corresponding willingness on his part to render conjugal rights to the respondent. I am satisfied that the petition was presented and prosecuted solely with a view to ultimately obtaining a dissolution of the marriage and not bona fide."

The learned Judge stated a case for the opinion of the Full Court as to the following questions:—

> Under the above circumstances is the petitioner entitled to maintain the present suit, or should the suit be dismissed?

The Full Court, being of opinion that it was bound by the decisions of the Court of Appeal in *Palmer* v. *Palmer* (1) and *Harnett* v. *Harnett* (2), answered the question as follows: "Under the circumstances the petitioner is not entitled to maintain the present suit, and the same should be dismissed": *Woodlands* v. *Woodlands* (3).

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

H. G. Edwards (with him *Patterson*), for the appellant. The recent decisions of the English Courts in *Mann* v. *Mann* [*No.* 1] (4),

(1) (1923) P. 180.
(2) (1924) P. 126.
(3) (1924) 42 N.S.W.W.N. 67.
(4) (1922) P. 238.

H. C. OF A. 1924.

WOODLANDS v. WOODLANDS.

Palmer v. *Palmer* (1) and *Harnett* v. *Harnett* (2), to the effect that in a suit for restitution of conjugal rights the petitioner must prove a sincere desire, not merely for the form of cohabitation, but for the reality of conjugal rights, are wrong in law, and are not binding on the Supreme Court. The position in New South Wales is the same as it was in England when *Russell* v. *Russell* (3) was decided, namely, that the Court would only refuse to grant a decree for restitution of conjugal rights if the petitioner had been guilty of some conduct which would entitle the respondent to a judicial separation.

[ISAACS J. referred to *Williams* v. *Williams* (4); *Matthews* v. *Matthews* (5).]

In *Pugh* v. *Pugh* (6) a decree for restitution was made, although the Court thought that the petitioner did not desire the return of the respondent. The state of mind of the petitioner not communicated to the respondent is immaterial. It has been the practice in New South Wales for many years not to take into consideration the question of the sincerity of the petitioner's desire for cohabitation.

[ISAACS J. referred to *Ardaseer Cursetjee* v. *Perozeboye* (7).]

There was no appearance for the respondent.

PER CURIAM. In this case we see no reason to differ from the view expressed by the Court of Appeal in *Harnett* v. *Harnett* (8). That being so, the appeal fails and should be dismissed.

Appeal dismissed.

Solicitor for the appellant, *C. P. White.*

B. L.

(1) (1923) P. 180.
(2) (1924) P. 126; 40 T.L.R. 269.
(3) (1895) P. 315; (1897) A.C. 395.
(4) (1921) P. 131, at p. 134.
(5) (1859) 1 Sw. & Tr. 499; (1860) 3 Sw. & Tr. 161.
(6) (1921) P. 136 (n.).
(7) (1856) 6 Moo. Ind. App. 348.
(8) (1924) P. 126.