decessors in title, and which they themselves have so completely recognized, is bad, and the agreement invalid.

I think, therefore, that the appeal should be dismissed.

Appeal dismissed with costs.

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O'Connor J.

Loxton, for the respondent, asked that the order as to the female appellant should be limited as in *Scott* v. *Morley* (1).

Order made as asked.

Solicitor, for the appellants, *A. Nicholson.*

Solicitor, for the respondent, *C. M. Boyce* for *A. R. Cummins.*

C. A. W

Foll Brown v Brown (1906) 4 CLR 395

[HIGH COURT OF AUSTRALIA.]

THOMAS EDWIN BROWN . . . . APPELLANT;

AND

MARY BROWN AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 28, 29; *Dec.* 1.

Griffith C.J., Barton and O'Connor JJ.

Matrimonial Causes Act (*N.S.W.*), (*No.* 14 *of* 1899), *sec.* 60—*Decree of judicial separation—No order as to maintenance of child—Subsequent proceedings for maintenance under Deserted Wives and Children Act* (*N.S.W.*), (*No.* 17 *of* 1901), *secs.* 4, 7—*Jurisdiction of inferior Court—Res judicata—Prohibition.*

Evidence Act (*N.S.W.*), (*No.* 11 *of* 1898), *secs.* 16, 23—*Proof of proceedings before magistrates—Certificate or certified copy—Signature of officer—Interpretation Act* (*N.S.W.*), (*No.* 4 *of* 1897), *sec.* 31.

(1) 20 Q.B.D., 120, at p. 132.

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By sec. 60 of the *Matrimonial Causes Act* 1899 the Supreme Court in its matrimonial causes jurisdiction has power, in a suit for judicial separation, to make such orders as it deems just for the custody maintenance and education of the children of the parties to the suit, either by interim orders before the final decree, or by provisions in the final decree, or after the final decree, upon application for that purpose. Secs. 4 and 7 of the *Deserted Wives and Children Act* 1901, *inter alia*, give power to justices, upon complaint duly made, if they are satisfied that a child is left by its father without means of support, and that the father is able to contribute to its support, to make an order for the payment by the father of a certain sum weekly or otherwise for that purpose.

In a suit by a wife the Supreme Court, by consent, made a decree for judicial separation, and gave the husband custody of the children, certain rights of access being reserved to the wife. The wife was at the time pregnant, but no order was asked for or made with regard to the maintenance of the child about to be born. After the birth of the child the wife took proceedings against her husband before a magistrate, under the *Deserted Wives and Children Act* 1901, for maintenance of the child.

Held, that the existence of the decree of judicial separation, whether regarded as the foundation for a plea of *res judicata*, erroneously rejected by the inferior Court, or as ousting the jurisdiction of the inferior Court, was a bar to the proceedings, inasmuch as the relief sought by the wife was relief which she might have obtained, and might still obtain, from the Supreme Court, and that a prohibition should go to restrain the inferior Court from further proceeding in the matter.

Ex parte Bindon, (1904) 4 S.R. (N.S.W.), 503, approved.

Sec. 16 of the *Evidence Act* 1898 provides for the proof of certain books and other documents of a public nature by means of a copy certified under the hand of the officer to whose custody the originals are entrusted ; and sec. 23 provides, *inter alia*, that evidence of the pendency or existence of proceedings in any Court may be given by the production of a certificate showing that fact under the hand of the clerk of that Court or the officer having "ordinarily" the custody of its records or proceedings.

Held, that for the purpose of an application for a prohibition, a copy of the proceedings in the Police Court, certified by an officer describing himself as relieving clerk of that Court, and as the person having the custody of its records, and signed by him as such relieving clerk, is sufficient proof of the proceedings to satisfy the requirements of sec. 23, but, *semble*, that it comes more properly within the meaning of sec. 16, with the requirements of which it strictly complies.

Decision of the Supreme Court on this point, *Ex parte Brown*, (1905) 5 S.R. (N.S.W.), 691, reversed, and rule made absolute for a prohibition.

APPEAL from a decision of the Supreme Court of New South Wales.

The respondent, Mary Brown, on 24th March, 1904, instituted a suit in the Supreme Court in its matrimonial causes jurisdiction for judicial separation from her husband, the appellant, and by consent a decree was made for judicial separation, giving the husband the custody of the children of the marriage then living, and the wife certain rights of access to the children. The wife undertook not to claim then or at any future time maintenance for herself. She was at the time pregnant, but no application was made in the suit for maintenance in respect of the child about to be born. After the birth of the child the wife took proceedings before a magistrate under the *Deserted Wives and Children Act* 1901, to compel the appellant to contribute towards the maintenance of the child.

At the hearing in the Police Court objection was taken on behalf of the appellant that the Court had no jurisdiction to make an order by reason of the existence of the decree of the Supreme Court. The objection was overruled, and an order made for the payment by the appellant of a certain sum weekly towards the support of the child.

The appellant obtained a rule *nisi* for a prohibition from the Supreme Court on the ground that the magistrate had no jurisdiction to make an order, and that the order was against natural justice, but, on motion to have the rule made absolute, the Full Court discharged the rule on the ground that the copy of the proceedings before the Court was not properly certified in accordance with sec. 23 of the *Evidence Act* 1898: *Ex parte Brown* (1).

From this decision the present appeal was brought by special leave.

The proceedings in the Supreme Court and the material parts of the sections in question are set out in the judgments.

Watt, (with him *Wilson*), for the appellant. The certificate was strictly in compliance with sec. 23. Sub-sec. (*f*) provides that it may be under the hand of the clerk of the Court in which the proceedings were taken, and in the present case it was signed by the relieving clerk of Petty Sessions. Sec. 31 of the *Interpretation Act* 1897 provides that a power may be exercised or a duty

(1) (1905) 5 S.R. (N.S.W.), 691.

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performed as well by the person holding an office for the time being, as by the person who permanently holds the office, and upon whom the power is conferred or the duty imposed. But, apart from the section, any person present in Court can prove what took place there, and the appellant made an affidavit as to the making of the order against him by the magistrate. This was not a case of having to prove a conviction. It was only necessary to satisfy the Supreme Court that certain proceedings had been taken in the inferior Court, and there was ample evidence of that apart from the formal certificate. These provisions of the *Evidence Act* are not intended to limit the means of proof, but to extend them.

As to the main point, when the wife brought her petition in the Supreme Court in its matrimonial causes jurisdiction, all matters affecting the relationship of the husband and wife and the care and maintenance of the children passed out of the jurisdiction of the inferior Court. By sec. 60 of the *Matrimonial Causes Act* 1899 the Supreme Court then had exclusive jurisdiction in questions relating to the maintenance of the children born or unborn, and the wife had power to apply at any time for alimony. [He referred to *Ex parte Bindon* (1).] This jurisdiction extends over the whole period of the infancy of the child or children: *Thomasset* v. *Thomasset* (2). By the decree of the Supreme Court the matter *transit in rem judicatam*, as far as the inferior Court is concerned, and any interference by justices with the question of maintenance is in effect an attempt to alter or call in question the decree already made: *Chetwynd* v. *Chetwynd* (3). It must be taken that the Supreme Court dealt with the whole of the matters that could have been brought before it in the suit for judicial separation. If an inferior Court refuses to entertain a plea of *res judicata* prohibition will lie: *Ex parte Home* v. *Earl Camden* (4).

[GRIFFITH C.J. referred to *White* v. *Steele* (5).]

A plea that a defendant is removed from liability to be proceeded against in a particular Court is a plea in bar, not in abatement, and a ground for prohibition if not entertained: *Steward*

(1) (1904) 4 S.R. (N.S.W.), 503.
(2) (1894) P., 295.
(3) L.R., 1 P. & D., 39.
(4) 2 H. Bl., 533.
(5) 12 C.B.N.S., 383.

v. *Greaves* (1); and, even if the objection is not one going to the jurisdiction, the application may be treated as an application for a statutory prohibition, which the Supreme Court has power to grant for a mere mistake in law on the part of the magistrate.

There was really no desertion, or leaving without support. The wife had the right to obtain relief from the Supreme Court in the shape of an order for maintenance, and the leaving of the wife was in obedience to that Court's decree. [He referred to *Ex parte Bindon* (2), and *Ex parte Noble* (3).] The wife was estopped from saying that she had been deserted: *Ex parte Pullen* (4).

[GRIFFITH C.J.—That point was not taken before the magistrate, and, if it had been taken, he had jurisdiction to consider the question, and dismiss the application if there were no evidence of desertion. But we did not grant leave to appeal on this ground, and we should probably have refused it if it had been asked for.]

It is not a mere matter of evidence, it tends to support the argument that the matter had passed out of the jurisdiction of the magistrates.

P. K. White, for the respondent, Mary Brown. The *Evidence Act* 1898, sec. 23, provides a means of proof of certain matters by secondary evidence. Apart from that provision the best evidence, that is to say the original documents, would have had to be produced by the person proved to be the proper officer. Consequently, when a person avails himself of the new right conferred by sec. 13 he must comply strictly with the provisions of the section. That was not done here. The Court could not assume that the officer who certified was the officer ordinarily having the custody of the originals, from the mere statement that he had the custody at that time. He might have been wrongfully in possession of them.

[GRIFFITH C.J.—What necessity was there to prove any of the matters referred to in sec. 23? Does not sec. 16 apply to the case?]

It must be admitted that, if the case comes within the meaning of sec. 16, there was a compliance with that section. But it was

(1) 10 M. & W., 711, at p. 720.
(2) (1904) 4 S.R. (N.S.W.), 503.
(3) 3 N.S.W. L.R., 52.
(4) 15 N.S.W. W.N., 269, at p. 270.

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necessary to prove that there were certain proceedings in the Court to which prohibition was sought. The affidavit of the applicant was not sufficient for that purpose. There was no proof that he was present in Court, and there were written documents which could not be proved by his statement.

As to the question of jurisdiction, it must not be overlooked that the child has rights as well as the wife. The wife may, perhaps, be taken to have concluded herself, as far as her own claims to relief were concerned, by invoking the jurisdiction of the Supreme Court. But in that suit the only questions dealt with were the right of the wife to relief, and the custody of the children then living. No question arose as to the maintenance of the unborn child. That child's rights, especially rights conferred by another Statute, could not have been affected by the decree. No doubt the wife could have asked for maintenance for the child, but she confined her claim to relief for herself. It may be that if, after the birth of the child, she had made an application for its maintenance to the Supreme Court, the matter would have become *res judicata*. But she made no such application. The application to the Police Court is therefore no interference with the Supreme Court's decree. The decree only concludes the parties to it, and this child was not a party. Under the *Deserted Wives and Children Act* the application for maintenance of the child, though in this case made by the wife, may be made by any reputable person, and the order makes the money payable, not to the applicant, but to some official on behalf of the child. The wife applies not in her own right, but as representative of the child. The fact that she might have applied to the Supreme Court for similar relief is not inconsistent with a right to come to the inferior Court. There are many matters over which several Courts have equal jurisdiction, but, until one or other of those Courts has been invoked and has disposed of the matter, any of the other Courts has jurisdiction to deal with it. It is the practice of the Supreme Court in its matrimonial causes jurisdiction to deal only with the claims of those children specifically mentioned, and their names and ages must be fully set out. There is therefore no presumption that the rights of a child have been dealt with unless specific mention is made of it in the prayer.

In this case both prayer and decree were silent on the point. *Ex parte Bindon* (1) was a case involving only the rights of husband and wife. The presumption is that all their rights were dealt with by the decree. In the present case the child's rights are in question.

[*Watt* referred to *The George and Richard* (2), as to the claim of an unborn child in an action by a mother for negligence.]

In that case appearance was entered for the child. It was therefore nominally a party, and was bound by the decision.

Watt, in reply. Whether the child was or was not represented in the suit for judicial separation, its claim to maintenance could have been, and may still be, dealt with by the Supreme Court. It was therefore potentially represented by the wife, who in the present case is the actual applicant, and she is personally estopped. [He referred to *Morgan* v. *Thorne* (3).]

Cur. adv. vult.

1st December.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court of New South Wales discharging with costs a rule *nisi* for a prohibition against a conviction on a complaint charging the appellant with leaving Mary Brown his lawful child without means of support. Before the magistrate the appellant set up the defence that the Court had no jurisdiction to hear the complaint inasmuch as a decree for judicial separation had been pronounced by the Supreme Court in its divorce jurisdiction, by which the respective rights of the parties had been determined. This objection was overruled by the magistrate, who, after hearing evidence, made an order against the appellant for the payment of a certain sum weekly. A rule *nisi* was granted by *Cohen* J. on the grounds, first, that the magistrate had no jurisdiction to make the order, inasmuch as the matter was exclusively within the jurisdiction of the Supreme Court in its matrimonial jurisdiction, secondly, that the magistrate had no jurisdiction to make the order inasmuch as the complainant was the wife of the defendant

(1) (1904) 4 S.R. (N.S.W.), 503. (2) L.R. 3 A. & E., 466.
(3) 7 M. & W., 400.

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judicially separated from him by the decree of the Supreme Court in its matrimonial jurisdiction, and, thirdly, that the order was against natural justice, inasmuch as the defendant was still liable to proceedings at the suit of the complainant in the Supreme Court in its matrimonial jurisdiction, and the complainant had not abandoned her right to take such proceedings.

When the matter came before the Full Court, the objection was taken that the copy of the depositions was not properly verified. The Court gave effect to that objection, and discharged the rule. The difficulty arose in this way. The certificate was in this form:—"I H. H. C. relieving clerk of Petty Sessions and Chamber Magistrate having the custody of the records of proceedings before the Stipendiary Magistrates at the Police Court Redfern do hereby certify," &c. The objection was taken that the certificate did not say that the officer certifying was the officer "ordinarily having the custody of the records." The attention of the Supreme Court was unfortunately directed to the 23rd section of the *Evidence Act* (No. 11 of 1898), which provides:—"Where it is necessary to prove any of the following facts—(*a*) the conviction or acquittal before or by any Court or Judge or Justice of any person charged with any offence; or (*b*) that any person was sentenced to any punishment or pecuniary fine by any Court or Judge or Justice; or (*c*) that any person was ordered by any Court or Judge or Justice to pay any sum of money; or (*d*) the pendency or existence at any time before any Court, Judge, Justice, or other official person, of any suit, action, trial, proceeding, inquiry, charge, or matter, civil or criminal, evidence of such fact may be given by the production of a certificate under the hand of . . . (*f*) the clerk of such Court; or . . . (*g*) the officer having ordinarily the custody of the records, or documents or proceedings, or minutes of such Court or Judge or Justice; . . . ." Either of these persons therefore could give a certificate. The objection was that the officer did not certify as the officer ordinarily having the custody of the records. But he described himself as the relieving clerk of Petty Sessions, so that he did describe himself as one of the officers (*f*) who could give a certificate under that section. As to the point that he was only "relieving" clerk, the *Interpretation Act* (No. 4 of 1897), sec. 31, provides that: "Where an Act confers

a power or imposes a duty on the holder of an office, as such, then unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office." So that it did appear on the face of the certificate that he was one of the persons who could do what the Act required. There was therefore nothing in the objection in point of fact. But sec. 23 has, in truth, no reference to certifying copies of documents. It relates to the proof of certain facts, and the formal certificate is only as to the correctness of the matters alleged. But it is to the fact, not the nature of the documents, that it refers. This sort of certificate is a very old one. The form is given in *Dickinson's Sessions Guide*, 6th ed., p. 249, in the following words: "These are to certify that at the Assizes of general delivery of the gaol of our Lady the Queen holden at———A. B. was in due form of law indicted tried and convicted, for that he . . . and was thereupon ordered and adjudged by the Court to be imprisoned . . . "

"(Signed) C. D. clerk of the Assizes in the county of———*or* clerk of the Peace for the county of ———."

That is the certificate contemplated by sec. 23. The only section that has any real bearing on this case is sec. 16, which provides: "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no Act exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence, if it is—(*a*) proved to be an examined copy or extract; or (*b*) certified under the hand of the officer to whose custody the original is entrusted . . ." And the officer is required to furnish a certified copy on payment of a certain fee. Sec. 15 provides that where by any Act an original certificate, document, or proceeding, or a copy or extract from any document, or an entry in any register is admissible in evidence, a document purporting to be any one of these shall be admitted in evidence without further proof if it purports to be signed or sealed as directed by the Act making it admissible. If therefore sec. 23 applied, this document was properly certified,

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and if sec. 16 applied, it was properly certified under that section. Unfortunately the learned Judges of the Supreme Court took the contrary view, and allowed the objection to prevail.

I think, therefore, that in that they were wrong, and that the rule ought not to have been discharged on the preliminary objection, even if the rules as to the admissibility of evidence on applications for prohibitions were the same as on the trial of an action, which I must not be supposed to take for granted.

It is unfortunate that we have not had the opportunity of learning the opinion of the Supreme Court on the main question in the case. We cannot, however, make the rule absolute simply because it was discharged on an erroneous ground. If for any other reason it ought not to have been made absolute, we ought to affirm this judgment.

It is necessary, therefore, to consider the real point in the case, that is, whether, after a decree has been made by the Supreme Court in its divorce jurisdiction, justices can, in effect, vary that decree by an order made in proceedings before them under the *Deserted Wives and Children Act* 1901. The objection was taken as if it were a matter of jurisdiction, but it may perhaps be taken in another way. In the case of *Ex parte Bindon* (1), a wife had applied for an order for maintenance for herself under precisely similar circumstances, and the Court made a rule absolute for a prohibition restraining her from further proceeding in the matter. The grounds taken in that case were that the magistrate had no jurisdiction, and that the matter was *res judicata*. In delivering his judgment *Owen* J. said: (2), "It appears to me, therefore, that the wife, having elected to go into the Divorce Court and obtain a decree without any alimony, she cannot now go to the magistrate and ask for maintenance." He did not put the case on either of the grounds taken. They were, however, both of them good grounds for a prohibition at common law, and the second ground might perhaps be taken here under the *Justices Act*. I propose however, to deal with the matter briefly as a matter of jurisdiction.

First as to the effect of the decree for judicial separation. The

(1) (1904) 4 S.R. (N.S.W.), 503.
(2) (1904) 4 S.R. (N.S.W.), 503, at p. 504.

Statute which controls this point is the *Matrimonial Causes Act* No. 14 of 1899). Sec. 60 provides: "(1) In any suit or other proceeding for obtaining a decree of judicial separation or of nullity or dissolution of marriage the Court may—(*a*) make such orders as it deems just and proper with respect to the custody maintenance and education of the children the marriage of whose parents is the subject of such suit or other proceedings and (*b*) if it thinks fit direct proper proceedings to be taken for placing such children under the protection of the Supreme Court in its equitable jurisdiction. (2) Such orders and directions may be made (*a*) from time to time by interim orders before making the final decree or (*b*) by provisions in the final decree or (*c*) from time to time after the final decree upon application by petition for that purpose."

In this case it appears that the Court has made a final decree. It was made by consent of the parties, but that is not material. By the decree it was provided that the husband should have the custody of the six children of the marriage then living. At that time the wife was pregnant with another child, whose paternity the husband denied. Clearly then the Court had jurisdiction to make provision, by its decree or afterwards, for this child, but it was not asked to do so. As was pointed out in *Ex parte Bindon* (1), it was open to the wife to make the application for alimony for the child, but she chose not to do so. Further, it is open to the Court still to vary that decree on a proper application for that purpose. There is, therefore, still standing a judgment of the Court, which must be taken to have dealt with the whole matter which the magistrate has assumed to deal with. In support of the proposition that a party who has the right to ask for certain relief is bound by silence in not asking for it, if authority is wanted, I may refer to the case of *Newington* v. *Levy* (2). In that case a party had omitted in previous litigation to avail himself of the opportunity of setting up a claim which he then sought to set up. It was held that by so doing he was estopped from relying upon it in a second action. Therefore the plea of *res judicata* would appear to be applicable. That being so, has the magistrate any right to interfere with and in effect vary an order

(1) (1904) 4 S.R. (N.S.W.), 503. (2) L.R. 6 C.P., 180.

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of the Supreme Court, which the Supreme Court itself has express power to vary?

The principles on which inferior Courts will be restrained from dealing with matters outside their jurisdiction, are clearly stated in *Shortt on Mandamus and Prohibition*, Part IV. Cap. 1, p. 426, where the author says, quoting from *Blackstone*:—'Prohibition . . . . is a writ . . . . directed to the Judge, and parties of a suit in any inferior Court, commanding them to cease from the prosecution thereof; upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court." Although I do not know of any instance exactly the same as this, it seems to me that when an inferior Court takes upon itself to vary an order of a superior Court it is a case of a Court dealing with a matter that does not belong to its jurisdiction. It would be very singular if an inferior Court were to be allowed to vary an order of a superior Court, which the latter Court had the power to vary. There are two passages in the well-known judgment of *Willes* J. in *Mayor of London* v. *Cox* (1), which I will read. In dealing with the classes of cases in which there is an absence of jurisdiction in the inferior Court, and the prohibition is asked for upon that ground, he said:—"because there are exceptions which, from their very nature, must be first raised in the Court below. These occur in cases where there is jurisdiction over the subject matter, and in which, therefore, prohibition will not go for mere irregularity in the proceedings, or even a wrong decision of the merits . . . but in which it will be granted for a denial or perversion of right, such, for instance, as refusal of a copy of the libel, in which case the prohibition is only *quousque*; or refusal of a valid plea to a subject matter of complaint within the jurisdiction, in which case, although, if the plea had been received, it might have been tried in the Court below, yet, if it be refused, then upon its validity and truth being established in the Court above, the prohibition is absolute: *White* v. *Steele* (2). In these cases there is entire jurisdiction over the subject matter." And then, after referring to another class of cases, where there is general jurisdiction over the subject matter,

(1) L.R. 2 H.L., 239, at pp. 276, 277. (2) 12 C.B.N.S., 383.

but a defence is raised which the Court is incompetent to try, he adds: "But, whatever be the true conclusion upon this, the reasoning is unanswerable, that, if it appears judicially to the prohibiting Court that the special or inferior Court will not allow the plea, the prohibition shall go without the idle ceremony of tendering there a plea which is sure to be rejected." So that, either on the ground that the Court has undertaken to interfere with or vary the order of the superior Court, or on the ground that it will not take any notice of the fact that the Supreme Court has already dealt with the matter, there is a good ground for a prohibition.

It is not necessary for us to consider the question whether, under these circumstances, there could be a leaving of the child within the meaning of the *Deserted Wives and Children Act*. That question cannot arise in these proceedings.

For these reasons it appears to me that the jurisdiction of the justices was ousted, and I have no doubt that the learned Judges of the Supreme Court, if they had dealt with the question, would have come to the same conclusion.

BARTON J. In this case the appellant was defendant to a summons issued on a complaint of the respondent, his wife, charging him with having left his daughter Mary Brown without means of support, within the meaning of sec. 4 of the *Deserted Wives and Children Act* (No. 17 of 1901). His defence in the Police Court was that the magistrate had no jurisdiction. The magistrate overruled this objection, and ordered the appellant to pay a certain sum weekly for the maintenance of the child. The appellant obtained a rule *nisi* for a prohibition, but it was discharged with costs by the Full Court on a preliminary objection, and against that order of the Supreme Court he now appeals to this Court.

The grounds upon which the rule was granted were that the magistrate had no jurisdiction, inasmuch as the matter was exclusively within the jurisdiction of the Divorce Court, and that Court had already made a decree of judicial separation between the parties, and that the order was against natural justice inasmuch as the wife still had her right to take proceedings in the Divorce

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Court for maintenance of the child in question. It will be well to deal first with the preliminary objection.

The application was treated by the Full Court as one for a statutory prohibition, as appears by their reasons for discharging the rule. The original depositions of the witnesses were not before the Court, but annexed to the applicant's affidavit was a copy of them, verified by the certificate of a Mr. Connell, who described himself in the body of the certificate as "Relieving clerk of Petty Sessions, and Chamber Magistrate, having the custody of the records of proceedings before the Stipendiary Magistrate, at the Police Court, Redfern" (where the complaint was heard.) At the foot of the certificate Mr. Connell appended to his signature the words "Relieving clerk of Petty Sessions and Chamber Magistrate." On objection taken the Court held that the certificate was not in accordance with the 23rd section of the *Evidence Act* (No. 11 of 1898), since it did not appear that the officer who certified was the officer "having ordinarily the custody of the records, or documents, or proceedings or minutes" of the Redfern Court of Petty Sessions: sec. 23, sub-sec. (1) (*g*). The Court therefore declined to hear the matter as it then stood and discharged the rule *nisi*.

The *Interpretation Act* (No. 4 of 1897) in its 31st section enacts as follows: [His Honor read the section and proceeded:] I think the relieving clerk of petty sessions was the holder for the time being of the office of clerk of petty sessions, that the *Evidence Act*, by sec. 23, confers on him as the person having ordinarily, during his tenure of office, the custody of the records &c. the power or duty of giving such a certificate as was given in this case, and that the certificate was sufficient in form and substance. But this does not remove the difficulty, for I cannot see that the present case is affected by sec. 23 of the *Evidence Act* at all. That applies to the proof of certain facts, such as the fact of conviction, punishment, acquittal of persons charged with offences, and the fact that certain proceedings have been taken. But the facts which are there contemplated seem to me to belong to a totally different class of facts from the fact involved in the question, what was the evidence given in a particular proceeding. There is not one paragraph of the several into which sec. 23 is divided which

suggests that it was ever intended to aim at facilitating the proof of the evidence which is the basis of the decision appealed from, or of anything more than the actual facts of the proceedings, as distinguished from the evidence taken in proceedings; and I confess I do not know by which of the paragraphs contained in that section it could be said that the evidence given at a Police Court was intended to be aimed at.

It is not easy to suppose, however, that the legislature, in the *Evidence Act*, assuming that it was necessary to provide for all cases, intended to leave wholly unprovided for the case of the proof of evidence given in a proceeding before a magistrate. I think that sec. 16 of that Act may be looked on as the provision covering the ground. [His Honor read sec. 16 and proceeded:] I see no reason to doubt that the depositions are documents within that section, and that a copy of them was admissible if "certified under the hand of the officer to whose custody the original is entrusted." There is no doubt that the production of the original documents would have satisfied the Supreme Court, and it is quite clear to my mind that the relieving clerk of petty sessions was the person entrusted with the custody of all original documents such as those which are the subject of these proceedings. That being so, I think that sec. 16 was the section which could have been properly applied to the case, as the depositions were an original within that section. I see no reason, therefore, to doubt that, the depositions being documents within the meaning of sec. 16, the copy of them was admissible, as certified by the proper officer, or that the findings of the magistrate were properly before the Court, and I am, therefore, of opinion that the reasons given by the Court for the discharge of the rule *nisi* were not sufficient.

But the question whether the rule was rightly discharged does not end there. It remains to be considered whether the grounds on which the rule had been granted, or any of them, are tenable, or whether it appears on the face of the proceedings that the respondent had no lawful ground for her complaint. What is the dispute in substance?

The Supreme Court in its matrimonial causes jurisdiction had, on 24th March, 1904, in a suit in which the present respondent was

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petitioner, and the present appellant respondent, decreed a judicial separation between them, by consent. Among the terms of this consent decree was this, that the present appellant should have committed to him the custody of the children therein named, being all the children who had up to that time been born to the parties, and described in the decree as "the issue of the marriage." The wife was to have certain access to the children, and she undertook not to claim then or at any future time during the separation maintenance for herself. No maintenance was, of course, mentioned as to the children whose custody was committed to the father. The child in respect of whom the maintenance proceedings were taken, was at the time of the decree unborn, but the mother was *enceinte* of that child, and it was born about a fortnight after the decree. So that, when the decree was made, the mother knew very well that there would soon be another child to be maintained, and it was open to her to make an application in respect of it. And there can be no doubt that the Court had jurisdiction to make an order affecting that child. It had assumed jurisdiction over the whole of the matters in controversy between the parties. However, no application was made for that purpose. By sec. 60 of the *Matrimonial Causes Act* 1899 it is enacted: [His Honor read the section and proceeded:] So that the wife not only had the right to make application at the time, but she could have done so at any time after the decree. She has not done so, and the question is now whether the Court of Petty Sessions at Redfern had jurisdiction in respect of her application for maintenance at the Police Court, or whether the Court had power to entertain or should have entertained the application. The case of *Ex parte Bindon* (1), of which the Chief Justice has already stated the substance, is a complete bar to the case set up under the *Deserted Wives and Children Act*, with respect to the position of a wife after a decree of judicial separation. If the application had been one of the kind before us here, I feel sure that the Supreme Court would have given effect to this objection, and come to the same conclusion as they did in the case of *Ex parte Bindon*. His Honor the Chief Justice has also mentioned the case of *Newington* v. *Levy*

(1) (1904) 4 S.R. (N.S.W.), 503.

1), about which I need not say anything further. But there is another case which deserves mention on this part of the controversy. That is the case of *Lord Tredegar* v. *Windus* (2), the decision in which is accurately described in the head note. "A plaintiff in equity filed his bill stating that a policy had become void at law, and claiming to have it treated as valid in equity. After bill dismissed the same plaintiff sued at law on the policy. *Held*, that a bill would lie to restrain the action, and injunction granted accordingly." The plaintiff having had the matter finally dealt with in equity could not re-open the matter there, nor could he go afterwards to another Court with that object. So in respect of the matters connected with the custody and maintenance of the children in question, whether it is a question of jurisdiction or not, and there may be some doubt as to that, I think that the magistrate had no right to interfere, and, putting it on the lowest ground, that the defence of the existence of this decree purporting to deal with the whole of the matters in controversy between the husband and the wife, being really a defence of *res judicata*, was a clear bar to the maintaining of the proceedings in the Police Court. It is not necessary to enter into any fuller explanation of the manner in which it did so operate. On the facts as they appear from the evidence it is abundantly clear that there could be no such proceedings taken in the Police Court after the decree of judicial separation. The existence of that decree and of the matters with which it dealt were in point of fact the real ground set up in the Police Court, and I cannot help thinking that that was a ground which ought to have prevented the magistrate from entertaining the application or, at any rate, from making any order against the appellant, after proof of that bar, and that the Supreme Court should for that reason have made the rule absolute.

O'CONNOR J. I am of the same opinion.

It is clear that these depositions were properly certified under the *Evidence Act* 1898. Sec. 31 of the *Interpretation Act* 1897, puts the matter beyond all question, and I think that if that section had been brought under the notice of the Supreme Court,

(1) L.R. 6 C.P., 180. (2) L.R. 19 Eq., 607.

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their conclusion would have been different. That, however, is not a matter in respect of which, if it had stood alone, this Court would have given special leave to appeal. The substantial question arising in the case is whether the children of a marriage which has been under the consideration of the Divorce Court, and in respect of which a decree has been made, can be, within the meaning of the *Deserted Wives and Children Act* 1901, "deserted or left without means of support," and whether a wife can make an application for maintenance upon such desertion.

I do not think it necessary to deal with this matter from the point of view of jurisdiction, as I quite concur in the observations of my learned brother the Chief Justice on that point.

The application was for a prohibition under sec. 112 of the *Justices Act* 1902, which is in reality a form of appeal, for whenever it is seen that a mistake of law has been made, it is open to the Supreme Court to grant a prohibition. On the hearing before the Police Court, Mr. Schrader, for the appellant, took the objection that the magistrate had no jurisdiction to entertain the application, and cited *Ex parte Bindon* (1). The consideration of that objection necessitates an examination of the *Deserted Wives and Children Act* 1901, and the *Matrimonial Causes Act* 1899. Sec. 4 of the former Act, so far as is material, provides that :—"In any case where—(*a*) any husband or father has deserted his wife or child, or has left such wife or child without means of support . . . . . any justice may, upon complaint on oath being made by such wife or by the mother of such child, or by any reputable person on behalf of such wife, mother, or child issue his summons requiring such husband, father . . . . to appear before two justices to show cause why he should not support such wife or child," or, in certain cases, the justice may issue a warrant for the apprehension of the husband or father. By sec. 7 it is provided that :—"Upon the hearing the justices shall inquire into the matter of the complaint and if they are satisfied that the wife or child is in fact left without means of support, and that the defendant is able to contribute to the support of such wife or child" may make an order for the payment of a certain sum by the defendant towards the maintenance

(1) (1904) 4 S.R. (N.S.W.), 503.

of his wife or child. It is clear that what the Act deals with is the enforcement of the duty that the law casts upon a father to maintain his children. It assumes the existence of the liability to support his children which the law ordinarily imposes upon the father. And where there is a marriage and children of the marriage the liability follows as a matter of course. It is to enforce that duty and liability that the jurisdiction is given. Now, what is the position of the children of a marriage which has been the subject of a decision in the Divorce Court? It does not by any means follow that the liability continues. That Court, in pronouncing a decree of judicial separation, may by the terms of the decree, alter entirely the obligations which flowed from the condition of marriage and from paternity in the ordinary course of things, and substitute altogether different obligations. The Court in this case directed that the six children should live with the father and be maintained by him. The wife was at the time *enceinte* with a child which was born a few weeks after the separation decree. It is sworn by the applicant that during the divorce proceedings he denied the paternity of that child. Under these circumstances, the Court, having dealt with the whole matter and specifically with the whole of the children then born, must be taken to have had cognizance of every obligation then existing actually or potentially arising out of the marriage, and to have made its decree with respect to all the questions that might in such a proceeding be litigated between husband and wife. It appears to me that while that order continues it is impossible that the provisions of the *Deserted Wives and Children Act* could be applied. The defence raised, whether it is regarded as an objection to the jurisdiction, or as a plea of *res judicata*, seems to me in substance to amount to this, that whenever the Divorce Court, in dealing with a marriage, has dealt with the duties of a husband and wife towards one another, and with the custody and maintenance of the children, and has made a decree, the only Court which can further deal with the rights under that marriage is the Divorce Court itself. That defence is in my opinion a good one. It was laid down in *Ex parte Bindon* (1), that any person who wishes to have such a decree varied must

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go to the Divorce Court for a further order. The respondent might have gone to that Court and asked to re-open the matter for the purpose of having a special adjudication as to the maintenance of this child which has been born since the decree. But that step has not been taken. She has chosen to make an attempt to invoke the assistance of the *Deserted Wives and Children Act*, and in that she must fail.

There is one passage which I will read from the judgment of *Martin* B. on this point, in *Newington* v. *Levy* (1), which has a direct bearing on this question He said:—"Again in *Langmead* v. *Maple* (2), my brother *Willes* says: 'I apprehend that if the same matter or cause of action has already been finally adjudicated on between the parties by a Court of competent jurisdiction, the plaintiff has lost his right to put it in suit either before that or any other Court. The conditions for the exclusion of jurisdiction on the ground of *res judicata* are, that the same identical matter shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been decided.' If the parties have had an opportunity of controverting it, that is the same thing as if the matter had actually been controverted and decided." So here it must be taken that the Judge decided the question of the maintenance and custody of the whole of the children of the marriage. But, assuming that he did not do so, there was an opportunity for the wife to have had an adjudication as to the maintenance of the child about to be born, and it must therefore be taken as against her, when she seeks to litigate that question in another Court, that the Divorce Court has adjudicated upon it.

For these reasons I am of opinion, on the main ground, that a prohibition will lie, and that the rule ought to have been made absolute.

Appeal allowed. Order appealed from discharged. Rule made absolute for a prohibition.

Solicitor, for the appellant, *W. D. Schrader.*

Solicitors, for the respondent, *Sullivan Brothers.*

C. A. W.

(1) L.R. 6 C.P., 180, at p. 188. (2) 18 C.B. N.S., 255, 270.