

[HIGH COURT OF AUSTRALIA.]

CAIN APPELLANT ;

AND

CAIN RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Justices—Special case—Service on respondent—Service on solicitor—Appearance*
1918. *in Chambers—Waiver of objection—Special leave to appeal to High Court—*
—Matter in issue not determinable by appeal—Justices Act 1902 (N.S.W.)
(No. 27 of 1902), sec. 105—Justices (Amendment) Act 1909 (N.S.W.) (No. 24 of
SYDNEY, *1909), sec. 19.*
April 25.

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Barton,
Gavan Duffy
and Rich JJ.

On an appeal from the decision of a magistrate by way of special case under sec. 101 of the *Justices Act 1902* (N.S.W.), the notice of appeal and copy special case were served on the respondent's solicitor, who said that he would accept service without prejudice and on condition that all rights were reserved. The case coming on in Chambers, counsel for the respondent objected to the jurisdiction upon a ground other than that of the want of personal service, and after hearing the objection stated the Judge referred the matter to the Full Court of the Supreme Court of New South Wales. That Court held that service of the notice of appeal and copy special case on the respondent's solicitor was insufficient, and that the objection had not been waived by the appearance of the respondent in Chambers.

Held, that special leave to appeal to the High Court from that decision should be refused, as the question whether the Magistrate's decision was right would not be determined on an appeal from the decision of the Full Court.

Special leave to appeal from the decision of the Supreme Court of New South Wales : *Cain v. Cain*, 18 S.R. (N.S.W.), 26, refused.

APPLICATION for special leave to appeal.

In December 1914 Mary Cain obtained an order under the *Deserted Wives and Children Act 1901* for the payment by her husband of

twenty-five shillings per week for her maintenance. In December 1917 the husband applied to a Magistrate to vary the order by directing the payments to cease on the ground that the wife had been guilty of adultery. The Magistrate dismissed the application, holding that proof of adultery by the wife was no ground for a variation of the order for maintenance. A special case was stated under sec. 101 of the *Justices Act* 1902 (N.S.W.), which was delivered to the appellant on 4th January. On 11th January a clerk of the appellant's solicitor left the notice of appeal and copy special case at the office of the respondent's solicitor, who said that he thought service must be personal, and that he did not know if he could accept service. He said, however, that he would accept service without prejudice, and on the condition that all rights were reserved, and indorsed on appellant's solicitor's copy of the special case a memorandum to that effect. The special case came on before *Street J.* in Chambers, when counsel for the respondent objected to the jurisdiction on the ground that the special case would not lie, as it was not an appeal from a proceeding commenced by an information or complaint. After argument counsel for the respondent suggested that the matter be referred to the Full Court, and this was done. No mention was made of any objection to the service. Upon the matter coming before the Full Court, counsel for the respondent took the preliminary objection that personal service of the notice of appeal and special case had not been made on the respondent as required by sec. 105 of the *Justices Act* 1902 as amended. The Full Court held that service of the notice of appeal and copy special case on the respondent's solicitor was insufficient and that the objection had not been waived by the appearance of the respondent, and therefore that the appeal was not properly constituted and must be dismissed: *Cain v. Cain* (1).

Against this decision the appellant sought special leave to appeal to the High Court.

Collins and *Badham*, for the applicant, argued that the service effected was good service under sec. 105 of the *Justices Act* 1902 as amended, and that special leave should be granted as the matter was one of public importance.

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In the course of argument the COURT intimated that it was of opinion that special leave should not be granted since an appeal from the decision of the Full Court would not determine the real question in dispute between the parties, which was whether the Magistrate's decision was right. That question could be determined by instituting fresh proceedings before the Magistrate.

PER CURIAM. Special leave to appeal must be refused.

*Special leave to appeal refused.*

Solicitor, *William Charles Moseley.*

C. A. W.

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[HIGH COURT OF AUSTRALIA.]

IN RE THE TRADE MARK OF RYAN LEWIS & COMPANY  
 PROPRIETARY LIMITED.

EX PARTE THE AUTOTONE COMPANY.

H. C. OF A. 1918.  
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 MELBOURNE,
 May 17.

Practice—High Court—Affidavit—Authentication of foreign affidavit—Notary public—Judiciary Act 1903-1915 (No. 6 of 1903—No. 4 of 1915), sec. 79—Acts Interpretation Act 1901 (No. 2 of 1901), sec. 26—Evidence Act 1905 (No. 4 of 1905), sec. 12—Evidence Act 1915 (Vict.) (No. 2647), sec. 116.

Gavan Duffy J.

An affidavit made in the United States of America purported to be signed and sworn before a notary public of that country, who affixed his signature and official seal. The fact that the person named as the notary public held such office and his signature were verified under the seal of the Supreme Court of the State of New York, and by a British pro-consul under the seal of the British Consulate-General at New York.

Held, that the affidavit might be received in evidence in the High Court without further authentication, and might, therefore, be filed in the Registry of the Court.