

PEAKE v. PEAKE

MACFARLAN, J., made the declaration and order sought.

Order made.

[Solicitors—For the plaintiffs, L. L. Benjamin and Son; for the defendants, Colin Benjamin, W. M. McIlwrick.]

F. D. C.S.

Before Macfarlan, J.

October 8, 14, 1937.

BENSON, STIRLING AND CO. v. WHILEY.

Practice — Summons for final judgment — Affidavit verifying cause of action—Affidavit by person other than the plaintiff—Authority of plaintiff necessary—Rules of the Supreme Court 1916, Order XIV., r. 1.

An affidavit verifying the cause of action, made in support of a summons for final judgment under Order XIV. of the Rules of the Supreme Court 1916, if made by a person other than the plaintiff, should state that the plaintiff has authorised the deponent to make the affidavit.

SUMMONS.

Benson, Stirling and Co. Ltd. brought an action against Belfield Edward Whiley and Gwendoline Edith Whiley for the recovery of an alleged debt. The plaintiff Company was incorporated in New South Wales, and registered in Victoria as a foreign Company carrying on business in Victoria. In support of a summons for final judgment, an affidavit was sworn by one Gwendoline May Oliver, who was registered as agent for the plaintiff to carry on its business in Victoria. In this affidavit the deponent did not swear that she had been authorised by the plaintiff to make such an affidavit, though she did swear that she was the secretary of the Victorian branch of the plaintiff Company, and that the facts deposed to were within her own personal knowledge.

Dean for the plaintiff in support of the summons.

D. M. Little for the defendants.—There is a preliminary objection. The affidavit in support of the summons for final judgment, if not made by the plaintiff, must show that the deponent was duly authorised by the plaintiff to make it—*Bank of Montreal v. Cameron*, (1877) 2 Q.B.D. 536; *Pathé Freres Cinema Ltd. v. United Electric Theatres Ltd.*, [1914] 3 K.B. 1253; *Chirquin v. Russell*, (1910) 27 T.L.R. 21. The form No. 23A in Appendix B to the Rules of the Supreme Court Act 1883 was adopted in consequence of the decision in *Chirquin v. Russell* (*supra*). He referred to—*Hallet v. Andrews*, (1897) 42 Sol. Jo. 68; *Annual Practice* 1908, vol. II., p. 42; *Annual Practice* 1909, p. 42; *Annual Practice* 1914, p. 1445; *Annual Practice* 1937, p. 1650; *Suburban Homes Pty. Ltd. v. Ward*, [1928] V.L.R. 267, 49 A.L.T. 202, [1928] A.L.R. 160.

Dean.—The affidavit in support of the summons is sufficient. It is not necessary that the deponent should state that he or she was authorised by the plaintiff

to make it. If the affidavit is defective the plaintiff should be allowed leave to issue a fresh summons.

Cur. adv. vult.

MACFARLAN, J.—In my opinion the objection taken by Mr. Little is a good objection. The necessity for following the practice which has always been insisted upon, is based on the fact that the rule requires, not merely that the application is to be made on an affidavit by any person who can swear positively to the facts verifying the cause of action, but that the affidavit shall state that in the belief of the deponent there is no defence to the action. A stranger might know all the facts necessary for the cause of action, but there might still be a defence unknown to him but known to the plaintiff. Hence, probably the practice has arisen (where the original affidavit in support is that of a stranger) of insisting that it should state that the deponent is authorised by the plaintiff to make it. Unless it so states it is insufficient.

In accordance with the practice of the Court, even though I do not altogether agree with it, the proper course to take is to dismiss the summons.

Summons dismissed.

[Solicitors—For the plaintiff, D. S. Abraham; for the defendants, Muir and Hobson.]

W. P.

Before Macfarlan, J. Dec. 17, 19, 1935; Oct. 8, 1937.

PEAKE v. PEAKE.

Marriage—Dissolution of—Ground of adultery—Wife respondent contracting a bigamous marriage—Innocence of other party to the bigamous marriage—Order excusing joinder as co-respondent—Marriage Act 1926 (No. 3726), sec. 79.

A husband sought the dissolution of his marriage, on the ground of his wife's adultery, the wife having contracted a bigamous marriage with a man who at the time erroneously believed that the wife was an unmarried woman. The petitioner desired to call this man as a witness at the hearing to prove the adultery alleged.

An order was made excusing the petitioner from joining this man as a co-respondent in the suit.

SUMMONS.

A husband filed a petition for the dissolution of his marriage on the ground of his wife's adultery, the alleged adulterer being a man named in the petition. According to the affidavit filed in support, this man had in New South Wales gone through the form of marriage with the respondent wife. The petitioner applied for an order excusing him from joining this man as a co-respondent in the suit, on the ground that at the time when the man referred to went through the form of marriage with the respondent he believed, though erroneously, that she was not a married woman.

On its appearing that the respondent had not been served in the suit, and that the application had been

made *ex parte* and not by summons, the application was adjourned in order that these defects might be remedied. Difficulties in effecting service accounted for the long lapse of time between the first hearing of the summons and the judgment.

Winneke for the petitioner.—The petitioner imputes no moral blame to the person with whom the adultery is alleged to have been committed. Moreover, it will be necessary to call that person at the hearing of the petition in order to prove the adultery alleged in the petition. [MACFARLAN, J.—I shall adjourn the matter so that I may consult my brother Judges.]

Cur. adv. vult.

MACFARLAN, J.—I will make the order sought.

Order made.

[Solicitor for the petitioner, D. H. Alexander.]

W. P.

High Court of Australia.

FULL COURT—(Latham, C.J.,
Rich, Starke, Dixon and
Evatt, JJ.) } Oct. 25, Dec. 17,
1937.

THOMAS v. THE KING.

Criminal Law — Bigamy — Mens rea—Belief in invalidity of former marriage—Crimes Act 1928 (No. 3664), sec. 61—Marriage Act 1928 (No. 3726), secs. 85, 89, 91.

Practice — Case stated—Powers of Full Court—Restricted to facts stated—Special verdict amounting to not guilty—Not to be set aside.

On a presentment for bigamy the jury found that, at the time of the marriage in question, the prisoner *bonâ fide* and on reasonable grounds believed that the woman whom he had previously married was a person against whom a former husband of hers had obtained a decree *nisi* for divorce, and that this decree had not been made absolute.—

Held (Starke and Evatt, JJ., dissenting), that the prisoner was not guilty of bigamy, since he had not the necessary *mens rea*.

Reg. v. Tolson, (1889) 23 Q.B.D. 168, followed.

Rex v. Wheat, Rex v. Stocks, [1921] 2 K.B. 119, disapproved.

Decision of the Supreme Court of Victoria, [1937] A.L.R. 566, [1937] V.L.R. 283, affirmed on this point.

At the trial the Judge took a verdict in the following terms:—"Guilty: the accused at the time of going through the second marriage believed *bonâ fide* and on reasonable grounds that the divorce granted to the first wife's former husband had not been made absolute." The Judge thereupon stated a case for the Full Court upon the question: "Should I have directed the jury that if they found that the accused did hold such a belief *bonâ fide* and on reasonable grounds, the verdict should be not guilty?" The Full Court sent for the transcript of evidence which was not part of the case, and thereupon answered the question: "No; because there was no evidence on which the jury could reasonably so find."—

Held, per Latham, C.J., Rich and Dixon, JJ., that the Full Court had no power to go outside the Special

Case, that the verdict amounted to one of acquittal, and could not, therefore, be set aside.

Per Evatt, J.—Subject to its being held that the prisoner's belief as found by the jury was a defence, the verdict amounted to one of acquittal.

Order of the Supreme Court varied.

APPEAL.

In 1929, John Henry Thomas married a woman named Agnes Julia Higgins, who had been married before, and against whom Higgins, her former husband, had obtained a decree *nisi* for divorce on 27th April, 1928. This decree was made absolute by the Prothonotary under Marriage Act 1928 (No. 3726), sec. 89, on 28th July, 1928. The woman later left Thomas, and told him she was never his wife, as the above-mentioned decree *nisi* had never been made absolute. He believed this and, acting on that belief, he married another woman named Bessie Deed, and he was charged with bigamy in respect of this marriage.

Martin, J., at the trial, charged the jury that such a belief was no defence, but he asked the jury to answer specially as to the prisoner's belief. The verdict of the jury was in these terms—"Guilty: the accused at the time of going through the second marriage believed *bonâ fide* and on reasonable grounds that the divorce granted the first wife's former husband had not been made absolute." The prisoner was remanded for sentence, and a case stated for the Full Court on the questions whether such a belief was a defence, and whether the Judge should have directed the jury that, if they found that the accused did hold such a belief *bonâ fide* and on reasonable grounds, the verdict should be not guilty.

The case stated was heard before the Full Court (Mann, C.J., Macfarlan and Gavan Duffy, JJ.). Questions were raised by the Bench as to the retrospective operation of sec. 91 of the Marriage Act 1928, under which a decree made absolute at any time relates back to the date when it should have been made, and the Court inquired what evidence there was that, even if the prisoner reasonably believed the woman's statement, he had any grounds for believing that the decree had not afterwards been made absolute before he married Bessie Deed. The Court thereupon sent for the transcript of evidence which was not part of the Special Case, and eventually answered the questions as follow:—

(1) It was a good defence to the charge of bigamy contained in the indictment that the accused *bonâ fide* and on reasonable grounds believed that the divorce granted to Mr. Higgins had not been made absolute.

(2) No: The learned Judge should have directed the jury that there was no evidence upon which they could properly find that the accused held such a belief *bonâ fide* and on reasonable grounds.

The conviction was affirmed, and the prisoner sought special leave to appeal to the High Court.