

Supreme Court

Before Gavan Duffy, J.

March 25, 31.

BODLEY v. BODLEY.

Divorce—Practice—Counter-petition—Affidavit in support—Requisites of—Rules of Supreme Court 1938, Chapter II., rules 2, 3, 29, 31—Marriage Act 1928 (No. 3726), sec. 122.

Where a respondent defending a suit for divorce seeks matrimonial relief pursuant to section 122 of the Marriage Act 1928, it is not obligatory upon him to file an affidavit in support setting out the particulars enumerated in rule 3 of the Divorce Rules. A formal affidavit complying with rule 31 is sufficient.

SUMMONS.

George Marshall Bodley presented a petition for a dissolution of his marriage with his wife, Evelyn May Bodley, on the ground of desertion. The respondent filed an answer denying the allegations contained in the petition, and alleging that the petitioner had deserted her and left her continuously so deserted during three years and upwards, and she sought relief accordingly by way of divorce. By her affidavit, the respondent verified her answer paragraph by paragraph, and in reference to the counter-charge, she deposed: "That the petitioner has without just cause or excuse wilfully deserted me, this deponent, and without any such cause or excuse left me continuously so deserted during three years and upwards." The petitioner took out a summons for an order that the respondent file an affidavit in support of her petition containing the particulars enumerated in rule 3 of Chapter II. of the Rules of the Supreme Court.

Doyle for the petitioner.—A counter-petition must be verified by affidavit in accordance with rule 3.

Gillard for the respondent.—A full and detailed affidavit is not required—*Deane v. Deane*, (1858) 1 Sw. & Tr. 90; *Fowler v. Fowler*, (1890) 16 V.L.R. 723; *Bailey v. Bailey*, (1909) 15 A.L.R. 38, [1909] V.L.R. 138.

Cur. adv. vult.

GAVAN DUFFY, J.—This is a summons asking for an order that the respondent file an affidavit in support of her petition, as required by rule 3 of the Rules of the Supreme Court 1938, chapter II. The petitioner having brought his suit and filed his petition, the respondent in her answer admitted certain allegations, and then stated: "The petitioner has without just cause or excuse wilfully deserted the respondent and without any such cause or excuse left her continuously so deserted during three years and upwards." Having done that and having headed the document "Answer and Counter-Petition," the respon-

dent then proceeded to support it with an affidavit according to rules 29 and 31, which require the filing of an affidavit of a certain type. The petitioner is not satisfied with that affidavit, and contends that the procedure in effect is a cross-petition for divorce on the ground of desertion, and should therefore be supported by an affidavit as long and as detailed as that which is required to support a petition for divorce.

There is very little authority which deals with the question. I am told that the general practice is for those who state in the answer facts which support an application for divorce to file an affidavit in just the same form as for a divorce petition. Whether that is so I do not want to decide. But, of course, in this case the petitioner says that it is not just a practice, but that it is a duty cast upon the respondent to file such an affidavit. To my mind the only rules which might make it necessary to file such an affidavit are rules 2 and 3. [His Honour read the rules.] Unless the respondent comes within those rules I can find no statutory obligation, or one under the rules, to provide for the filing of an affidavit except in the form of the one the respondent did file. It is said that what the respondent in fact did was to file a petition—that is, it was a prayer for relief by way of divorce, and so it came within the rule. However, it was pointed out on behalf of the respondent that sec. 122 of the Marriage Act 1928 is in these terms—"In any proceeding for judicial separation or dissolution of marriage if the respondent opposes the relief sought on the ground of any cause entitling either husband or wife to any relief under this Act the Court may in such proceeding give to the respondent on his or her application the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief." In my opinion those words, standing by themselves and unaffected by any decisions or other sections of the Act, are perfectly plain. They make it clear that whatever is happening when the respondent is taking advantage of the section, it is not a proceeding by way of petition.

I was referred to *Bailey v. Bailey*, [1909] V.L.R. 138, (1909) 15 A.L.R. 38, decided by Hodges, J., but really I am without authority in the matter. In coming to my decision I am speaking entirely for myself. I have spoken with some of my brother Judges, but I have not had the time, nor have they, to look into the matter to entitle me to make a statement for them. The matter is important, but I felt no good purpose would be served if I reserved my decision for a further time. The difficulty may not have been foreseen when the rules were framed, but it seems clear enough to me that the section is perfectly plain. Therefore there is nothing in the rules to impose a duty to file the affidavit sought. Whatever the practice may be, there is nothing there to empower

me to make the order asked. Of course, nothing I have said has any relevance to whether further particulars should be given. The summons will be dismissed, with costs, which I fix at 5 guineas.

Summons dismissed.

[Solicitors—For the petitioner, R. H. Dunn; for the respondent, Bullen and Burt.] F. M. B.

Before Martin, J.

Nov. 29, Dec. 4, 1940.

THE KING v. FOSTER. Ex parte ISAACS.

Contempt of Court—County Court—Right to be heard in defence—Denial of right—Remedy by certiorari—County Court Act 1928 (No. 3665), secs. 54, 77.

The power of apprehension and commitment conferred upon a Judge by section 54 of the County Court Act 1928 is not exerciseable without first giving the alleged offender notice of the charge made and affording him an opportunity of answering it. The matters constituting the offence should be specifically stated; and, if they are not capable of being formulated in specific allegations, the nature of the charge arising from such matters as a whole should be stated.

In re Pollard, (1868) L.R. 2 P.C. 106 at 120; *Chang Hang Kiu v. Piggott*, [1909] A.C. 312, followed.

In the case of a committal by a Judge upon his own motion, by way of punishment for contempt of Court, the provisions of section 77 of the County Court Act are not applicable.

Semle.—In cases within the terms of section 77 of the County Court Act, review by way of *certiorari* is only applicable where manifest defect of jurisdiction in the tribunal or manifest fraud in the party procuring the order appears.

ORDER NISI FOR CERTIORARI.

ORDER NISI FOR PROHIBITION.

In an action in the County Court at Melbourne brought by Edna Frances Isaacs, an interpleader summons was taken out for a determination, as between the plaintiff and her husband, John Isaacs, as to the ownership of certain chattels claimed in the action. On the hearing of the interpleader issue the plaintiff, Edna Frances Isaacs, conducted her own case before Judge Foster, and, according to an affidavit filed on behalf of the respondents in the later proceedings, continually disregarded rules of evidence and was on several occasions told by Judge Foster that she was prevaricating and misbehaving herself, and that if she persisted she would be punished for contempt of Court. In his final address, Counsel for the claimant, John Isaacs, asked the Judge to give some expression to his view on the matter of the plaintiff's conduct. On the plaintiff rising to speak, she was told

that she would be heard next day, and the Court adjourned. When the Court resumed next day a solicitor appeared for the plaintiff, and asked for an adjournment, on the ground that the plaintiff was unwell. No evidence was called in support of the application. The application was refused, judgment delivered, and at the conclusion of this the Judge signed a warrant for the apprehension of the plaintiff and her imprisonment for fourteen days, on the grounds that she, being a witness, had been guilty in his opinion of wilful prevarication, had misbehaved herself in the Court, and did wilfully insult him. An order *nisi* for a writ of prohibition directed to the bailiff of the County Court at Melbourne and the keeper of the gaol was obtained by the plaintiff, and notice was given to Judge Foster of her intention to apply on the return of the order *nisi* for a writ of *certiorari* to remove the record to the Supreme Court.

On the return of the order *nisi* for prohibition, the order was discharged by Martin, J., but an order *nisi* for a writ of *certiorari*, alternatively prohibition, directed to the Judge and the Registrar of the County Court at Melbourne was granted.

P. D. Phillips for the applicant to move the order absolute.—A person should be heard in his defence before being committed for contempt—*In re Pollard*, L.R. 2 P.C. 106; *Chang Hang Kiu v. Piggott*, [1909] A.C. 312. Section 77 of the County Court Act 1928 applies only to civil proceedings *inter partes*, and does not prevent *certiorari* from lying in the present instance—*Lewis v. Owen*, [1894] 1 Q.B. 102. [MARTIN, J., referred to *Re Bell, Ex parte The Marine Board of Victoria*, (1892) 18 V.L.R. 432.] Failure to hear the other side is not a mere irregularity, but renders the proceeding a nullity. *Certiorari* will therefore lie—*R. v. North, Ex parte Oakey*, [1927] 1 K.B. 491; *R. v. Huntingdon Confirming Authority, Ex parte George and Stamford Hotels Ltd.*, [1929] 1 K.B. 698; *Spackman v. The Plumstead District Board of Works*, (1885) 10 A.C. 229 at 240; *McIntosh v. Simpkins*, [1901] 1 K.B. 487; *Alderson v. Palliser*, [1901] 2 K.B. 833; *Colonial Bank of Australasia v. Willan*, (1874) L.R. 5 P.C. 417 at 442; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *R. v. Magistrates Court, Ex parte Morrison*, (1925) St. R. Qd. 220; *Abdey v. Dale*, (1850) 16 L.T. O.S. 365; *Re South Australian Brewing Co. Ltd.*, (1908) 14 A.L.R. (C.N.) 34.

Tait for the respondents to show cause.—Neither prohibition nor *certiorari* is an appropriate remedy for the matter complained of here. Only if there is a want of jurisdiction in the Court below will either writ lie. Where there is a failure to give a person an opportunity to be heard in his defence, it is the decision, not the proceedings, which become a nullity and the writs do not lie—*Colonial Bank of Australasia v. Willan (supra)*; *R. v. Nat Bell Liquors Ltd. (supra)*. *Certiorari* lies only with regard to matters which appear on the record—*Re the Justices of Shrop-*