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[1947] "THE ARGUS" LAW REPORTS

POSNER v. COLLECTOR FOR INTERSTATE DESTITUTE PERSONS

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High Court of Australia.

FULL COURT — (Latham, C.J.,
Starke, Dixon, McTiernan
and Williams, J.J.)
(Melbourne and Sydney.)

Oct. 7, 8,
Dec. 17, 1946.

POSNER v. COLLECTOR FOR INTERSTATE
DESTITUTE PERSONS.

*Husband and wife — Interstate destitute persons—
Maintenance order—Made in other State—Voidable
for defective service of complaint—Enforcement in
Victoria — Maintenance Act 1928 (Vict., No. 3722).
Part IV.—Justices Act 1902-1936 (W.A.), sec. 57.*

An order for the payment of maintenance to a wife was made in Western Australia. The husband did not appear when the summons was heard, but there was evidence of personal service. Upon the hearing of a summons to enforce this order in Victoria, under the Maintenance Act 1928, Part IV., the husband proved that he had never been served with the original summons, but an order for execution of the order was made.—

Held (Williams, J., dissenting) that, as the Justices Act 1902-1936 (W.A.) gives jurisdiction to determine the fact of service, the original order was valid until set aside, and therefore enforceable in Victoria, the rules of private international law as to foreign judgments being inapplicable.

Per Latham, C.J.—The order should not have been enforced in Victoria without giving the husband an opportunity to apply in Western Australia to set the original order aside.

Decision of Supreme Court of Victoria affirmed.

APPEAL FROM SUPREME COURT OF VICTORIA (Gavan Duffy, J.).

On 24th October, 1941, upon the application of Esther Posner, an order was made against her husband, Mordka Hirsch Posner, in the Court of Summary Jurisdiction at Perth, Western Australia, for the payment of £2 per week for maintenance. The husband did not appear, but there was an affidavit of personal service. At the date of the order both parties were resident in Western Australia, but they afterwards came to Victoria. The wife took proceedings under the Interstate Destitute Persons' Relief provisions, Part IV., of the Maintenance Act 1928, to enforce the order, and a summons was issued calling upon Posner to show cause before the Court of Petty Sessions at Melbourne why the amount of £440 due under the order should not be levied by imprisonment. On the hearing, Mr. Mahony, the

"not. In either case the offence would be proved. "In other words injury to the person or health of "the wife is no part of the offence charged." Avory, J., said (at p. 91)—"To the general rule of law that "in the case of husband and wife one is not a competent witness against the other on a criminal charge there is, so far as I know, only one exception "at common law, namely, that either is a competent witness on any charge which affects his or her liberty or person. The cases cited to us by Mr. Humphreys in support of his argument are cases "in which the liberty or person of the wife has been "affected by force or fraud. In my opinion the "charge in the present case under the Vagrancy Act "1898 is not a charge affecting the liberty or person "of the wife either by force or fraud. The offence "is equally constituted whether the wife is or is not "a consenting party. It is no part of the offence "to shew that her liberty or her person was affected "either by force or fraud." It is true that Lush, J., who dissented, took a much wider view of the exception. He put the substance of his reasoning thus (at p. 92)—"Apart from treason, the only cases in which "a wife was competent to give evidence in support "of a criminal charge against her husband were cases "where, if the general rule were not relaxed, the wife "would be exposed to the cruelty of her husband. . . "I do say that we ought not to disclaim an important "principle merely because the particular instance "before us has not hitherto been the subject of "decision. If by legislation a particular act is made "an offence which, when all the facts are known, "may, like assault or abduction, involve an injury "to the person or liberty of the wife, a wrong done "to her against her will, then in my view it is wrong "to preclude the wife from giving evidence on the "charge. Until it is known what the evidence is "it is impossible to say whether this particular offence "does or does not involve such an injury to the "person, liberty, or health of the wife. It may do "so, and that is enough, and if it does it is a wrong "which can never be proved or may never be proved "unless the wife can give evidence. In my opinion "the proper course would have been to admit the "evidence of the wife in this case, even though, when "admitted, it might establish an offence against the "State rather than against the wife." This gives a larger ambit to the exception than any other case which I have read, but, even so, it seems not quite clear whether Lush, J., would have been prepared to say that it covered an offence which of its very nature could involve nothing more than an intention against the wife.

Questions answered.

Appeal allowed.

[Solicitors—For the appellant, Maurice Goldberg;
for the respondent, F. G. Menzies, Crown Solicitor.]

F. M. B.

POSNER v. COLLECTOR FOR INTERSTATE DESTITUTE PERSONS

assistant collector, appeared to assist the Court on behalf of the collector. It appeared that the original summons in Western Australia had not in fact been served on the husband. It was contended on behalf of Posner that Mr. Mahony ought not to be heard, and that the order of the Western Australian Court was void, and that therefore the Court in Victoria had no jurisdiction. The Court made an order for payment and in default imprisonment.

Posner obtained an order to review, which was discharged by Gavan Duffy, J., on the grounds that the Court had power to avail itself of the assistance of Mr. Mahony or of any person whom it thought proper to hear, and that the validity of the Western Australian order was not examinable by the Victorian Court.

Posner then appealed to the High Court.

Gillard for the appellant.—Failure to serve, where service of process is by law required, will render null and void, and not merely voidable, any order against a person who should have been served. A party against whom an order is made without service may ignore it—*Craig v. Kanssen*, [1943] K.B. 256; *Cameron v. Cole*, [1944] A.L.R. 130, 68 C.L.R. 571; *Marsh v. Marsh*, [1945] A.C. 271 at pp. 275-6. [DIXON, J., referred to *D. M. Gordon on Observance of Law as a Condition of Jurisdiction*, L.Q.R. XLVII, 386, 557. STARKE, J.—In England the word "nullity" is used in two senses: where a judgment can be set aside *ex debito iustitiae*, and where there is nothing that can be called a judgment.] There was no order in Western Australia that could be transmitted to Victoria. [WILLIAMS, J., referred to *R. v. North, Ex parte Oakey*, [1927] 1 K.B. 491.] Mr. Mahony should not have been heard—*McGrath v. Dobie*, (1890) 16 V.L.R. 646; *Ritter v. Charlton*, (1904) 10 A.L.R. 38, 29 V.L.R. 558; Justices Act 1928, secs. 79, 88 (1) (2) (10), 97, 200.

Gowans for the respondent.—The Justices are entitled to hear whom they like—*Collier v. Hicks*, (1831) 2 B. & Ad. 663; *Bhenke v. Wechsel*, (1885) 2 Q.L. J. 85; *Busato v. Dempsey*, (1909) 11 W.A.L.R. 238; *Brennan v. Alexander*, [1932] S.A.L.R. 237. An attorney has no exclusive right of audience. The Act does not purport to transfer a foreign order to Victoria, only to collect what is due on the certificate. The Western Australian order could be enforced under sec. 62 of the Act and under the Service and Execution of Process Act. It is not such a nullity as would have been the subject of prohibition, nor would it be impeachable in collateral proceedings in Western Australia. It would not be impeachable as a foreign order in Victoria if jurisdiction as to subject-matter and persons existed and the procedure did not offend Victorian ideas of natural justice. In any case the certificate is not impeachable in proceedings under the Maintenance Act. The Western Australian Court had jurisdiction to decide the question of service—

Pritchard v. Jeva Singh, [1915] V.L.R. 510, 21 A.L.R. 350; *Backhouse v. Moderana*, (1904) 1 C.L.R. 675; *Ex parte McEvoy*, (1880) 6 V.L.R. (L.) 424; *Courtney v. Simpson*, (1940) 57 W.N. (N.S.W.) 5; *Ex parte Roach*, (1908) 25 W.N. (N.S.W.) 103. This jurisdictional fact is not examinable in Victoria. [STARKE, J., referred to *Elkan v. Juveny*, (1900) 6 A.L.R. 139, 26 V.L.R. 186.]—*Pemberton v. Hughes*, [1899] 1 Ch. 781; *Salvesen or Von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641; *Becquet v. McCarthy*, (1831) 2 B. & Ad. 951; *Crawley v. Isaacs*, (1867) 16 L.T. 529; *Duflos v. Burlingham*, (1876) 34 L.T. 688. The order must be attacked where it was made. If it were set aside in Western Australia there would be no "order" in Victoria—*Bailey v. Welply*, (1869) I.R. 4 C.L. 243; *Wotherspoon v. Connolly*, (1871) 9 Macph. 510; *Riley v. Rule*, (1930) 26 Tas. L.R. 31. [STARKE, J., referred to *In re Low, Bland v. Low*, [1894] 1 Ch. 147.]—*Cheshire on Private International Law* (2nd ed.), p. 586; *Hogan v. Moore*, (1884) 6 A.L.T. 156; *Ruby Extended Tin Mining Company v. Woolcott*, (1880) 6 V.L.R. (L.) 301. [STARKE, J.—Then whoever relied on it is guilty of trespass?] Yes—*In the Affairs of Hart*, (1943) 169 L.T. 60. *Cameron v. Cole* is authority that in the case of an inferior court, where service is a basis of jurisdiction, an order made without service is a nullity, whatever may be the case in a superior court. [DIXON, J., referred to *Reg. v. Smith*, (1867) L.R. 1 C.C.R. 110. McTIERNAN, J., referred to *Ex parte Seccaly, In re Rouse*, (1927) 44 W.N. (N.S.W.) 20.] Where a foreign judgment or order is made in circumstances which, according to Victorian law, are regarded as contrary to natural justice, it cannot be sued on in Victoria—*Buchanan v. Rucker*, (1808) 9 East. 192; *Ferguson v. Mahon*, (1839) 11 A. & E. 179; *Larnach v. Alleyne*, (1862) 1 W. & W. (Eq.) 342; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Rudd v. Rudd*, [1924] P. 72. The Legislature is not by the use of other than the clearest words to be taken to have subverted the fundamental principles of law—*In re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440 at p. 465; *Ex parte O'Sullivan, In re Craig*, (1944) 44 S.R. (N.S.W.) 291 at p. 298. The purview of the relevant provisions of the Victorian Act is to enforce orders duly obtained in other States, not to create independent rights.

Gillard in reply.—A distinction must be made between defective service and no service at all, in cases where service of some sort is necessary to found jurisdiction—*Ferguson v. Mahon*, (1839) 11 A. & E. 179; Halsbury's *Laws of England* (2nd ed.), vol. VI, secs. 389, 390; *In re E. and B. Chemicals and Wool Treatment Pty. Ltd.*, [1939] S.A.S.R. 441; *Williams v. North Carolina*, (1944) 325 U.S. 226; *Ex parte Penglase*, (1908) 3 S.R. (N.S.W.) 680; *Mackenzie v. Manwell*, (1903) 20 W.N. (N.S.W.) 18.

Cur. adv. vult.

The following written judgments were delivered:—

LATHAM, C.J.—On 16th January, 1946, Mordka Hirsch Posner was served in Victoria with a certificate of a maintenance order which had been made against him in Perth, Western Australia, on 24th October, 1941. On the same day a demand was made upon him by the Collector for Interstate Destitute Persons for payment of £438 arrears due under the order. On 18th January, 1946, a summons (in the form prescribed by regulations made under the Victorian Maintenance Act 1928) was issued, calling upon him to show cause why he should not be imprisoned for failure to pay moneys in accordance with the order. Upon the hearing of the summons, Posner satisfied the Court of Petty Sessions, Melbourne, that he had not been served with any process relating to the proceedings in Western Australia, and that he had become aware only on 16th January, 1946, of the order which had been made in Perth in 1941. The Court was of opinion that the order was a nullity, but that under the Victorian Act it was bound to give effect to it, and it accordingly ordered that, in default of payment of £440 arrears of maintenance, the defendant Posner should be imprisoned for six months, the money to be paid in instalments of £150 forthwith and £2 5s. per week. The defendant took proceedings by way of order to review. Gavan Duffy, J., held that the Western Australian order was a nullity, but that nevertheless it was enforceable in Victoria by reason of the provisions of the Maintenance Act. Posner now appeals to this Court from the order of the Supreme Court discharging the order *nisi* to review and affirming the decision of the Magistrate.

The Victorian Maintenance Act 1928 makes provision for the enforcement in Victoria of orders for maintenance made in other States. Section 59 defines "order" as meaning "an order or judgment whereby "any person is adjudged ordered or directed to pay "money . . . for or towards the support of any "person. . ." Section 70 provides that the Collector for Interstate Destitute Persons, upon receiving from a collector appointed in any other State the original or a duplicate or a certified copy or a certificate of an order, an affidavit in the form in the Fourth Schedule to the Act and a request that the order be made enforceable in the State of Victoria, shall attend before a justice and apply to have the order indorsed as provided by sec. 71. Section 71 provides that upon such an application being made to a justice, and upon production of the documents mentioned, the justice, if satisfied that the person against whom the order is made is resident either temporarily or permanently within the State of Victoria, shall indorse the original or duplicate order or certified copy or certificate, with a direction that the order be enforced within the State, and shall sign the indorsement. Section 72 provides that upon obtaining such indorse-

ment the collector shall serve a copy of the order,

certified copy or certificate, and of the indorsement thereon, certified as correct, upon the person against whom the order was made, and that "such order shall thereupon be and continue to be enforceable in Victoria." Section 73 provides that the collector shall then be entitled to collect moneys under the order. Under sec. 74 it is the duty of the collector to remit moneys so collected to collectors appointed in other States. Section 78 provides that any order made under Part IV. of the Act and any order made enforceable in the State by virtue of the provisions of that Part, may be enforced by a court of petty sessions or justices by distress and in default of distress by imprisonment for such period as the court or justices may fix.

All the proceedings required by the Maintenance Act were duly taken. The appellant Posner had his first opportunity of being heard when he was called upon to show cause why he should not be imprisoned for failure to comply with the order which had been made against him without his knowledge five years before. As already stated, an order for imprisonment in default of payment was made. Proceedings which bring about such a result require careful scrutiny.

The Western Australian order was made under the Married Women's Protection Act 1922. Section 2 enables a married woman whose husband has been guilty of wilful neglect to provide reasonable maintenance for her or any of her children to apply for summary protection under the Act. Section 4 gives jurisdiction under the Act to all courts of summary jurisdiction. Section 5 provides that an order for protection under the Act may relieve the applicant from any obligation to cohabit with her husband; may grant to the applicant the legal custody of her children; and may direct the husband to pay such weekly or other periodical sum as the court may consider reasonable for the maintenance of herself and children. Section 14 provides that applications under the Act shall be made by complaint, and that the provisions of all laws relating to summary proceedings before justices shall apply to all such applications.

The effect of sec. 14 is to introduce the provisions of the Justices Act 1902-36 relating to summary proceedings before justices. Section 56 of that Act, dealing with summary proceedings upon complaints, provides—"A summons must be served upon the "person to whom it is directed by delivering a "duplicate thereof to him personally or if he cannot "be found by leaving it with some person for him "at his last known place of abode," with a proviso relating to service by post. In relation to service by post, sec. 56 provides that "the magistrate may accept "as proof of service" a certificate of the clerk of petty sessions of due posting of the summons as a prepaid registered letter. Section 57 is as follows:—

POSNER v. COLLECTOR FOR DESTITUTE PERSONS [LATHAM, C.J.]

"(1) The service of any summons where service has "not been effected by post may be proved by an "indorsement on the summons signed by the person "by whom it was served setting forth the day place "and mode of service or such person may depose to "the service on oath at the hearing. (2) The signa- "ture to an indorsement of service shall be *primâ* "*facie* evidence that the indorsement was signed by "the person whose signature it purports to be. (3) "Any false statement in an indorsement of service "shall render the person making the same liable on "summary conviction to imprisonment with or without "hard labour not exceeding six months."

In the present case service of the summons was proved by an indorsement, purporting to be signed by one D. Keiller, stating that on 17th October, 1941, he served the appellant Posner with the summons by delivering a duplicate of it to him personally. This indorsement provided the evidence of service required by the Western Australian Justices Act. Upon the proceedings taken in Victoria for the enforcement of the order it was found as a fact by the Court of Petty Sessions that the statement in the indorsement was false and that the summons had not been served upon Posner. This Court must deal with the case upon the basis of this finding of fact. The Western Australian Court, however, had before it the evidence of service which the statute precisely prescribed, and therefore *primâ facie* had authority to proceed with the case.

A court is not deprived of jurisdiction by the fact that false evidence is given before it, but it is contended for the appellant that the Western Australian Court has now been shown to have had no jurisdiction because the defendant was not in fact served with any process and had no notice of the proceedings. It is argued that the Victorian Maintenance Act relates only to orders which really are orders, and not to what merely purport to be orders, and that the Victorian Court had authority to inquire into the jurisdiction of the Western Australian Court. It is urged that the order was a nullity in Western Australia, and that therefore the necessary basis of any proceeding in Victoria was wanting, and that the indorsement of the copy order by the Victorian Magistrate was an act done without authority, with the result that the order for imprisonment of which the appellant complains was made without jurisdiction.

The first question which arises is whether the service of the summons in Western Australia was a condition of jurisdiction of the Court of Summary Jurisdiction, or whether the absence of service was an irregularity which makes an order voidable in appropriate proceedings but not void so as to be a complete nullity.

The words of sec. 56 of the Western Australian Act are imperative. They are, "the summons must be

"served upon the person to whom it is directed." In *Reg. v. Smith*, (1875) L.R. 10 Q.B. 604, the Court of Queen's Bench considered a provision that "every "summons shall be served upon the person to whom "it is directed by delivering it to him personally "or by leaving it with some person at his last known "or most usual place of abode." Justices convicted the defendant, there being evidence of service in accordance with the statute. It was held, however, that service had not in fact been made in accordance with the Act, and it was said that therefore the justices "acted without jurisdiction." The conviction was therefore quashed. In *Mitchell v. Foster*, (1840) 12 Ad. & E. 472, improper service of summons was held to render a conviction void. In *Marsh v. Marsh*, [1945] A.C. 271, the Privy Council considered the distinction between procedural irregularities which render a judgment or an order void and those which render it only voidable. It was held that if there were an irregularity which had caused a failure of natural justice the irregularity made the order void, but that if the irregularity was not of this description it made the order only voidable. In the judgment of the Board, it was said that there was an obvious distinction between obtaining judgment on a writ which had never been served and one in which there had been a defect in the service but the writ had come to the knowledge of the defendant. In the present case the order was obtained on a summons which had never been served. According to the reasoning in *Marsh v. Marsh*, it would seem that the order should be held to be void. The Court of Appeal has recently taken the same view of the effect of complete absence of service in two cases: first, *Craig v. Kanssen*, [1943] K.B. 256, where it was held that failure to serve process where service is required renders null and void an order made against the party who should have been served, and that he is entitled *ex debito justitiæ* to have it set aside; and, secondly, *In the Affairs of Hart*, (1943) 169 L.T. 60. Similarly, in *R. v. North, Ex parte Oakey*, [1927] 1 K.B. 491, it was held that, in the absence of notice of proceedings, a tribunal (in that case the Consistory Court) "had no jurisdiction" to make an order—*per* Bankes, L.J., at p. 580. On the other hand, in *Ex parte Hopwood*, (1850) 15 Q.B. 121, and *Ex parte Blewitt, In re Shropshire Justices*, (1861) 14 L.T. 598, the fact that there had been no service of a summons was held not to affect the jurisdiction of justices. In *Fry v. Moore*, (1889) 23 Q.B.D. 395, there was an order for substituted service of a writ which was held to be "a bad order." The result was that the writ was not properly served. Lindley, L.J., said (p. 398)—"But then arises the question, whether the "order for substituted service was a nullity, render- "ing all that was done afterwards void, or whether "it was only an irregularity. If it was the latter, "it could be waived by the defendant. I shall not

"attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived." It was held that the defendant had waived the irregularity by taking certain steps in the action.

It is difficult, if not impossible, to reconcile all the decisions upon this question, but in the present case, in my opinion, sure ground is to be found in the answer to the next question which arises. If it be conceded that service of process is a condition of jurisdiction, it is still necessary to determine whether the responsibility of determining whether process has been served has been committed to the tribunal by which the challenged judgment or order was made. In *Colonial Bank of Australasia v. Willan*, (1874) L.R. 5 P.C. 417, it was said in a well-known passage (p. 442)—"There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes."

In *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 at p. 158, Lord Sumner referred to "the not infrequent confusion between facts essential to the existence of jurisdiction in the inferior Court which it is within the competence of that Court to inquire into and determine, and facts essential thereto which are only within the competence of the superior Court." See also *Amalgamated Society of Carpenters and Joiners v. Haberfield Pty. Ltd.*, (1907) 14 A.L.R. 224, 5 C.L.R. 33, and *The King v. The Commissioner of Patents, Ex parte Weiss*, [1939] A.L.R. 101, 61 C.L.R. 240. Thus, though service of process may be a condition of jurisdiction of a court, the question as to whether there has been service of process or not may be a matter to be decided by that court itself. Provisions conferring such authority upon a court are, for reasons which readily suggest themselves, much more usual than provisions which leave such a question outstanding for binding decision in collateral proceedings in some other jurisdiction—see *Parisienne Basket Shoes v. Whyte*, [1938] A.L.R. 119 at p. 128, 59 C.L.R. 369 at p. 391.

Was it within the competence of the Court of Summary Jurisdiction in Western Australia to inquire into and to determine the fact of service? In my opinion the provisions of the Western Australian Justices Act 1902-1936 show that it was intended that that Court should consider and determine questions of service. In the first place, sec. 56, which provides for the method of service, provides that the magistrate may accept as proof of service a certificate of the clerk of petty sessions. This provision shows that it is the duty of the magistrate to consider whether or not service has been proved. Section 57 provides that the service of any summons "may be proved by an indorsement on the summons, &c." This reference to proof of service is plainly a reference to proof in the proceedings before the justices. Section 135 provides that, if at the time and place appointed by the summons for hearing and determining a complaint the defendant does not appear when called, "and proof is made to the Justices, in manner hereinbefore prescribed, of due service of the summons upon the defendant a reasonable time before the time appointed for his appearance," the justices may either proceed *ex parte* or issue their warrant. These provisions, in my opinion, show that it was intended that the Court of Petty Sessions should itself determine whether the summons had been duly served. The decision that a summons has been duly served may be right or it may be wrong, but the Court had jurisdiction to decide the matter. The jurisdiction to decide is not a jurisdiction to decide only if the Court decides rightly—*R. v. Nat Bell Liquors Ltd.*, (*supra*) at pp. 151-2.

The Court of Summary Jurisdiction in Western Australia had before it the evidence of service which was sufficient under sec. 57 of the Justices Act. The Court had jurisdiction in respect of the subject-matter of the complaint—leaving the wife without proper maintenance—and in respect of the persons to the complaint—the wife and husband. There was complete evidence of service as required by the statute under which the Court acted, and, accordingly, in my opinion the Court had jurisdiction to deal with the case, and it cannot be held that the order made was a nullity. The order is, in my opinion, good until it is set aside in proper proceedings. The Married Women's Protection Act, sec. 12, provides that a court of summary jurisdiction may, on the application of a wife or husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time alter, vary or discharge the order made under the Act. This section provides means whereby Posner, if he satisfies the Court in Western Australia that he was not served with the summons in the prior proceedings, may get the order set aside.

It is argued, however, that even if the order is not a nullity in Western Australia, it should not be

POSSNER v. COLLECTOR FOR DESTITUTE PERSONS [LATHAM, C.J.]

recognised in Victoria as a valid order and made enforceable under the Victorian Maintenance Act, because recognition and enforcement of an order made without any service of process is not permitted by the principles of private international law with respect to the recognition of foreign judgments. Our courts will not recognise and enforce a judgment of a foreign court where the proceedings of the foreign court are contrary to natural justice—*Ferguson v. Mahon*, 11 Ad. & E. 179 at p. 183, *per* Denman, C.J. "... when it appears, as here, that the defendant "has never had notice of the proceeding, or been "before the Court, it is impossible for us to allow "the judgment to be made the foundation of an action "in this country"—*Pemberton v. Hughes*, [1899] 1 Ch. 781, particularly at pp. 793-7, *per* Vaughan Williams, L.J., who gives as an example of procedure contrary to natural justice, "a case where there has "been not only no service of process but no knowledge "of it"—*Rudd v. Rudd*, [1924] P. 72.

The proceedings in the Victorian Court, however, were not an action upon a foreign judgment. The Victorian Act provides means for collecting moneys due under an order made in another Australian State. When the moneys are collected they are forwarded to the State in which the judgment was given, and are then paid out to the persons entitled to receive them. The Act requires the magistrate to indorse the order or the copy or certificate of an order when specified documents are produced to him. At that stage the person against whom the order is made is not present and has no opportunity of challenging the order, and the magistrate has no means whatever of knowing whether or not the order was made under circumstances which might be contrary to natural justice. The duty of the magistrate in signing an indorsement which makes the order enforceable is ministerial and not judicial. There is no room, in my opinion, for the application of the principles of private international law at this stage. When the indorsement has been made and notice has been given to the person against whom the order was made, the result is that the order is enforceable in Victoria—sec. 72. The only conditions which must be satisfied in order to produce this result are those specified in the statute. There is no warrant in the terms of the statute for adding to these conditions further conditions derived from rules of private international law relating to the recognition of foreign judgments.

But, though an order is made enforceable, execution does not issue upon it as a matter of course. Application to a court is necessary before the order can actually be enforced. If the intention of the statute was that an order which had become "enforceable" should be enforced by distress or imprisonment as of course, there would be no reason for requiring an application to a court in which the person affected is allowed to show cause why the order should not

be so enforced. The contrary view is that the Court of Petty Sessions was bound as a matter of course to make an order for enforcement by distress or imprisonment. But the first opportunity which a defendant has of contesting his liability in any way is when an application is made to the court for an order for enforcement by distress or imprisonment. Section 78 of the Maintenance Act draws a distinction between the enforceability of the order and the actual enforcement of the order. The relevant words are, "any order made enforceable in this State by virtue "of the provisions of this Part may be enforced by "a court of petty sessions or justices and in default "of distress by imprisonment." Under the earlier provisions the order has already been "made enforceable"—sec. 70 (1) (iii). But the question whether it shall actually be enforced arises only when an application is made under sec. 78. The words "may "be enforced" can be interpreted so as to allow the court a discretion. Otherwise, the court would act mechanically, and whenever an order had been indorsed would be bound to make some order for enforcement either by distress or by imprisonment. In my opinion it was intended that on this, the first occasion upon which a defendant can be heard, he should have the opportunity of contesting the propriety of making an order for enforcement of the order made against him in the other State, and accordingly that the Victorian Court should exercise a discretion in accordance with the circumstances of the case.

In this case the defendant satisfied the Court that he had had no notice whatever of the proceedings in Western Australia. In such circumstances it was wrong to make an order directing the defendant to pay £150 forthwith and in default of payment for imprisonment for six months. This order should be set aside. But it would not be fair to the wife simply to decline to enforce the order. In my opinion the husband should be given an opportunity of applying in Western Australia to have the order of the Western Australian Court set aside. If he succeeds in that application no question will arise under the Maintenance Act. If he fails in such an application or does not take advantage of such an opportunity, the Court of Petty Sessions can then deal with the matter as it thinks proper. In my opinion this Court should allow the appeal, set aside the order of the Supreme Court and the order of the Court of Petty Sessions, and remit the case to the Magistrate for re-hearing. Upon such re-hearing it will be open to the defendant to make an application for a reasonable adjournment so that he can take in Western Australia such proceedings as he may be advised.

STARKE, J.—Appeal from a judgment of the Supreme Court of Victoria discharging an order *nisi* to review an order of the Court of Petty Sessions at

Melbourne enforcing an order for maintenance made in Western Australia.

The Married Women's Protection Act 1922 of Western Australia provides that a married woman might apply for summary protection in certain cases to any court of summary jurisdiction. In 1941 Esther Posner complained to Justices that her husband, Mordka Hirsch Posner, the appellant, had been guilty of wilful neglect to provide reasonable maintenance for complainant on a day within the period prescribed by the Act, and on the 17th October, 1941, a summons was issued calling upon her husband, Mordka Hirsch Posner, to answer the application for protection on a named day at the Police Court, Perth, before a court of summary jurisdiction there sitting. Indorsed on the summons was a signed certificate that, on the 17th October, 1941, Posner was served with the summons by delivery of a duplicate thereof to him personally at a named place. On the 24th October, 1941, a Court of Summary Jurisdiction at Perth found that Posner had been guilty of wilful neglect to provide reasonable maintenance for her on the day named in the summons: And did "by consent"—1. Relieve the complainant (Esther Posner) from any obligation to co-habit with the said Mordka Hirsch Posner: Direct the said Mordka Hirsch Posner to pay to clerk of Petty Sessions, Perth, the sum of two pounds per week, first of such sums to be paid to the said clerk of Petty Sessions, Perth, on 31st October, 1941, for the maintenance of the said complainant Esther Posner.

Both the complainant and her husband were resident in Perth at the time of these proceedings.

The Married Women's Protection Act provides that application under the Act should be made by complaint, and that the provisions of all laws relating to summary proceedings before justices should apply to all such applications, and that any court of summary jurisdiction might alter, vary or discharge any order or decrease or increase the amount of any payment ordered. The Justices Act 1902-1936 of Western Australia provides that a summons must be served upon the person to whom it is directed by delivering a duplicate thereof to him personally, or if he cannot be found, by leaving it with some person for him at his last known place of abode. And it is also provided that the service of any summons might be proved by an indorsement on the summons signed by the person by whom it was served, setting forth the day, place and mode of service, and that the signature to an indorsement of service should be *prima facie* evidence that the indorsement was signed by the person whose signature it purports to be.

Apparently the consent mentioned in the order is a document signed by the husband, under which he undertook to pay to his wife £2 per week, but which he now states that he did not understand, and only

signed because he was told that otherwise he would not get police permission to leave Perth.

The Court of Summary Jurisdiction at Perth, which made the order, had jurisdiction over the subject-matter of the complaint and over the parties thereto, for both were resident in Perth. And service of process was proved in the manner allowed by the Justices Act. Moreover, the order follows the form in the schedule to the Married Women's Protection Act, which it is provided (sec. 18) shall be valid and sufficient for the purposes of the Act.

No want of jurisdiction is apparent on the face of the order or the proceedings before the Court of Summary Jurisdiction, nor anything to suggest any want of regularity in the proceedings before that Court.

In January, 1946, the Collector for Interstate Destitute Persons took proceedings to enforce the Western Australian order, pursuant to the provisions of Part IV. of the Maintenance Act 1928 of the State of Victoria. The collector duly followed the procedure laid down in Part IV. of that Act, and the Western Australian order was indorsed in the manner prescribed by the Act, and became enforceable in Victoria. And on the 18th January, 1946, a summons was obtained on the application of the collector, calling upon Mordka Hirsch Posner to show cause before the Court of Petty Sessions at Melbourne why the amount due under the Western Australian order should not be levied by imprisonment.

The Maintenance Act 1928, as amended by the Act No. 4154, provides that any order made enforceable in Victoria by virtue of the provisions of Part IV. of the Act may be enforced by a court of petty sessions by distress, and in default of distress by imprisonment or without ordering any such distress by imprisonment for such period as the court may fix. The Court ordered that in default of payment of £440 arrears of maintenance by certain instalments, that Mordka Hirsch Posner be imprisoned for six months. An order to review this order was obtained from the Supreme Court of Victoria by Mordka Hirsch Posner, but, as already stated, the order was subsequently discharged.

The main contention on the part of Mordka Hirsch Posner in the review proceedings was that the order of the Court of Summary Jurisdiction in Western Australia was void, on the ground that the complaint and summons were not served on Posner, and that the order was not, therefore, enforceable under Part IV. of the Maintenance Act 1928. The Police Magistrate who heard the summons to enforce the Western Australian order found this fact in favour of Posner, but was of opinion that the order was not void and could be set aside only in Western Australia. A void order, in this sense, is one, I apprehend, that has no effect or operation in law. Such an order is unenforceable in any legal proceedings and may be

POSNER v. COLLECTOR FOR INTERSTATE DESTITUTE PERSONS

ignored—*Marsh v. Marsh*, [1945] A.C. 271 at p. 284—but it is also corrigible on appeal and subject to prohibition.

An order that discloses no jurisdiction upon its face is an order of this character—see, for instance, *Mitchell v. Foster*, (1840) 12 Ad. & E. 473; *Brooke v. Hodgkinson*, (1859) 4 H. & N. 712. Orders, however, may not disclose any want of jurisdiction on their face and yet be without jurisdiction owing to some mistake of law or of fact. To this category may, perhaps, be assigned orders made “contrary to natural justice,” or “so vicious as to violate some fundamental principle of justice,” as if, for example, a suit was instituted and prosecuted to judgment in the absence of the party sued without summoning him or giving him any opportunity of defending himself—see *Marsh v. Marsh*, [1945] A.C. 271; *Martin v. Mackonochie*, (1878) 3 Q.B.D. 730 at p. 739; *Parisienne Basket Shoes Pty. Ltd. v. Whyte*, [1938] A.L.R. 119 at p. 125, 59 C.L.R. 369 at p. 384. A party, however, executing the process of an inferior court in a matter beyond its jurisdiction is liable to action, and cannot justify under such process whether he knows the defect or not, but the magistrate is only liable if he knew of the defect of jurisdiction—*Calder v. Halket*, (1840) 3 Moo. P.C.C. 28 at p. 78; *Houlden v. Smith*, (1850) 14 Q.B. 841; *Mayor, &c., of London v. Cox*, (1867) L.R. 2 H.L. 239 at p. 263. And an officer executing and obeying such process is protected—*ibid.*

Orders of this character are not, I apprehend, void in the sense already indicated, for they have effect and operation in law though corrigible on appeal, where appeal lies, and are subject to prohibition.

Irregularities in procedure do not, it is clear, invalidate or make void orders within jurisdiction. When a court has jurisdiction over a proceeding, and proceeds *inverso ordine* or erroneously, that does not take away the jurisdiction of the court and make its order void. A party is not without remedy in such cases: he may make application to the court itself or appeal where appeal lies—*Ex parte Story*, (1852) 8 Ex. 195. But, as the Lord Chief Justice Coleridge observed in *Martin v. Mackonochie*, (1879) 4 Q.B.D. 697 at p. 786, what is procedure, and therefore, if wrong, matter of appeal only; and what is jurisdiction, and if wrongly asserted, matter for prohibition, is almost impossible to define in general language. Cotton, L.J., in the same case, said (at p. 735) if the court of limited jurisdiction, in dealing with a matter over which it has jurisdiction, has fallen into an error of practice or of the law which it administers, this can only be set right by appeal, and affords no ground for prohibition. When, however, an Act of Parliament has imposed restrictions, as to the circumstances under which a court of limited jurisdiction is to act in matters otherwise within its jurisdiction, then, if the court of limited jurisdiction disregards

the restriction so imposed, and acts in violation of the statutory restrictions, the party aggrieved has a remedy by prohibition, even although the court of limited jurisdiction may have put a construction on the Act and there is an appeal from its decision. Orders made in violation of statutory restrictions, and therefore without jurisdiction, have already been discussed.

Irregularities in procedure in matters within jurisdiction are often called nullities, but the proceedings are not void in the sense that they have no effect or operation in law and can be ignored. The procedure or order may be disallowed or set aside *ex debito justitiæ* in some cases and the irregularity waived in others. It is unnecessary to discuss the line of demarcation between such irregularities in this case. *Smurthwaite v. Hannay*, [1894] A.C. 494; *Anlaby v. Practorius*, (1888) 20 Q.B.D. 764; *Craig v. Kanssen*, [1943] 1 K.B. 256, however, illustrate irregularities that are often described as nullities, though proceedings or orders in a superior court of record cannot be ignored and treated as of no effect or operation in law.

The order made in this case by the Court of Summary Jurisdiction in Western Australia was within jurisdiction as already indicated. The service of process was not a condition or restriction upon jurisdiction of the Court, but the procedure whereby a party is brought before the Court.

The Justices Act directs that service shall be effected, but confides to the justices the determination of the question whether service has been effected in manner allowed by the Act. And service was in fact proved in manner allowed by the Act. So it is plain that the proceedings before the Court of Summary Jurisdiction were not “contrary to natural justice,” or “so vicious as to violate some fundamental principle of justice.”

Another objection taken to the order the subject of the order *nisi* to review was that the Magistrate was wrong in permitting an unqualified person to appear for the Collector for Interstate Destitute Persons. The Magistrate should not, I think, have allowed an unqualified person to conduct the proceedings, but the matter is to some extent within his discretion, and does not invalidate the order which he made.

The appellant did not apply to the Magistrate or to the Supreme Court to adjourn the Victorian proceedings, so that he might apply to the Court of Summary Jurisdiction in Western Australia to set aside or vary the order there made. And I can see no good reason for this Court making any order for that purpose.

The appeal should be dismissed.

DIXON, J.—The subject upon which Division 3 of Part IV. of the Maintenance Act 1928 of the State of Victoria operates is an order made by a justice or

March 18

[1947] "THE ARGUS" LAW REPORTS

20 MAR 1947

69

POSNER v. COLLECTOR FOR INTERSTATE DESTITUTE PERSONS

justices of another State, whereby a person now residing in Victoria is required to make a payment or payments, or some other provision, for or towards the support of another person. The person in whose favour the order operates must be a resident of the other State whence the order comes—see sec. 59, definition of "order"; sec. 70 (1) (i), and sec. 71. I think that the references to an order so defined mean more than a piece of paper expressed to have such an effect. A document purporting to be an order of the required character, but absolutely void and of no legal effect in the State of origin, would not, I think, fill the description. On the other hand, the application of Division 3 to an order of another State would not be excluded by the fact that under the law of that State some ground existed upon which, at the instance of the party affected, the order might be set aside or quashed as improperly made.

In the present case the appellant, who is the party adversely affected by the supposed order, which comes from Western Australia, alleges that it is completely void because it was made in his absence and no summons was served upon him. He has obtained a finding that he had not been served with a summons and was not aware of his wife's application for an order. The finding was made by a Victorian magistrate, who sat as a court of petty sessions to hear an application under sec. 78 to enforce the order. The rules provide for a summons calling on the person against whom the order of another State is to be enforced to show cause why it should not be levied by distress and, in default of distress, by imprisonment—rule 5 and Form VII. in the Regulations made on 3rd November, 1930. Imprisonment may now be ordered in the first instance—sec. 9 of Act No. 4154—and that is what the summons in this case seeks. Under Division 3 the application of the collector or deputy collector under sec. 78, made in this way on summons, affords the party against whom the order is to be enforced his only opportunity of contesting his liability under the order. Sub-section (1) of sec. 78 confers power to enforce orders. But, clearly enough, there may be some circumstances which would make it wrong to issue a warrant of distress or of commitment. For instance, the amount due under the order might have been paid or the order might have been vacated in the State of origin since its despatch, or the despatch of the duplicate or copy, to Victoria. Hence the expression "may be enforced." If the complete invalidity of the Western Australian order were established, that might be a reason why it should not be enforced in Victoria. It certainly would be a reason, if I am right in the view I have expressed that a purported order completely void at law is no order for the purposes of Division 3. But, even if the division does not permit the Victorian Court of Petty Sessions to pass upon the validity of a document transmitted as an order, it might be right to

defer the enforcement of a document impugned as bad in order to give the party adversely affected an opportunity of applying in the State of its origin to have it quashed or set aside. And that might be a proper exercise of discretion, even although the order was not void but only voidable.

The order in the present case appears upon its face to have been regularly made. It is true that it does not recite either the summoning or the appearance of the defendant, but that is not necessary, and it is expressed to be an order by consent. It appears from his evidence that the defendant did in fact agree with the solicitor obtaining the order to pay the weekly sum stated therein, but he says that he was unaware of the pendency of any curial proceedings, and was not in fact served with a summons. A summons was issued and returned with a regular indorsement of service. The certificate of the clerk of Petty Sessions, under sec. 19 of the Western Australian Interstate Destitute Persons Relief Act 1912, certifies that the order was made after due proceedings and inquiry. Further, under sec. 18 of the State and Territorial Laws and Records Recognition Act 1901-1928 of the Commonwealth, the Victorian Magistrate was bound to give to the Western Australian order such faith and credit as it has by law or usage in Western Australia, that is assuming that the order was proved as required by that Act.

In these circumstances, unless it were clearly shown that the Western Australian order was, under the law of that State, completely void, it would not be right that the application to the Victorian Court for its enforcement should be dismissed out of hand for the reason only that the evidence before the Victorian Court led it to the conclusion that in Western Australia the summons had not in fact been served, as the Magistrate making that order had believed. Under sec. 57 of the Justices Act 1902-1936 (W.A.), the indorsement of service already mentioned provided sufficient proof, and if false the person making it exposed himself to penal consequences. The question whether, upon proof by a preponderance of evidence that in fact service did not take place and the order was made in the absence of the appellant and, without notice to him, the order is to be considered completely void, depends upon the interpretation of the Western Australian Justices Act. In deciding whether that Act means that convictions or orders shall be void altogether if, through non-service or otherwise, an opportunity to be heard has not been given to the party adversely affected, great weight must be given to the principle of the common law expressed in the Latin maxim about hearing the other side taken from the tag which *Coke* first quoted from Seneca's *Medea*—*Boswell's Case*, (1605) 6 Rep. 48b at p. 52a. But attention should also be given to some distinctions which existed at common law in connection with the invalidation of convictions and orders by justices.

FCSNER v. COLLECTOR FOR DESTITUTE PERSONS [DIXON, J.]

In the first place, it must be remembered that such convictions and orders might be quashed on *certiorari* for error appearing on the face of the record whether going to jurisdiction or not; and for certain kinds of error though not so appearing, called error in fact. In other words, a conviction or order may be liable to quashing by the writ, although it is not a nullity that may be ignored for all purposes, but is binding or effective for all or some purposes until so quashed or otherwise set aside or discharged. Such a conviction or order may be described as not void but voidable. It is apparent that the distinction between a void order and a voidable order could not be material upon *certiorari*, and consequently cases decided under the writ are not to be relied upon as authorities upon the absolute invalidity of orders and convictions. In certain statutes, however, provisions were included taking away the writ in the case of convictions or orders thereunder except, according to the construction such provisions have received, when an order was made without jurisdiction, and decisions under those statutes might be more relevant.

In the next place, it must be borne in mind that a conviction or an order of justices in or out of sessions was required, on pain of invalidity or invalidation, to show certain matters on its face, among which was the fulfilment of all conditions going to jurisdiction. Now, as to service, it was clearly settled that orders need not show affirmatively that the party prejudiced appeared or was duly summoned, though there is a good deal of authority that in the case of a conviction it must so appear, the decisions not, however, being uniform—*R. v. Clegg*, (1721) 8 Mod. Rep. 4, 1 Stra. 475; *R. v. Austin*, (1725) 8 Mod. Rep. 309; *R. v. Venables*, (1725) 8 Mod. Rep. 377, 2 Ld. Raym. 1405; *R. v. Alkington*, (1726) 1 Sess. Cas. (K.B.) 353, No. 281; *R. v. Inhabitants of Oulton*, (1735) 2 Sess. Cas. (K.B.) 146, 73 No. 76; *R. v. Cotton*, (1733) 2 Barn. (K.B.) 241, 261, 282; *R. v. Hawker*, (1735) Hard. 130; see further, 1 Wms Saund. 262c. It is, perhaps, interesting to see from these cases that when Lord Camden was Chief Justice his brethren of the King's Bench failed to reconcile him to the distinctions between orders and convictions; and it will be further seen from them that, in the case of an order, if it affirmatively appeared that there was a bad summons or no summons at all, and no appearance of the party against whom the order was made, the order was bad and liable to quashing—see *R. v. Venables* (*supra*), *per* Fortescue, J.; and *R. v. Inhabitants of Oulton* (*supra*); *R. v. Mallinson*, (1758) 2 Burr. 679 at p. 681; *Mitchell v. Foster*, (1840) 12 Ad. & E. 472, 475. That it was unnecessary for an order to show on its face either due service of a summons or the appearance of a party indicates that service or voluntary appearance was not regarded as a jurisdictional fact.

In the third place, important distinctions should be noticed which were maintained in actions of trespass

to the person or to goods or of trover or the like for acts done in execution of convictions or orders. The rules in relation to mesne and final process in the common law courts supplied an analogy in cases of convictions or orders by justices. One such rule was expressed by de Grey, C.J., in *Parsons v. Loyd*, (1773) 3 Wils. K.B. 341 at p. 345, an action for trespass against a party suing out a *ca. re.* which had been set aside. "There is a great difference," said the Chief Justice, "between erroneous process, and irregular (that is to say void) process, the first stands valid and good until it is reversed, the latter is an absolute nullity from the beginning; the party may justify under the first until it is reversed; but he cannot justify under the latter, because it was his own fault that it was irregular and void at first." Another rule was expressed by Denman, C.J., in *Andrews v. Marris*, (1841) 1 Q.B. 3 at p. 17. Speaking of one of the defendants, His Lordship said—"He is the ministerial officer of the commissioners, bound to execute their warrants, and having no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not. There would therefore be something very unreasonable in the law if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant. The law, however, is not so. His situation is exactly analogous to that of the sheriff in respect of process from a superior court; and it is the well known distinction between the cases of the party and of the sheriff or his officer, that the former, to justify his taking body or goods under process, must show the judgment in pleading as well as the writ; but for the latter it is enough to show the writ only; *Cotes v. Michill* (3 Lev. 20); *Moravia v. Sloper* (Willes, 30, 34). It was said, indeed, for the plaintiff, that these and the numerous other authorities which might be cited to the same effect all went upon the principle that the proceeding, however irregular, was the act of the Court." Thus, a conviction or order might be inefficacious in favour of a party but might have some operation as against the other party in favour of officers, &c.

Again, it was the rule that, unless an order or conviction was bad upon its face or made altogether without jurisdiction, it stood in the way of an action against the justice until quashed or set aside. In *Goss v. Jackson*, (1800) 3 Esp. 198, which was an action against a justice and a constable for a seizure under a conviction by the justice, it was proposed by counsel at *nisi prius* to prove that the conviction had been made without hearing the plaintiff and without the issue of a summons. Thereupon, says the report, "Lord Kenyon interrupted him, and said, he could not in this action inquire into the regularity or irregularity of it; it was sufficient that there was

"a conviction." Apparently Lord Kenyon considered that a failure to summon did not show want of jurisdiction or complete invalidity. In *Mason v. Barker*, (1843) 1 Car. & Kir. 100, Erskine, J., would seem to have taken the contrary view, for he allowed proof of non-service for the purpose of invalidating a conviction drawn up in a statutory form without a recital of a hearing on summons or warrant; and this, perhaps, is the view taken in *Reg. v. Totnes Union*, (1845) 7 Q.B. 690. It was the view of the effect of the Metropolitan Building Act 1855 adopted in *Labalmondie v. Frost*, (1861) 1 E. & E. 527. The cases of *Painter v. Liverpool Gas Company*, (1836) 3 Ad. & E. 433; and *Turley v. Daw*, (1906) 94 L.T. 216, 22 T.L.R. 231, may be referred to as illustrating the different positions of a party and an officer when process is founded on a bad order. But the badness of the order in *Painter's Case* depended upon the view taken of the defendant company's statute, and the case ought not, I think, to be regarded as laying down a rule about the effect of non-service necessarily applicable to other statutes.

It must also be borne in mind that, when a party is entitled as of right upon a proper proceeding to have an order set aside or quashed, he may safely ignore it, at all events, for most purposes. It is accordingly natural to speak of it as a nullity, whether it is void or voidable, and, indeed, it appears almost customary to do so. Further, the observation of Sir Frederick Pollock about the use of the word "void" in relation to contracts is even more true of its use in connection with orders and judgments. "The use of the word *void* proves nothing, for it is to be found in cases where there has never been any doubt that the contract is only voidable. And as applied to other subject-matters it has been held to mean only 'voidable' in formal instruments and even Acts of Parliament"—*Principles of Contract* (10th ed.), p. 56. These considerations explain the language used in *Ex parte Price Jones: R. v. Evans and Yale*, (1850) 15 L.T. (O.S.) 142, 19 L.J. M.C. (N.S.) 157; *R. v. Farmer*, [1892] 1 Q.B. 637; *Craig v. Kanssen*, [1943] K.B. 256; and *Marsh v. Marsh*, [1945] A.C. 271.

When there has been a failure of the due process of law at the making of an order, to describe it as void is not unnatural. But what has been said will show that, except when upon its face an order is bad or unlawful, it is only as a result of the construction placed upon a statute that the order can be considered so entirely and absolutely devoid of legal effect for every purpose as to be described accurately as a nullity. Modern legislation does not favour the invalidation of orders of magistrates or other inferior judicial tribunals, and the tendency is rather to sustain the authority of orders until they are set aside, and not to construe statutory provisions as meaning that orders can be attacked collaterally or ignored as

ineffectual, if the directions of the statute have not been pursued with exactness.

It is now necessary to turn to the Justices Act of Western Australia. The order was made under the Married Women's Protection Act 1922, but sec. 14 of that statute makes applicable all laws relating to summary proceedings before justices, and it follows that it is the provisions of the Justices Act that govern the present question. The structure and arrangement of the Justices Act do not support the conclusion that non-service or bad service renders an order absolutely void. Part III. deals with jurisdiction; Part IV. relates to general proceedings and is so headed; and Part VI. to "proceedings in case of simple offences and other matters." Sections 56 and 57, which occur in Part III., prescribe respectively how service of a summons must be effected and how it may be proved. Section 135, which occurs in Part VI., provides that, if at the appointed time and place the defendant does not appear when called and proof is made to the justices in manner thereinbefore prescribed—*scil.* by sec. 57—of due service of the summons upon the defendant a reasonable time before the time appointed for his appearance, the justices may either proceed *ex parte* to hear and determine the case in the absence of the defendant, or issue their warrant for his apprehension. By sec. 147 a restriction is imposed upon the use of *certiorari*, but it is not taken away completely—see *Paley on Convictions* (9th ed.), pp. 804 *et seq.*; and Paul's *Justices of the Peace* (2nd ed.), pp. 426-7. On the other hand, there appears to be no express power in the justices to set aside orders made in the absence of the defendant, and to re-hear the complaint such as that dealt with in *De la Rue v. Brown*, 19 A.L.R. 167, [1913] V.L.R. 150, and it has been said that justices have no inherent power of that kind—*Gregory v. Murphy*, [1906] V.J.R. 71 at pp. 76 and 77, 11 A.L.R. 507. Moreover, the time for obtaining an order to review is limited, though, perhaps, now there is some elasticity—secs. 197 and 206 (b). On an order to review, there is power to take fresh evidence—sec. 205. A party against whom an order has been made without his knowledge may, therefore, encounter some difficulty in having it set aside or quashed. That no doubt is an argument for treating the Justices Act as intending that non-service of a summons should be fundamental to the validity of an order made in the absence of a defendant. It is not clear that, except for bad faith or want of jurisdiction, *certiorari* will still go for non-service—*cf.* *Reg. v. Smith*, (1875) L.R. 10 Q.B. 604; *Reg. v. Farmer* (*supra*); *Colonial Bank of Australasia v. Willan*, (1874) L.R. 5 P.C. 417. But, however that may be, it appears to be very difficult to say that the Justices Act means that for no purpose shall an order made *ex parte* in purported pursuance of sec. 135 have any validity, if it turns out that service was not effected duly or at all. That

FOSNER v. COLLECTOR FOR DESTITUTE PERSONS [DIXON, J.]

is an interpretation which, I think, the statute cannot fairly bear. But unless the order is altogether void and for every purpose, it appears to me to be impossible to say that Division 3 of Part IV. of the Victorian Maintenance Act does not apply to it. The appellant's contention that the order is not one that is enforceable under Division 3 must, in my opinion, fail.

It was, however, argued that the principles governing the enforcement by suit of foreign judgments might be invoked for the purposes of Division 3, particularly in reference to the "discretion" implied in the word "may" in sec. 78 (1). Under those principles it was said that the present order ought not to be enforced. I am unable to accept the view that the principles in question have any application in the interpretation or in the administration of the provisions of Division 3. These provisions are of a special character, and were not intended to be restricted by the introduction of rules of private international law.

It would, however, in my opinion have been open to the Magistrate to defer making an order under sec. 78 until the appellant had an opportunity of seeking relief in Western Australia from the order had he been asked to do so. Possibly, independently of the procedure which to some extent I have already discussed, sec. 12 of the Married Women's Protection Act 1922 might be invoked in Western Australia on the footing that the evidence of non-service was fresh evidence, though doubtless it was not the kind of evidence contemplated by the framers of the section. If, however, there were a remission to the Victorian Magistrate, and he were disposed to adopt the course of adjourning the application, it would be a question for his consideration whether he would impose terms, particularly as to costs. But, so far as I am concerned, I think that at this stage the matter ought not to be remitted for the purpose, inasmuch as the Magistrate was not asked to adopt such a course.

A minor matter of procedure was argued before us. A gentleman, who was said to be an assistant collector, was permitted to appear before the Magistrate in Melbourne on behalf of the collector. It was objected to on behalf of the appellant, who contends that it vitiates the determination of the Magistrate. Assistant collectors may be appointed under sec. 69 (1). There appears to be nothing inconsistent in Victorian practice in the Magistrate's permitting the officer so to appear—Paul's *Justices of the Peace* (2nd ed.), p. 215. As the proceeding was necessarily between residents of different States, it would seem to be a matter of federal jurisdiction, and on that footing sec. 78 of the Judiciary Act would apply. But, even if that section should be construed as implicitly negating the right of the parties to appear otherwise than personally or by counsel or solicitor, it does not affect the Court's discretion where otherwise

it possesses one, and in any case the point involves no substantial miscarriage.

I would dismiss the appeal.

McTIERNAN, J.—In the proceeding instituted by the respondent under sec. 78 of the Maintenance Act 1928, the appellant alleged that the order made against him at Perth was a nullity, for the reason that he was neither served with the complaint upon which that order was made nor received notice of the complaint. The Magistrate went behind the order to investigate this allegation, and found that it was true. However, the Magistrate directed that the order made at Perth be enforced under sec. 78. His decision was upheld by Gavan Duffy, J. The appeal raises the question whether, upon the application under sec. 78, the Magistrate was entitled to go behind the order which the respondent sought to enforce to inquire into the question whether there had been due service or notice of the complaint and, if he were so entitled whether, having sustained the appellant's allegation about service or notice of the complaint, he should have held that the order was a nullity and consequently not an order which he had any power to enforce.

The question is governed by the construction of sec. 78 and the other provisions of Part IV. of the Act. The operative words of sec. 78 are "may be enforced." The word "may" is in itself potential. The effect of these operative words is that it is made lawful for a court of petty sessions or justices in Victoria to enforce any order of either class mentioned in sec. 78 by distress, or, in default of distress, by imprisonment for such period as the court or justice may fix. One class of orders are those made under the provisions of Part IV. These are orders made in Victoria. The other class are orders made enforceable in Victoria by virtue of the provisions of Part IV. These are orders made in other States. Section 78 confers jurisdiction upon the Victorian Court of Summary Jurisdiction to enforce orders of both classes in the manner specified in the section. The only distinction which the section makes between these two classes of orders is that it provides that any order of the latter class shall be enforced only at the instance of the Collector for Interstate Destitute Persons or his assistant. The jurisdiction conferred upon the court of petty sessions or justices by sec. 78 is limited to the enforcement of the order.

The order sought to be enforced was good and regular upon its face. In my opinion the Court has not jurisdiction under sec. 78 to go behind that order in order to rip open the decision of the Court which made it on any question involved in the making of the order—*cf. Ex parte Penglase*, (1903) 3 S.R. (N.S.W.) 680; *Ex parte Roach*, (1908) 25 W.N. (N.S.W.) 103; *Reg. v. Swindon Justices*, (1878) 42 J.P. 407; *Rex v. Lancashire Justices*, [1925] 1 K.B.

200, 27 Cox C.C. 711; *Cook v. Cook*, (1903) 30 A.L.R. 29, 33 C.L.R. 369.

The proof of the service of the complaint which the Justices Act 1902-1936 of Western Australia required was before the Magistrate who made the order sought to be enforced in Victoria. It is evident that such Magistrate accepted that proof and found that there had been service of the complaint. The question whether the complaint had been served or the appellant had received notice of it might have been re-opened in an appeal against the order to the competent court in Western Australia, or in any way in which it was competent to re-open that question under the laws of that State. But the Magistrate before whom the application was made in Victoria to enforce that order was not entitled, under sec. 78, to re-open that question.

In the view which I take, that the jurisdiction of the Magistrate under sec. 78 did not extend to the question of service into which he inquired, it is not necessary for me to deal with any other question argued in the appeal. I think that the appeal should be dismissed.

WILLIAMS, J.—On 24th October, 1941, the Court of Petty Sessions at Perth made an order under the Married Women's Protection Act (W.A.) 1922 that the appellant pay the sum of £2 per week to his wife. Section 14 of this Act provides that applications under the Act shall be made by complaint, and the provisions of all laws relating to summary proceedings before justices shall apply to all such applications and informations. Section 56 of the Justices Act (W.A.) 1902-1936 provides that a summons must be served by delivering a duplicate thereof to the defendant personally, or, if he cannot be found, by leaving it with some person for him at his last known place of address. Section 57 provides that the service of any summons may be proved by an indorsement on the summons signed by the person on whom it was served, setting forth the day, place and mode of service. The order of 24th October, 1941, was made after the summons had been indorsed as having been served on the applicant personally at a given address on 17th October, 1941.

The Maintenance Act (Vic.) 1928, Part IV., Division 3, provides for enforcing orders for maintenance made in another State. Section 70 provides that the collector, upon receiving from a collector appointed in any State other than Victoria the original or duplicate of an order made by a justice for such State signed by him or a copy of such order certified as correct under the hand of the justice by whom such order was made or a certificate of an order under the hand of the clerk of the court an affidavit in the form of the 4th Schedule and a request that the order be made enforceable in Victoria, shall attend before a justice and apply to have such original or

POSNER v. COLLECTOR FOR INTERSTATE DESTITUTE PERSONS

duplicate order certified copy or certificate indorsed as provided by sec. 71. Section 71 provides that a justice, if satisfied that the person against whom the order was made is resident in Victoria shall indorse such document with a direction that the order be enforced within Victoria. Section 72 provides that the collector shall serve a copy of the order or certificate and indorsement upon the person against whom the order was made, and that such order shall thereupon be, and continue to be, enforceable in Victoria.

In January, 1946, the steps prescribed by the Maintenance Act were taken to make the order of 24th October, 1941, enforceable in Victoria, and the defendant was ordered but failed to pay to the collector the sum of £438 then due for maintenance under the order. Section 73 provides that the collector may take all such steps for the recovery of the money as might be taken by the person in whose favour the order was made. Section 78 provides that an order made enforceable in Victoria may be enforced by a court of petty sessions by distress, and in default of distress by imprisonment for such period as the court may fix.

On 18th January, 1946, a summons was issued by the Court of Petty Sessions at Melbourne, calling upon the applicant to show cause why the order of 24th October, 1941, should not be levied by imprisonment. On 6th March, 1946, an order was made by that Court that in default of payment of the sum of £440 arrears as therein mentioned, the applicant should be imprisoned for six months. At the hearing, the applicant gave evidence, which the Magistrate accepted, that he had not been personally served with the summons or otherwise received notice of the application before the order of 24th October, 1941, was made. The objection was taken that this order was therefore made without jurisdiction and was void, but the Magistrate overruled the objection on the ground that the order was valid in Victoria until set aside, and that it could only be set aside in Western Australia.

On appeal to the Supreme Court, Gavan Duffy, J., held that the order of 24th October, 1941, was a complete nullity in Western Australia, but that it derived efficacy from the Maintenance Act, and the collector was entitled to enforce the order in Victoria.

There are many recent authorities which show that a statute which creates an inferior court may contain provisions relating to matters of procedure which are intended to be mandatory in the sense that they must be complied with as a condition precedent to the court having jurisdiction to make a valid order—*Howard v. Graves*, (1885) 52 L.T. 858; *McIntosh v. Simpkins*, [1901] 1 Q.B. 487; *Alderson v. Palliser*, [1901] 2 K.B. 833; *R. v. North*, [1927] 1 K.B. 491 (these are all cases where a writ of prohibition was granted on the ground that the order was made without jurisdiction);

POSNER v. COLLECTOR FOR INTERSTATE DESTITUTE PERSONS

In the Affairs of Hart, (1943) 169 L.T. 60; *Galos, Hired and Another v. The King*, [1944] A.C. 149.

It is a fundamental principle of British justice that a party should have notice of any proceedings which are brought against him. In *In re a Debtor*, [1939] Ch. 251 at p. 256, Sir Wilfrid Greene, M.R., said—"It is no exaggeration to say that the practice in regard to writs and the requirements of the law in regard to service are, and they always have been, regarded as matters *strictissimi juris*." In *R. v. North* (*supra*), at p. 505, Atkin, L.J., said—"To my mind if a Chancellor seeks to exercise any coercive power over a parishioner, or anybody else who comes within the scope of a general citation, he must see that the person against whom the coercive jurisdiction is sought to be exercised has in fact received special notice that proceedings are being taken upon which an order may be made against him; and in the absence of a special citation of that kind it seems to me that there can be no power in the Chancellor to exercise any such coercive jurisdiction. I think, therefore, that the Chancellor in this case had no jurisdiction to order the vicar to pay the expense of the restoration or the costs of the proceedings. Under these circumstances it appears to me that the vicar is entitled to a prohibition, the order being a breach of the fundamental principle of law, that a person is entitled to have notice of a claim against him and to be heard before he can be deprived of his property. The order, being made without jurisdiction, was wholly without effect, and nothing could validly be done under it."

An order of a superior court is never void, but only voidable. An order of a superior court which is made in the absence of a person who has not been duly served, is so fundamentally impeachable that it is often described in judgments of the highest authority as being null and void and so lacking in efficacy that it can be disregarded. The latest of these authorities appear to be *Craig v. Kanssen*, [1943] 1 K.B. 256; *Marsh v. Marsh*, [1945] A.C. 271. I take the expression "null and void" where it occurs in these judgments in reference to a superior court to mean that the person against whom the order is made may disregard it in the sense that it is so fundamentally impeachable that he is entitled to have it set aside in the inherent jurisdiction of the court which made it, *ex debito justitiae* if at any time it is sought to be enforced against him. The contrast between the order of a superior and of an inferior court is well illustrated by comparing the statements of Vaughan Williams, L.J., in *Pemberton v. Hughes*, [1899] 1 Ch. 781 at p. 796, with respect to a superior court, and in *Alderson v. Palliser* (*supra*), with respect to an inferior court.

Section 56 of the Justices Act (W.A.) requires, with certain immaterial exceptions, that the summons must be served on the defendant personally. "Must"

is a word of absolute obligation, and occurs in a section which is concerned with a fundamental principle of justice. It is not merely directory. Compliance is essential to an effective hearing of the summons. Section 135 provides that when the defendant does not appear, the justices, on proof of due service of the summons, may proceed *ex parte* to determine the case in his absence, but this does not give them jurisdiction where the defendant was not in fact served at all—*R. v. Evans*, (1850) 19 L.J. M.C. (N.S.) 151; *R. v. Farmer*, [1892] 1 Q.B. 637. I adhere to what I said in *Cameron v. Colc*, [1944] A.L.R. 130 at p. 143, 68 C.L.R. 571 at p. 604, that—"Where [as in the present case] service of a particular nature is required to give an inferior court jurisdiction, failure to effect such service will make all the subsequent proceedings null and void."

I am unable to agree with the learned Judge that the order of 24th October, 1941, though void when made in Western Australia, could acquire any efficacy in Victoria from the provisions of the Maintenance Act. That Act provides machinery for the extra-territorial operation of orders for maintenance made in another State, and appoints the collector to enforce the order in Victoria as the statutory agent of the person entitled to the benefit of the order. The only point of substance upon which the justice has to be satisfied under sec. 71 before indorsing the order with a direction that it is to be enforced in Victoria, is that the defendant is resident temporarily or permanently in Victoria. The order then becomes and continues to be enforceable against the defendant in Victoria after he has been served with a copy of the order and indorsement by the collector. The provision that the order is to continue to be enforceable in Victoria only means that it will be enforceable in Victoria whenever the defendant is in that State, although he may leave the State and subsequently return to it. These provisions cannot, in my opinion, have the effect of imparting any additional virility to the order to that which it had at the time it was made. They merely provide the procedure for its enforcement. The Act does not provide any procedure by which the defendant when served with the copy of the order and indorsement can apply to a court to stay the enforcement of the order in Victoria or have it set aside. The first opportunity that the Act gives the defendant of objecting to the order in a court in Victoria is when the collector seeks to enforce the order in a court of petty sessions, under sec. 78. It is clear that at this stage the defendant must be entitled to raise some grounds of objection. It is admitted that he must be able to raise matters which have occurred subsequently to the order being indorsed in Victoria affecting his liability to pay the amount claimed wholly or in part. The authority of the court of petty sessions under the section is simply to enforce in Victoria

the order made in another State. An order of an inferior court which is made without jurisdiction and void can be shown to be so in collateral proceedings—*Bonaker v. Evans*, (1850) 16 Q.B. 162; *Revell v. Blake*, (1873) L.R. 8 C.P. 533 at p. 544. The present proceedings are not even collateral proceedings. They are proceedings for the direct enforcement in Victoria of an order made in Western Australia. But as that order was void *ab initio*, it was completely devoid of legal effect and, as Atkin, L.J., pointed out in *R. v. North (supra)*, at p. 506, a mere *brutum fulmen*. Just as in *Galos Hired v. The King (supra)*, there was nothing which the acting secretary to the Government could validly confirm so far as the sentence of death was concerned, so here there was nothing for the Court of Petty Sessions at Melbourne to enforce.

For these reasons I would allow the appeal, set aside the order of the Supreme Court, and make the order *nisi* absolute.

Appeal dismissed.

[Solicitors—For the appellant, Alfred L. Abrahams; for the respondent, F. G. Menzies, Crown Solicitor.]

F. D. C.S.

FULL COURT — (Latham, C.J.,
Rich, Starke, Dixon, McTiernan
and Williams, JJ.)
(Sydney.)

Nov. 22, 25.
Dec. 23, 1946.

COMMISSIONER OF TAXATION v. HARDIE INVESTMENTS PTY. LTD.

Revenue—State income tax—Assessable income—Dividend received by company shareholder — Issue of bonus shares—Out of profits upon re-valuation of assets—Income Tax Management Act 1936 (N.S.W.), sec. 53 (c) .

A company, by way of dividend upon shares held by it in another company, received a parcel of bonus shares issued by that other company out of profits arising from its having written up the value of certain of its assets above the values appearing in the previous balance-sheet.—

Held, that the bonus shares were a dividend paid out of profits arising from the re-valuation of assets not acquired for the purpose of re-sale at a profit and, by reason of the Income Tax Management Act 1936 (N.S.W.), section 53 (c), they did not form part of the assessable income of the company receiving them.

Dickson v. Commissioner of Taxation, 62 C.L.R. 687, [1940] A.L.R. 9, followed.

Decision of Supreme Court of New South Wales affirmed.

APPEAL.

The Commissioner of Taxation of New South Wales made an assessment against Hardie Investments Pty. Ltd. for special income tax in respect of income derived during the year ending 30th June, 1937, and he included in the assessable income 120,088 bonus shares allotted to the Company as a shareholder in a company called James Hardie and Sons Limited. Under sec. 53 (c) of the Income Tax Management Act 1936 (N.S.W.), the assessable income of a shareholder is not to include dividends paid out of profits arising from the re-valuation of assets not acquired for the purpose of re-sale at a profit if those dividends are satisfied by the issue of shares of the company declaring this dividend. Pursuant to a resolution of James Hardie and Sons Limited, the value of certain assets not acquired for re-sale at a profit was written up, the increase over the total value as appearing in the previous balance-sheet being £218,100, and part of this sum was capitalised and applied in paying up in full 217,600 unissued shares of the Company of £1 each. The 120,088 bonus shares referred to above were the proportion allotted to Hardie Investments Pty. Ltd. This Company lodged an objection to the inclusion of the paid-up value of these shares in the assessable income, and the objection was disallowed and treated as an appeal, and forwarded to the Supreme Court of New South Wales. The appeal was heard by Owen, J., and was allowed and the assessment was set aside.

The Commissioner appealed to the High Court.

Weston, K.C., and *Bridge* for the appellant Commissioner.

Kitto, K.C., and *Macfarlan* for the respondent Company.

Reference was made to the following:—

Dickson v. Commissioner of Taxation, 62 C.L.R. 687, [1940] A.L.R. 49.

Stapley v. Read Bros., [1924] 2 Ch. 1.

1 Halsbury's *Laws* (2nd ed.), vol. V., 393.

Commissioner of Taxation v. Henry, (1941) 41 S.R. (N.S.W.) 185.

Cur. adv. vult.

The following written judgments were delivered:—

LATHAM, C.J.—This is an appeal from an order of the Supreme Court of New South Wales (Owen, J.) allowing an appeal from an assessment of the respondent Company to income tax under the New South Wales Special Income and Wages Tax (Management) Act 1936. That Act incorporates certain provisions of the Income Tax Management Act 1936, including the provisions relating to the inclusion in or exclusion from assessable income of dividends received from companies. By sec. 53 (c) of the latter Act it is provided that the assessable income of a shareholder shall not include dividends paid on or after 1st January, 1936, wholly and exclusively out of profits arising from the re-valuation of assets not