[HIGH COURT OF AUSTRALIA.]

PLOWMAN . . . . . APPELLANT;
PLAINTIFF,

AND

PALMER AND OTHERS. . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *Aug.* 6, 7, 10, 11.

Griffith C.J., Barton, Isaacs and Rich JJ.

*Assault—Justification—Writ of habere facias—Issue without special order—Nullity or irregularity of writ—Bankruptcy Act* 1898 (*N.S.W.*) (*No.* 25 *of* 1898), *sec.* 134—*Bankruptcy Rules* 1896 (*N.S.W.*), *rr.* 200, 201—*Consolidated Equity Rules of* 1902 (*N.S.W.*), *rr.* 210, 214.

Sec. 134 of the *Bankruptcy Act* 1898 (N.S.W.) provides that "(4) Whenever the official assignee or trustee claims any property as part of the bankrupt's estate, or claims any right against any person, whether such person is or is not a party to the bankruptcy, the Court may upon motion by the assignee or trustee . . . hear and determine . . . the question raised by such claim, and make such order thereupon as he may deem expedient or necessary, for the purpose of doing complete justice between all the parties interested." "(6) Every order of the Court made under this Act in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment of the Supreme Court to the same effect."

Rule 200 of the *Bankruptcy Rules* 1896 provides that "Non-compliance with any of these Rules . . . or with any rule of practice for the time being in force, shall not render any proceeding void unless the Judge shall so direct; but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with, in such manner and upon such terms, as the Judge may think fit." Rule 201 of those Rules provides that save as provided by those Rules "the Rules of the Supreme Court in Equity shall apply to any proceeding in bankruptcy."

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Rule 210 of the *Consolidated Equity Rules of* 1902 provides that "No writ of . . . *habere facias* shall be issued without special order, to be obtained on motion with affidavit of the circumstances of the case; and the person against whom such writ is sought to be issued shall be served with notice of the motion, unless the Court otherwise orders." Rule 214 of the last mentioned Rules provides that "When any party who by any order or decree is ordered to deliver possession of any lands . . . within a limited time, refuses or neglects, after due service of such decree or order, to obey the same, the party prosecuting such order or decree shall be entitled to a writ of assistance or of *habere facias*."

The Supreme Court in its bankruptcy jurisdiction having made an order under the authority of sec. 134 (4) of the *Bankruptcy Act* 1898 directing delivery of possession of certain land to the official assignee of a bankrupt, the fact that a writ of *habere facias* is issued without a special order under rule 210 of the *Consolidated Equity Rules of* 1902 having been first obtained does not render the writ a nullity, but it is merely an irregularity.

*Held*, therefore, that the person by whose authority the writ was issued might justify under it in an action for assault by a person who was removed from the land by the sheriff acting pursuant to the writ.

Decision of the Supreme Court affirmed, but on a different ground.

APPEAL from the Supreme Court of New South Wales.

George Plowman brought an action in the Supreme Court against William Harrington Palmer, Alfred Edward McIntosh and John Gordon Crowther for assault. By their fourth plea the defendants said that at the time of the alleged assault (23rd January 1912) the defendant Palmer was the official assignee of one Donald Plowman, a bankrupt, and that the other defendants, McIntosh and Crowther, were his solicitors in connection with the bankrupt estate; that Palmer by his solicitors had instituted proceedings in the bankruptcy jurisdiction of the Supreme Court under sec. 134 of the *Bankruptcy Act* 1898 against Margaret Plowman, the wife of the plaintiff, and one Daniel Plowman, who claimed certain land as against Palmer, for the purpose of ascertaining Palmer's title to the land and to the possession thereof as against Margaret Plowman and Daniel Plowman, and that in those proceedings it was declared by an order of the Court, dated 6th September 1910, that a certain alleged transfer of the land from the bankrupt to Margaret Plowman was void as against Palmer, and it was ordered that possession of the land should be delivered up to Palmer within fourteen days; that Margaret

Plowman did not deliver up the land within fourteen days or at all, and that thereupon Palmer, by his solicitors, duly sued out a writ of *habere facias* directing the sheriff to cause Palmer to have possession of the land and premises; that thereupon the writ was delivered to the sheriff, who by his warrant commanded his bailiff to enter upon the land and cause Palmer to be put in possession thereof; and that the plaintiff being upon the land the bailiff removed him from the land with no more force than was necessary, which was the alleged assault.

The action was heard before *Ferguson* J. and a jury, who found a verdict for the defendants. A motion on behalf of the plaintiff for a new trial was dismissed by the Full Court.

From that decision the plaintiff now appealed to the High Court.

The material facts appear in the judgment of *Griffith* C.J. hereunder.

*Alroy Cohen*, for the appellant.

*Loxton* K.C. (with him *Boyce*), for the respondents.

During argument reference was made to *Bankruptcy Act* 1898, sec. 134; *Bankruptcy Rules* 1896, rules 200, 201; *Consolidated Equity Rules of* 1902, rules 210, 214; *Common Law Procedure Act* 1899, sec. 209; *Bullen & Leake's Precedents of Pleading*, 3rd ed., p. 770; *Andrews* v. *Marris and Whitham* (1); *In re Von Weissenfeld*; *Ex parte Hendry* (2); *In re Davison*; *Ex parte Official Assignee* (3); *Dews* v. *Ryley* (4); *Bryant* v. *Clutton* (5); *Starkie on Evidence*, 3rd ed., vol. III., p. 1110; *In re Worth*; *Ex parte Official Assignee* (6); *Upton* v. *Wells* (7); *Knight* v. *Clarke* (8); *Prentice* v. *Harrison* (9); *Collett* v. *Foster* (10); *Petty* v. *Daniel* (11); *Jones* v. *Williams* (12); *Jacques* v. *Harrison* (13); *Blanchenay* v. *Burt, Hodgson & Burton* (14);

(1) 1 Q.B., 3.
(2) 9 Morrell, 30.
(3) 17 N.S.W.L.R. (B. & P.), 92.
(4) 11 C.B., 434, at p. 442.
(5) 1 M. & W., 408.
(6) 1 N.S.W. Bky. Cas., 58.
(7) 1 Leon., 145.
(8) 15 Q.B.D., 294.
(9) 4 Q.B., 852.
(10) 26 L.J. Ex., 412.
(11) 34 Ch D., 172.
(12) 8 M. & W., 349, at p. 356.
(13) 12 Q.B.D., 165.
(14) 12 L.J.Q.B., 291; 4 Q.B., 707.

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*Anlaby* v. *Prætorius* (1); *Roberts* v. *Spurr* (2); *Chitty's Archbold*, 12th ed., vol. II., pp. 1471, 1474.

*Cur. adv. vult.*

Aug. 11.

GRIFFITH C.J. This was an action for assault. By their fourth plea the defendants justified under a writ of *habere facias* directing the sheriff to put the defendant Palmer in possession of certain land of which the plaintiff was in occupation. The learned Judge at the trial was of opinion that the writ was a nullity, apparently under a misapprehension as to the practice of the Court in its equitable jurisdiction, to which his attention does not seem to have been directed. The question substantially debated at the trial was whether the sheriff's officer had in making the entry under the supposed authority of the writ committed the offence of forcible entry, an offence created by an ancient Statute of Richard II. The jury found a verdict for the defendants. On an application to the Full Court for a new trial the only question discussed was the effect of the writ of *habere facias*, which the Court thought afforded a complete defence. The writ was put in evidence by the plaintiff himself in order to prove the defendants' responsibility for the entry by the sheriff's officer. The only objection to its validity was based upon want of proof of compliance with a rule of the Supreme Court in Equity, to which I will afterwards refer. The Full Court thought that, the writ having been put in evidence by the plaintiff himself, proof of compliance with the rule was not necessary.

The respondent Palmer is the official assignee of Donald Plowman, a bankrupt, and the other respondents were his solicitors in the proceedings to which I will now refer. On 6th September 1910 Palmer obtained a judgment in the Supreme Court in its bankruptcy jurisdiction against Margaret Plowman and Daniel Plowman declaring that a transfer of land from the bankrupt to Margaret Plowman was void, and directing her to deliver possession of the land to Palmer subject to a mortgage to one Wilson. The land was under the *Real Property Act*, the bankrupt being registered as proprietor and Wilson registered as

(1) 20 Q.B.D., 764.

(2) 3 Dowl. P.R., 551.

mortgagee. On 3rd November 1910 Wilson executed a transfer of the mortgage to Margaret Plowman. On 10th January 1911 Margaret Plowman as mortgagee agreed to sell the land to Daniel Plowman. Those transactions were not registered. On 27th September 1911 an order was made by the Court in its bankruptcy jurisdiction in a proceeding by Palmer against Margaret Plowman and Wilson, declaring that all the moneys secured by the mortgage had been repaid and ordering delivery of the land to be given to Palmer. His title being thus clear, since the previous order for delivery of possession to him was subject only to the mortgage, he in November 1911 obtained through his solicitors, the other respondents, the writ of *habere facias* the validity of which is now in question.

The learned trial Judge appears to have thought that the order of 6th September 1910 for delivery of possession was a personal order which could only be enforced by writ of attachment, and not by a writ of *habere facias*. According to the practice of the Court of Chancery the proper mode of enforcing such an order was by a writ of assistance, which was substantially in form and effect the same as the common law writ of *habere facias*. The practice of the Supreme Court of New South Wales in Equity is practically the same. The judgment or order of 6th September 1910 was made under sec. 134 of the *Bankruptcy Act* 1898, which provides (sub-sec. 6) that "every order of the Court made under this Act in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment of the Supreme Court to the same effect," that is, by the writ appropriate to the execution of such a judgment. Rule 201 of the *Bankruptcy Rules* 1896, which have effect as though made under the authority of the *Bankruptcy Act* 1898, prescribes that the Equity practice shall be followed in the Court of Bankruptcy except as otherwise provided. By Equity Rule 214 it is provided (in accordance with the practice in Chancery) that when a party is by an order or decree ordered to deliver possession of land and "refuses or neglects, after due service of such decree or order, to obey the same, the party prosecuting such order or decree shall be entitled to a writ of assistance or of *habere facias*." By rule 210 it is provided that "No writ of attachment, sequestra-

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tion, assistance or *habere facias* shall be issued without special order, to be obtained on motion with affidavit of the circumstances of the case; and the person against whom such writ is sought to be issued shall be served with notice of the motion, unless the Court otherwise orders." In this case it was not shown affirmatively that any such order had been obtained. It was contended that on this ground the writ was invalid. At common law a writ of *habere facias* after judgment for the plaintiff in ejectment can be obtained without any special order. The position, therefore, was this: In the Supreme Court there are two practices with respect to the enforcement of judgments of practically the same substance and effect—that is to say, judgments to recover possession in common law actions of ejectment and judgments to deliver possession in equity. Under one practice a special order is required, and under the other it is not. The objection, therefore, resolves itself into the following of the common law practice instead of the equity practice. Rule 200 of the *Bankruptcy Rules* provides that "Non-compliance with any of these Rules, save rule 176" (which does not relate to this matter), "or with any rule of practice for the time being in force, shall not render any proceeding void unless the Judge shall so direct; but such proceeding may be set aside, either wholly or in part, as irregular," &c. In my opinion, following the common law practice instead of the equity practice is at most an irregularity, and does not constitute the proceeding a nullity. It is a settled rule that a party assisting in the execution of an irregular writ can justify under the writ if it has not been set aside. The plea of justification was therefore established, subject to another objection which was taken by Mr. *Cohen*. He contended that only persons bound by the judgment were bound by the writ. The plaintiff, who was in possession, claimed under a contract of purchase from Margaret Plowman of 6th June 1911. The writ commanded the sheriff to deliver possession of the land, and he was bound to obey that writ and enforce it against anyone who might be in possession of the land. Everyone was bound to submit to the authority of the law. If, however, the appellant had had a title he would have been entitled to relief against the writ. The position of a person whose land is taken from him

under a judgment for recovery of possession from another person is pointed out in *Jacques* v. *Harrison* (1). He cannot resist the enforcement of the writ of *habere facias* by the sheriff. That point, therefore, fails, whether the plaintiff was or was not bound by the judgment of 27th September 1911. Much may be said in support of the contention that he was. In either case he was bound to submit to the authority of the sheriff.

There is still another difficulty in his way. In the meantime his alleged title to the land as purchased from Daniel Plowman had been the subject of decision in proceedings taken by himself in December 1912 against Palmer, in which it was adjudged that he had no title. That judgment, although subsequent to the alleged assault, operates by way of estoppel. So that he was in point of law a mere stranger.

It follows, from what I have said, that the writ of *habere facias* was not invalid, and that the defendants were entitled to judgment on the plea of justification. The decision of the Supreme Court was therefore right, and the appeal should be dismissed. It is strange that neither of these points was taken in the Supreme Court. On examination they both appear to be resolved in favour of the respondents.

BARTON J. The writ of *habere facias* is pleaded by the fourth plea. There is no issue of law. Is the plea proved as a fact? It is, unless the writ itself is a nullity. Is, then, the writ a nullity? I think not. The absence of an order under Equity Rule 210 was only an irregularity, and was not fatal. Sec. 134 of the *Bankruptcy Act* 1898, sub-sec. 6, provides that "Every order of the Court made under this Act in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment of the Supreme Court to the same effect." "In the same manner" means, I take it, by the proper process for enforcing such a judgment. The defendants have probably made an erroneous choice between the two practices—that of common law and that of equity—adopted for obtaining the writ. The question is whether by that error they have reduced the writ they obtained to a nullity. I think with the learned Chief

(1) 12 Q.B.D., 136; 165.

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Justice that the writ is not a nullity, and if it is only an irregularity it is good until set aside. Does it affect the appellant? It does not affect him directly in the sense that he is a "party bound thereby," but the writ if good—and it is good until set aside—is a writ to give possession against all and sundry, and that necessarily includes authority to remove persons who constitute themselves obstacles to possession. The appellant was such an obstacle, and was removable without unnecessary force. So far as the evidence shows, neither he nor anyone else sought to set aside the writ. Until it was set aside it could not be treated as giving no authority to the respondent Palmer to obtain possession; and his two co-defendants are the solicitors whom he instructed to take the necessary steps for that purpose. The jury's finding on the facts, as left to them by *Ferguson* J., must be taken to negative excess of force in the removal of the plaintiff. The writ, therefore, seems to have been subsistent and duly executed.

The Supreme Court, therefore, was right, and the appeal fails.

ISAACS J. read the following judgment:—The Supreme Court decided two points against the present appellant, and, as he failed on both, his motion was dismissed.

One point went to the very root of the matter, that is, whether under sec. 134 (6) of the *Bankruptcy Act* a writ of *habere facias possessionem* in universal terms is permissible. If not, the proceeding was, of course, unauthorized, and could afford no answer to the plaintiff's claim.

A relevant and vital distinction was said to exist between a common law judgment in ejectment, and an order for delivery of possession in equity. But there is no material distinction. The form of a common law judgment in ejectment is that "the said A.B. do recover against the said C.D. possession of the [land] in the said writ mentioned," &c. See *Cole on Ejectment*, pp. 786 and following. It is thus in terms limited to "possession," and does not in general conclude title (*ib.*, pp. 76, 77), and is stated to be as against the defendant, who is taken to hold the possession. The sheriff's duty, however, under the writ is to execute it so as

to give the plaintiff complete and peaceable possession even to turning out third persons: *Upton* v. *Wells* (1).

The Supreme Court bankruptcy order of 6th September 1910, declaring that "Margaret Plowman do deliver up possession of the land and premises to the official assignee within fourteen days," is consequently to the same effect as a Supreme Court judgment in ejectment, and, so far as sec. 134 (6) is concerned, comes within its terms.

The other point decided by the Full Court was that the mere putting in evidence of the writ of *habere facias* was some evidence of the requisite authority to issue it, and the onus of proof was thereby shifted. If it were necessary to determine this point of evidence I should require further time to consider it. There is great force in the argument of Mr. *Cohen* that, the writ being put in merely to connect the defendants with the acts complained of, and the validity of the writ being in issue, the onus of justification was not satisfied until jurisdiction to issue the writ was shown. But the point is not necessary for determination. For the purposes of this case, I might assume that it had been affirmatively proved that there was no special order within the meaning of Equity Rule 210. What is the effect on the writ of the failure to get the special order? Is it void, or merely irregular —that is, voidable?

Rule 200 has the effect of preventing non-compliance with the rules from operating to render proceedings void. But on identical words it has been held that a proceeding which is a nullity is not cured under such a rule.

A proceeding taken, where such proceeding is entirely forbidden or excluded by the rules (*Hewitson* v. *Fabre* (2)) or is not permitted at all at the time it is taken (*Anlaby* v. *Prætorius* (3) and *Smurthwaite* v. *Hannay* (4)), would be more than mere non-compliance with the rules. It is still necessary, therefore, to inquire whether the proceeding impeached is merely an irregularity for non-compliance with the rules, or is inherently a nullity.

This is vital, because it was properly conceded for the appellant that as the writ of execution has not been set aside and no assault

(1) 1 Leon., 145.
(2) 21 Q.B.D., 6.
(3) 20 Q.B.D., 764.
(4) (1894) A.C., 494.

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*ultra* is alleged, it is an answer to the action unless it is void (See *Riddell* v. *Pakeman* (1) and *Blanchenay* v. *Burt, Hodgson & Burton* (2)).

What, then, is the test in such a case between a nullity and an irregularity? As the Court of Appeal says in *Fry* v. *Moore* (3), it is sometimes difficult to say on which side of the line a given matter lies, and the line is very thin. The power to waive the objection is rather an accompaniment of mere irregularity than a standard of discrimination.

The line, however, has been, I think, clearly drawn in *Lloyd* v. *Great Western Dairies Co.* (4) by the Court of Appeal in a case where the defect in all material circumstances resembled that in the present case.

The English Rules of Court, Order XVIII., r. 2, provide that "No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land" except in certain cases immaterial to the matter in hand. The question came down to this, whether the defect in breach of that provision could be waived as an irregularity; for, if it could, it had been. *Vaughan Williams* L.J. in effect held that as there was under the rules jurisdiction in the Court to permit the proceeding to be taken as it was taken, it was not a nullity but a mere irregularity that could be waived. *Fletcher Moulton* L.J. read the requirement as a provision made for the protection of the defendants, and therefore one which might be waived by them. This implies jurisdiction in the Court. *Buckley* L.J. also drew the distinction between causes of action incapable of being joined, and those which might be joined by leave.

In other words, the test is: Is there jurisdiction at the time to do the act impeached, even though prior precautions for the protection of a party, or other formalities, are directed; or is the act complained of, in the circumstances entirely unprovided for or prohibited at the time it is done? Here, as in *Lloyd's Case* (4), the proceeding is provided for in the circumstances which happened; in both cases it is by negative words required to be preceded by a special order, in both cases the special order is for

(1) 2 C. M. & R., 30.
(2) 4 Q.B., 707.
(3) 23 Q.B.D., 395.
(4) (1907) 2 K.B., 727.

the benefit of the defendant, yet in neither case it is stated or implied that the prior order is a condition of jurisdiction; and so accepting the standard laid down in *Lloyd's Case* (1), and being unable to distinguish in effect the material facts of the two cases, I agree that this appeal should be dismissed.

RICH J. I agree.

*Appeal dismissed with costs.*

Solicitor, for the appellant, *H. C. G. Moss.*
Solicitor, for the respondents, *E. A. Roberts.*

B. L.

(1) (1907) 2 K.B., 727.

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[HIGH COURT OF AUSTRALIA.]

SPENCE . . . . . APPELLANT;
COMPLAINANT,

AND

RAVENSCROFT . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1914. SYDNEY, *Aug.* 13, 14, 17. Griffith C.J., Isaacs, Gavan Duffy and Rich JJ.

*Sunday Trading—Transaction not involving human labour—Goods obtained from slot-machine—Police Offences Act* 1901 (*N.S.W.*) (*No.* 5 *of* 1901), *sec.* 61.

Sec. 61 of the *Police Offences Act* 1901 provides that "Whosoever trades or deals, or keeps open any shop, store, or other place, for the purpose of trading or dealing on Sunday (the shops or houses of butchers, bakers, fishmongers, and greengrocers, until the hour of ten in the forenoon, and of