[HIGH COURT OF AUSTRALIA.]

THE NEW SOUTH WALES MONT DE PIETE DEPOSIT AND INVESTMENT COMPANY LIMITED . . . } APPELLANTS;

AND

WATERS AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *Nov.* 17, 18.

Griffith C.J., Isaacs and Powers JJ.

District Court of New South Wales—Jurisdiction—Interpleader proceedings—Summons to claimant issued by registrar—Jurisdiction of District Court Judge to set aside—Persona designata—District Courts Act 1912 (*N.S.W.*) (*No.* 23 *of* 1912), *secs.* 127, 128.

Sec. 127 of the *District Courts Act* 1912 provides as follows:—"(1) Application may be made for relief by way of interpleader—(*a*) by a defendant in an action brought in a District Court for or in respect of any debt, money, goods, or chattels to which some third party makes a claim; . . . (2) The application must be made to the registrar of the Court in which the action is brought or of the Court in the district of which the process is executed, as the case may be. (3) When the application is made by the defendant, it must be supported by an affidavit showing—(*a*) that the applicant claims no interest in the subject matter in dispute other than for charges or costs; (*b*) that the applicant does not collude with the person claiming as aforesaid; and (*c*) that the applicant is willing to pay or transfer the subject matter into Court."

Sec. 128 (1) provides that "The registrar shall thereupon issue a summons calling upon the person claiming as aforesaid (hereinafter called the claimant) to state the nature and particulars of his claim in such form and within such time as may be prescribed; and upon the issue of the summons, and where the application for relief is made by the defendant upon the payment or transfer of the subject matter into Court, all proceedings in the action and in any other action which may have been brought in the Supreme Court or a District Court in respect of such claim shall be stayed."

Held, that where, on the application of the defendant in an action in a District Court, the registrar has under sec. 128 issued a summons calling upon the claimant to state the nature and particulars of his claim, a Judge of a District Court has jurisdiction to set aside the summons.

Decision of the Supreme Court of New South Wales: *Ex parte New South Wales Mont de Piété Deposit and Investment Co. Ltd.*, 31 W.N. (N.S.W.), 15, affirmed.

APPEAL from the Supreme Court of New South Wales in prohibition.

An action was brought in the District Court at Sydney by Edith Waters against the New South Wales Mont de Piété Deposit and Investment Co. Ltd. by which the plaintiff sought to recover from the defendants a gold bangle or its value, £35, and £15 for its detention. The Company then, with the object of instituting interpleader proceedings, caused to be filed in that Court two affidavits. In one of them the manager of the Company stated that the Company had the bangle in its possession but claimed no interest in it other than for costs; that he was informed by an assistant employed by the Company and believed that the bangle was claimed by one James Williams, who he expected and apprehended would sue the Company for the bangle or its value; and that neither he nor the Company in any way colluded with James Williams. In the other affidavit the assistant mentioned in the affidavit above referred to stated that the bangle had been pledged with him by James Williams, who stated that he was the owner of it. The registrar thereupon on 1st November 1913 issued a summons calling upon James Williams to state the nature and particulars of his claim to the bangle, and on the same day the bangle was lodged in Court. That summons was not served upon Williams, the bailiff being unable to find him at the address he had given. On 2nd December on the application of the plaintiff a summons was issued calling upon the defendant Company to show cause why the interpleader proceedings should not be set aside. The summons came on for hearing before a District Court Judge, who made an order setting aside the interpleader proceedings. The defendant Company obtained an order *nisi* for prohibition on the ground that the learned District Court Judge had no jurisdiction to make the order complained of. The

H. C. OF A. 1914.

NEW SOUTH WALES MONT DE PIETE DEPOSIT AND INVESTMENT CO. LTD. v. WATERS.

order was directed to the plaintiff and the learned District Court Judge. The Full Court discharged the order *nisi*: *Ex parte New South Wales Mont de Piété Deposit and Investment Co. Ltd.* (1).

From that decision the defendant Company now, by special leave, appealed to the High Court.

Leverrier K.C. (with him *D. S. Edwards*), for the appellants. Sec. 128 of the *District Courts Act* 1912 confers upon the registrar the power, and imposes upon him the duty, to issue the summons, and a District Court Judge has no jurisdiction to interfere: *Owen* v. *London and North Western Railway Co.* (2). The registrar is designated by the Act as the person to issue the summons, and no one can be substituted for him or take his place nor can he be controlled by the Court: *Hoare & Co.* v. *Morshead* (3); *Sinclair* v. *Rogalsky* (4).

[GRIFFITH C.J. referred to *Metropolitan Bank Ltd.* v. *Pooley* (5).]

The statement by Williams when he pawned the bangle that he was the owner of it is sufficient to constitute him a claimant within secs. 127 and 128: *McIntosh* v. *Simpkins* (6). [Counsel also referred to *District Court Rules* 1914, r. 445.]

L. J. McKean, for the respondent Waters. The District Court has inherent jurisdiction to control its procedure and to correct errors in proceedings in the Court: *Ivanhoe Gold Corporation Ltd.* v. *Symonds* (7); *Mason* v. *Ryan* (8); *Bernstein* v. *Lynch* (9).

[ISAACS J. referred to *Webb* v. *Adkins* (10); *Tarn* v. *Commercial Banking Co. of Sydney* (11); *Boyle* v. *Sacker* (12).]

The registrar is an officer of the District Court, and the power to issue a summons under sec. 128 is given to him as such officer. The District Court Judge had, under r. 475 of the *District Court*

(1) 31 W.N. (N.S.W.), 15.
(2) L.R. 3 Q.B., 54.
(3) (1903) 2 K.B., 359.
(4) 9 N.S.W.L.R., 293.
(5) 10 App. Cas., 210, at p. 214.
(6) (1901) 1 K.B., 487.
(7) 4 C.L.R., 642, at p. 653.
(8) 10 V.L.R. (L.), 335; 6 A.L.T., 152.
(9) 15 W.N. (N.S.W.), 129.
(10) 14 C.B., 401.
(11) 12 Q.B.D., 294.
(12) 39 Ch. D., 249.

Rules 1914, jurisdiction to set aside the interpleader proceedings. The interpleader proceedings are proceedings in the action over which the Judge has control, and he may correct errors in them under sec. 96 of the *District Courts Act* 1912.

GRIFFITH C.J. The only point raised in this appeal is as to the jurisdiction of a District Court Judge to correct a mistake alleged to have been made in proceedings in his Court. If he has jurisdiction to deal with an application made for that purpose and makes a wrong order, the remedy is by way of appeal, and if no appeal lies there is no remedy. The only question before us is whether the District Court Judge had jurisdiction to make the order complained of.

The *District Courts Act* 1912, by secs. 127 and 128, provides for proceedings by way of interpleader when a defendant who is sued in an action sets up that some third party makes a claim to the subject matter of the action. In such a case, upon the defendant filing an affidavit stating that he himself claims no interest in the subject matter except for his charges or costs, that he does not collude with the alleged claimant, and that he is willing to pay or transfer the subject matter into Court, the registrar is required to issue a summons calling upon the alleged claimant to state the particulars of his claim. Sec. 128 (1) provides that "upon the issue of the summons, and . . . upon the payment or transfer of the subject matter into Court, all proceedings in the action and in any other action which may have been brought in the Supreme Court or a District Court in respect of such claim shall be stayed."

The respondent brought an action in a District Court against the appellants for the recovery of a bracelet which had been pawned with them by one Williams, who claimed to be owner. The appellants then filed an affidavit in the prescribed form and making the necessary offer, whereupon the registrar issued a summons directed to the alleged claimant. That summons, however, was not served upon Williams, and so there appeared to be a deadlock. For sec. 128 provides that upon the issue of the summons all the proceedings in the action shall be stayed. The section then goes on to provide for the two events of the claimant

H. C. OF A. 1914.

NEW SOUTH WALES MONT DE PIETE DEPOSIT AND INVESTMENT CO. LTD. v. WATERS.

Griffith C.J.

complying or not complying with the summons. It would seem that the case of failure to effect service is not provided for. The action being thus hung up, the plaintiff applied to the District Court Judge to set aside the interpleader proceedings which had been begun, and the learned Judge made the order complained of. The question is whether he had jurisdiction to make it.

It is contended for the appellants that he had not, because the summons to Williams was rightly issued by the registrar as a *persona designata* empowered to issue it, and therefore that no tribunal had authority to set it aside. I suggested during the argument two answers to that contention, which did not require any statutory provision to support them. The first is that it is a general principle of the administration of justice that parties shall not be condemned or prejudiced without being heard. A familiar instance of the application of that principle is that where an order is made *ex parte* any party affected by it may make an independent application to discharge the order. A good illustration is afforded by *Boyle* v. *Sacker* (1), where it was pointed out that a motion to discharge such an order is not an appeal, but is founded on the fact that the person affected by the order had not been heard. The issue of the summons to Williams was not an order of the Court, but was a regular proceeding in the Court which had the effect of prejudicing the plaintiff and stopping the action. The principle I have stated applies to such a case; otherwise the rights of the plaintiff might be prejudicially and permanently affected without his being heard. That principle does not depend upon the particular constitution of the Court, but is, as I have said, a general principle in the administration of justice. The other doctrine to which I referred is that every Court has an inherent power to control its own proceedings, and to see that they are not abused for the purpose of committing injustice. I will read on that point the words of the *Earl of Selborne* L.C. and of Lord *Blackburn* in *Metropolitan Bank* v. *Pooley* (2). The Lord Chancellor said :—" Before the rules were made under the *Judicature Act*, the practice had been established to stay a manifestly vexatious suit which was plainly an abuse of the authority of the Court, although so far as I know there was not at that time

(1) 39 Ch. D., 249.

(2) 10 App. Cas., 210, at pp. 214, 220.

either any Statute or rule expressly authorizing the Court to do it. The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure." Lord *Blackburn* said:—"But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing—the Court had the right to protect itself against such an abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action." The matter then under consideration was a stay of the action itself, but a proceeding suspending an action is within the principle. In the same way the Courts have asserted jurisdiction to strike out a defence which is manifestly an abuse of the procedure of the Court. If such a power did not exist, a Court of Justice, instead of being a live institution actuated by human intelligence, would be a mere machine that could be put in motion by an outsider with the result of doing irremediable injustice.

I think, therefore, that, apart from any express power conferred by Statute, the District Court Judge had authority to entertain the plaintiff's application, either on the ground that the plaintiff had been prejudicially affected by a proceeding taken in the action behind her back, or on the ground (which was apparently set up) that the registrar had been misled into thinking that Williams claimed the goods. If the Judge had jurisdiction to entertain the application, it is immaterial whether his decision upon it was right or wrong.

I will add a word as to the order which the District Court Judge made, and by which he set aside the interpleader proceedings. I infer that he did so because he thought that Williams, the alleged claimant, was not really a claimant within the meaning of the Act. Williams was the pawnor of the goods, and when pawning them alleged that he was the owner. It is an

H. C. OF A. 1914.

NEW SOUTH WALES MONT DE PIETE DEPOSIT AND INVESTMENT CO. LTD. v. WATERS.

Griffith C.J.

interesting, and perhaps arguable, question whether he was a claimant within the meaning of the Statute. We do not know whether the District Court Judge thought that he was not. One of the Supreme Court Judges seems to have thought so. But whether that view was right or not, the Judge had jurisdiction to entertain the application. One cannot help regretting that an application was not made by the defendants, who were the moving parties in the interpleader proceedings, to adjourn the hearing of the application until substituted service of the summons had been made upon Williams, which could have been done under the Rules. If that step had been taken—and I suggest that in similar proceedings in future it should be taken—the necessity for an appeal to the Supreme Court and for this appeal would not have arisen. In my view the Judge had jurisdiction to entertain the application and make the order, and that is sufficient to dispose of this appeal, which must be dismissed.

ISAACS J. I also think that the conclusion at which the Supreme Court arrived was right. Mrs. Waters brought an action in the District Court for detinue of a bangle, and the Court was fully seised of jurisdiction to decide that action. It was one of the cases under sec. 41 of the Act, which confers the jurisdiction, and it was within the competency of the Judge to decide the matter. Then the defendants in that action made an application in the action under sec. 127 for relief by way of interpleader. They filed an affidavit, and under sec. 128 obtained a summons from the registrar calling upon Williams, the alleged claimant (without deciding, I assume for this purpose that he was a claimant) to state the nature and particulars of his claim. Sec. 128 provides that the registrar "shall thereupon"—that is, upon the making of the application for a summons supported by the affidavit—"issue a summons."

It is contended by the appellants that that provision makes the registrar a *persona designata*, and therefore that he is not subject to the control of the Court, or a Judge of the Court, which is the same thing. Now, in my opinion that contention is wrong.

The registrar is an official of the Court. Sec. 14 provides that

Judges of the District Court are to be appointed. Sec. 21 provides that there shall be a registrar for every District Court, and sec. 25 provides that the registrar shall sign and issue all summonses and warrants, and do certain other things there mentioned. Wherever a summons is required the registrar is to sign and issue it, and the term registrar would include a deputy or assistant-registrar. In sec. 128 the provision that the registrar "shall thereupon issue a summons" is not a designation of a person independently of the Court, but it is an enactment of a certain case, or set of circumstances or conditions if you like to call them so, under which the registrar must, as an official of the Court, perform a duty which is required of him. That is the reason the registrar is mentioned. The force of the phrase is contained in the word "shall," not in the special designation of the registrar. He is not mentioned there as an individual, but as an official of the Court having in that particular conjunction of circumstances a prescribed duty which he must perform.

Then says sub-sec. 1 of sec. 128 the summons is to operate as a stay of all proceedings in the action. It is so far a provisional stay. Whether the action is permanently stayed depends upon subsequent events. If the claimant does not comply with the summons, then the stay is removed and the action goes on as before. If he does comply with the summons, an interpleader plaint is to be entered and a new summons is to be issued thereon. Of course, that would be issued by the registrar, and if the appellants are right that summons would be equally free from interference by the Judge. But the position is that the Judge who is fully seised of jurisdiction to decide the whole action finds that the ordinary course of the action has been intercepted by a summons issued at the instance of the defendants and that the regular exercise of his jurisdiction is blocked, and yet it is said that he is deprived of all power to remove that block though he sees that it is improperly there. I cannot agree with that, and I think that the power is given to the registrar merely for the convenience of the defendant, who in procuring the summons to be issued is interfering with the normal progress of the action as to which he is subject to the

H. C. OF A. 1914.

NEW SOUTH WALES MONT DE PIETE DEPOSIT AND INVESTMENT CO. LTD. v. WATERS.

Isaacs J.

jurisdiction of the Judge. It would be altogether an anomaly if he could assert that the summons which he had obtained was beyond the competency of the Judge to remove.

The case cited of *Owen* v. *London and North Western Railway Co.* (1) seems to be a very strong authority against the contention for the appellants, because the ground upon which the decision was given was that the taxing officer was designated, not as an officer of the Court, but as an individual who because he was taxing officer was especially capable of doing something in relation to taxing costs in a matter which was outside the Court's functions. The ground of the distinction is therefore entirely against the appellants.

I agree that the circumstance that the application for the summons is *ex parte* helps very much to show that the Judge would have jurisdiction to intervene and set aside the summons upon a proper ground. But I put it broadly on the position that even if the application were not *ex parte* it is a proceeding in the action and is subject to the superintendence of the Judge or the Court unless there is something in the Act itself which distinctly takes it out of that superintendence.

There being jurisdiction in the Judge in a proper case to entertain an application to set aside such a summons, the motion for a prohibition must of course fail, because prohibition can only go where there is absolute want or excess of jurisdiction, and not on the ground that an erroneous order in fact or law has been made. Therefore, in these circumstances, there being jurisdiction to entertain the application and give a decision, the appeal must fail.

POWERS J. I agree, and for the reasons stated, that the Supreme Court was right in holding that the District Court Judge had jurisdiction to make the order complained of; and that the appeal must, therefore, fail.

Appeal dismissed with costs.

Solicitors, for the appellants, *Dawson, Waldron & Glover.*
Solicitor, for the respondent Edith Waters, *E. R. Abigail.*

B. L.

(1) L.R. 3 Q.B., 54.