[HIGH COURT OF AUSTRALIA.]

RIDLEY . . . . . APPELLANT;
DEFENDANT,

AND

WHIPP . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 14, 15; *Dec.* 11.

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

Evidence—Corroboration—Pre-maternity order—Opportunity of intercourse—Summons, jurisdiction to issue—Condition precedent—Prohibition—Infant Protection Act 1904 (*N.S.W.*) (*No.* 27 *of* 1904), *secs.* 4, 5.

By sec. 4 of the *Infant Protection Act* 1904 (N.S.W.) it is provided that "Where any single woman is with child by any man who has made no adequate provision for the payment of preliminary expenses of and incidental to and immediately succeeding the birth of the infant, or the expenses of the future maintenance of the infant, she, or with her consent the chief officer or any other reputable person on her behalf, may make complaint in writing on oath to any magistrate that she is with child by the said man, and that he has made no adequate provision for the payment of the expenses aforesaid; and shall when making such complaint produce evidence on oath, either oral or on affidavit, in corroboration in some material particular of the allegation as to the paternity of the infant. The magistrate may thereupon summon the man to appear before the Court to answer such complaint; or, if the circumstances seem to require it, may issue a warrant for his apprehension."

Held, (1) that the corroborative evidence required by that section is evidence given by some person other than the person whose statement is to be corroborated; and (2) that where reliance is placed upon evidence of opportunity of intercourse as corroboration, that evidence must be supplemented by evidence of circumstances which lead to the inference that it was probable that advantage would be taken of the opportunity.

Ex parte Nicholls, 14 S.R. (N.S.W.), 210, overruled.

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Held also, by *Griffith* C.J. and *Barton*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that the production of the evidence prescribed by sec. 4 of the *Infant Protection Act* 1904 is a condition precedent to the jurisdiction to issue a summons or warrant under that section and, consequently, that, a summons having been issued without the production of such evidence, prohibition was the appropriate remedy.

Decision of the Supreme Court of New South Wales: *Ex parte Ridley*, 16 S.R. (N.S.W.), 258, reversed.

APPEAL from the Supreme Court of New South Wales.

On the complaint of May Maud Whipp, a single woman, a summons under sec. 4 of the *Infant Protection Act* 1904 (N.S.W.) was issued against Rupert Ridley by two justices of the peace. On being served with the summons Ridley obtained an order *nisi* for a prohibition directed to the complainant and the two justices to restrain them from further proceeding on or in respect of the summons, on the ground (*inter alia*) that, inasmuch as when making the complaint the complainant did not produce evidence either oral or on affidavit in corroboration in some material particular of the allegation as to the paternity of the infant referred to in the complaint, the justices had no jurisdiction to issue the summons. On the return of the order *nisi*, *Ferguson* J. discharged it with costs: *Ex parte Ridley* (1). From that decision Ridley appealed to the Full Court, which dismissed the appeal with costs: *Ex parte Ridley* (2).

From the decision of the Full Court Ridley now, by special leave, appealed to the High Court.

Knox K.C. (with him *Flannery*), for the appellant. The corroboration required by sec. 4 of the *Infant Protection Act* 1904 must be by some witness other than the person whose statement is to be corroborated. The Supreme Court followed the decision in *Ex parte Nicholls* (3), that the mother of the child might herself corroborate her own testimony by evidence of circumstances tending to confirm her statement as to the paternity of the child. That decision is not correct. The production of corroborative evidence is a condition precedent to the jurisdiction of the justices (*Dawson* v. *M'Kenzie*

(1) 32 N.S.W.W.N., 174.
(2) 16 S.R. (N.S.W.), 258.
(3) 14 S.R. (N.S.W.), 210.

(1)), and the proper remedy is prohibition (*Ex parte Moran* (2) ; *Herrick* v. *Tanner* (3) ; *Reffell* v. *Morton* (4)).

[ISAACS J. referred to *R.* v. *Fletcher* (5) ; *R.* v. *Simmonds* (6).]

In those and cases like them the defendant appeared to an irregular summons or had been apprehended on an irregular warrant, and, being before the justices, it was held that they had jurisdiction to determine the complaint which was then made before them, it being one which was within their general jurisdiction. That is made clear in *R.* v. *Hughes* (7). Here the only question is as to the jurisdiction to issue the summons. That summons is the first step in a judicial proceeding, and, as soon as it is taken, the person against whom it is taken may stop the proceedings by prohibition if the conditions precedent to the taking of that step have not been complied with (*R.* v. *Scotton* (8)).

[GRIFFITH C.J. referred to *McIntosh* v. *Simpkins* (9) ; *Alderson* v. *Palliser* (10).]

Breckenridge (*James* with him), for the respondent Whipp. The provisions in sec. 4 of the *Infant Protection Act* as to the issue of a summons are directory only, and not essentials to jurisdiction. Until some further step is taken there is nothing to prohibit. There is at most an erroneous decision upon a matter which is within the justices' decision, and prohibition will not lie (*Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (11)). The question of corroboration is one of sufficiency of evidence, and, if there is some corroboratory evidence, it is a matter for the justices to decide. The corroboration required is of the allegation of paternity, and does not necessarily import an independent witness. The evidence of the mother herself may corroborate that allegation. Even if that is not so, any evidence which tends to raise a fair presumption that the mother is speaking the truth is sufficient. If she tells a probable story very slight evidence is necessary to

(1) (1908) Ct. of Sess., 648.
(2) 8 S.R. (N.S.W.), 569.
(3) 31 N.Z.L.R., 282.
(4) 70 J.P., 347.
(5) L.R. 1 C.C.R., 320.
(6) 8 Cox C.C., 190.
(7) 4 Q.B.D., 614, at p. 631.
(8) 13 L.J. (N.S.) M.C., 58.
(9) (1901) 1 K.B., 487.
(10) (1901) 2 K.B., 833.
(11) 5 C.L.R., 33.

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corroborate it, and that has been given by the evidence of an independent witness as to opportunity for intercourse. [Counsel also referred to *Ex parte Rowan* (1); *Cole* v. *Manning* (2); *Ex parte Stuart* (3); *Ex parte Moore* (4); *Farr* v. *Thornton*; *Ex parte Thornton* (5); *Lihou* v. *Chalmers*; *Ex parte Chalmers* (6).]

Ralston K.C. (with him *Alec Thomson*), for the respondent justices. The production of evidence in corroboration of the allegation of paternity is not a matter which goes to the jurisdiction of the justices to issue the summons. That corroboration may be given by the mother herself. Evidence of opportunity may be corroboration of the allegation of paternity (*Farr* v. *Thornton*; *Ex parte Thornton* (5)), and, there being some evidence which is admissible, its sufficiency is a matter for the justices.

Cur. adv. vult.

Dec. 11.

The following judgments were read :—

GRIFFITH C.J. Sec. 4 of the *Infant Protection Act* deals with what are called pre-maternity orders. It provides that when a single woman is with child by a man who has not made adequate provision for the expenses of birth and maintenance "she, or with her consent the chief officer or any other reputable person on her behalf, may make complaint in writing on oath to any magistrate that she is with child by the said man, and that he has made no adequate provision for the payment of the expenses aforesaid; and shall when making such complaint produce evidence on oath, either oral or on affidavit, in corroboration in some material particular of the allegation as to the paternity of the infant." The magistrate may "thereupon" summon the man to appear before the Court to answer the complaint, or may issue a warrant for his apprehension.

The appellant contends that the production of the prescribed evidence in corroboration is an essential condition of the jurisdiction of the magistrate to issue the summons or warrant.

(1) 1 Knox, 321.
(2) 2 Q.B.D., 611.
(3) 6 S.R. (N.S.W.), 468.
(4) 9 S.R. (N.S.W.), 233.
(5) (1903) S.R. (Qd.), 312.
(6) (1914) S.R. (Qd.), 164.

The principle applicable to the construction of such a provision is laid down in the case of *McIntosh* v. *Simpkins* (1). The County Court Rules which authorized the issue of a judgment summons against a defendant provided that in certain cases such a summons should not be issued without the leave of a Judge, and that the application for leave must be made upon affidavit according to a form set out in the Appendix to the Rules and containing certain prescribed particulars. The Court of Appeal held that the production of an affidavit complying with the rule was an essential condition of the jurisdiction of the Judge to grant the leave. *Collins* L.J. said (2) :—" We are not entitled to approach this case as if there were no provision enacting that an affidavit in a particular form should be the foundation of the proceedings. To say that the question is merely, and apart from the statutory conditions, whether a *primâ facie* case is made out would be to strike out these safeguards in the case of a debtor against whom it is proposed to put in force the provisions of the *Debtors Act* 1869." *Romer* L.J. said (3) :—" The affidavit does not meet the conditions laid down in the form, and affords no evidence which would justify the County Court Judge in making an order of committal. If so, the condition on which the Judge could exercise the power given by the rule was wanting, and the prohibition granted at Chambers ought to stand." The case of *Alderson* v. *Palliser* (4), also decided by the Court of Appeal, is to the same effect.

In my opinion the provisions of the rule of Court under consideration in those cases are not distinguishable in principle from those of the Statute now under consideration. I am therefore of opinion that the production of the prescribed evidence in corroboration is an essential condition of the jurisdiction of the magistrate to issue the summons or warrant.

In answer to this argument several cases were cited, of which *R.* v. *Hughes* (5) is the latest. In all of them it was held that upon the proper construction of the Justices Acts the mode of bringing a man before the Court is a mere matter of procedure, and that

(1) (1901) 1 K.B., 487.
(2) (1901) 1 K.B., at p. 491.
(3) (1901) 1 K.B., at p. 492.
(4) (1901) 2 K.B., 833.
(5) 4 Q.B.D., 614.

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if a man, being in fact before justices and being charged, submits to the jurisdiction, the justices have authority to proceed. In none of them was the question determined as to what would happen if the defendant had made a valid objection to the jurisdiction.

The maxim that consent cannot give jurisdiction is sometimes misunderstood. Jurisdiction involves two distinct concepts: authority to deal with a person against his will, and authority to deal with the subject matter. If a person who is not amenable without his consent to the coercive jurisdiction of a Court voluntarily appears and submits to it, the Court has jurisdiction to deal with the matter as against him, as in the well known instance of an action against a foreign sovereign. But consent cannot give jurisdiction over subject matter which is itself not within the cognizance of the Court.

I have shown that under the Statute the justices have *primâ facie* no jurisdiction to entertain a complaint the subject matter of which is a summons for a pre-maternity order unless the prescribed conditions are fulfilled. If they are not, *McIntosh* v. *Simpkins* (1) shows that prohibition is the appropriate remedy.

It is not necessary to express any opinion upon the question whether if the appellant had appeared to the summons and submitted to the jurisdiction of the Court, the Court would have had jurisdiction to deal with the charge on the merits; for that stage was never reached. The cases of which *R.* v. *Hughes* (2) is an example have, therefore, no application.

The condition in this case is that the complainant shall when making the complaint produce evidence on oath, either oral or on affidavit, in corroboration in some material particular as to the allegation of paternity. The allegation referred to is that contained in the complaint, which must be in writing and on oath, and which may be made either by the woman or by the chief officer or any reputable person on her behalf. In either case the allegation of which evidence in corroboration must be produced is her allegation. In my opinion the word "corroboration" connotes that the corroborative evidence must be given by some person other than the person whose statement is to be corroborated. That person

(1) (1901) 1 K.B., 487. (2) 4 Q.B.D., 614.

cannot therefore corroborate himself. If, as in this case, the complaint is made by the woman, the corroboration must obviously be given by some other person. In my opinion the rule is the same if the complaint is made on her behalf, for in either case it is *her* allegation as to paternity that is to be corroborated.

The only evidence relied upon by way of corroboration is that of a witness who deposed that about the relevant time he together with the complainant and the appellant were sitting together in the evening in the kitchen of her father's house, in which room there was a couch, that about 9.30 p.m. he went to bed, and that although he slept in the next room to the appellant he did not hear him come to bed. In the case of *Dawson* v. *M'Kenzie* (1) the Court of Session in Scotland held that proof of opportunity of intercourse may be corroborative evidence if of such a character as to establish suspicion. In my opinion, when reliance is placed upon proof of opportunity, that proof must be supplemented by proof of circumstances of such a nature as to lead to the inference that it was probable that advantage would be taken of the opportunity. It is impossible to define in advance what circumstantial evidence would be sufficient for that purpose. In the present case the proof stops short at proof of opportunity, which is insufficient. The appeal must, therefore, be allowed.

With regard to costs, I think that under the circumstances the order of the Supreme Court should not be disturbed. I think, therefore, that the appeal should be allowed, and the order of the Supreme Court discharged except so far as they awarded costs to respondent Whipp. Appellant must, in terms of his undertaking given on obtaining special leave, pay the respondent Whipp her costs of this appeal.

BARTON J. The question in the present case is confined to the inquiry whether there was jurisdiction on the part of the magistrates to issue the summons. It is contended by the respondents that the jurisdiction existed, because compliance with the requirements of the section in question was not a condition precedent to the issue of the summons. What are the requirements? First, a

(1) (1908) S.R., 648.

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complaint in writing and on oath that the woman is with child by the man indicated, and that he has made no adequate provision for the payment of the expenses of and incidental to and immediately succeeding the birth, or the expenses of the future maintenance of the infant; secondly, the production, concurrently with the making of the complaint, of sworn evidence, either oral or by affidavit, corroborating " in some material particular " the allegation as to paternity.

In such English cases as *R.* v. *Smith* (1) and *R.* v. *Fletcher* (2) the enactment discussed was 7 & 8 Vict. c. 101, sec. 2, which merely required an information supported by the woman's deposition. Here, sec. 4 of the *Infant Protection Act* (No. 27 of 1904) requires on the part of the complainant not only an allegation of paternity and other particulars on oath, but especially requires of the complainant the production of sworn corroboration as to the allegation of paternity. And the requirement is introduced by the word " shall " as applying to the duty of the complainant. I am of opinion that the power to the magistrate to issue a summons " thereupon " does not come into operation until these requirements have been complied with, and that a summons not founded on the complaint and the evidence designated by the Statute is a nullity.* (If the man nevertheless appears before the Court and answers, it may be that he has submitted to the jurisdiction, and cannot afterwards take objection. See, in addition to the cases I have mentioned, *R.* v. *Hughes* (3) and the cases there referred to. The question which arose in those cases was not the question we have now to deal with). Until the passage of the *Infant Protection Act* of 1904 the law of New South Wales made no provision for what are called pre-maternity proceedings. The power or privilege was conferred for the first time by sec. 4 of that Act. As *Maxwell* observes (3rd ed., p. 521): " Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred; and it is therefore probable that such

(1) L.R. 1 C.C.R., 110. (2) L.R. 1 C.C.R., 320. (3) 4 Q.B.D., 614.

**Cf. Dixon* v. *Wells*, 25 Q.B.D., 249.—*E.B.*

was the intention of the Legislature." The production of the sworn corroborative evidence as to paternity is in my view a condition to be observed by the complainant before the summons can be demanded in proceedings taken before birth.

By the law of this State the issue of the summons is surrounded as fully as is the evidence at the hearing with precautions against trumped-up charges, and if in the present case the charge is not trumped up, that is no reason why the precautions should be dispensed with. They are part of the law, and the law applies to all complaints of this nature. If they were not regarded as imperative, uncorroborated charges might and probably would frequently be launched for mere extortion.

What then amounts to corroboration " in some material particular " of the paternity of the infant ?

In the present case the complainant is the girl herself : it is she who has made the deposition in support of her own complaint. It is an expansion of her allegation in the complaint, and it is she who is to be corroborated in the required particular. I cannot accept the suggestion that she can corroborate herself by her own evidence. Such a contention reminds one of the familiar simile of a man trying to lift himself off the ground by his bootstraps. If one part of a person's evidence is relied on for corroboratior of the remainder, the answer instantly arises that the part relied on is as much under the original reservation as the part sought to be corroborated. The only evidence besides that of the respondent May Maud Whipp is that of Handley, who says that on the occasion to which the girl deposes he was at her father's residence and slept there ; that the appellant was also there ; that he, Handley, was in the kitchen till about 9.30 p.m. with the appellant and the respondent ; that he then left them there, and went to bed, the girl's parents having already retired ; and that there was a couch in the kitchen where they all sat. He says that the appellant slept that night in the room next to his, that he did not hear him going to bed, but saw him next morning. It is consistent with this that, however soon the appellant went to bed, Handley was already asleep.

That is all. If that is not evidence of corroboration of the respondent's allegation of paternity " in some material particular," then

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there is no such corroboration. It is clear that it is evidence of opportunity. But was it anything more? If Handley or some other witness had deposed to circumstances under which the association of the girl and the man was in itself a cause for suspicion, then it could be taken perhaps as corroboration (*Dawson* v. *M'Kenzie* (1)). Here it cannot be sensibly suggested that it was such a cause.

On the whole subject of corroboration the case of *R.* v. *Baskerville* (2) may well be looked at. True, it arose only as to the evidence of accomplices in criminal matters, but the reasoning is instructive, and leads directly to the conclusion arrived at in the luminous judgment of the Court (3), delivered by Lord *Reading* C.J., that "Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by Statute." This language, of course, refers expressly only to criminal cases, but so far as it refers to the law of corroboration it serves for the present case, the paternity of the infant in such a case as this standing *pari ratione* with the commission of the offence in a criminal case. In other words, it being plain that the woman is with child, the corroboration must tend to show that the defendant is the person responsible. That has not been shown in the present case.

I am of opinion that the appeal must be allowed.

ISAACS J. I am unable to concur in the judgment. In my view the conclusion arrived at by the majority of the Supreme Court should be affirmed, and this appeal dismissed with costs. There is, however, one question involved upon which I agree with the opinion of the rest of the Court.

(A) *Corroboration.*—That question is as to the subject of

(1) (1908) S.C., 648.

(2) 12 Cr. App. R., 81.

(3) 12 Cr. App. R., at p. 91.

corroboration, the importance of which extends both to civil and criminal proceedings.

It was first contended on behalf of the respondent Whipp that her own evidence, by circumstantially setting out what had occurred, was itself corroboration of the general allegation in the complaint that Ridley was the father. I venture to repeat my view of the law of corroboration which I expressed in 1914 in *Eather* v. *The King* (1). That was a case where the Statute required corroboration "implicating the accused," just as in the present case the Act requires corroboration "as to the paternity." I said :—"Now, on the question of whether the evidence actually considered by the jury as corroborative was so or not, it is plain that while the child's evidence must be looked at to see whether the other evidence is material, and also to see what the independent evidence corroborates, if it corroborates anything, yet the independent evidence must alone be looked at to see whether it implicates the accused. To say that you have to consider the child's evidence in conjunction with the independent evidence in order to see whether the corroborative testimony, when combined with the child's evidence, implicates the man, is to destroy the very safeguard created."

According to a very recent English case, *R.* v. *Baskerville* (2), decided in May of this year by a Court specially constituted, this view correctly represents the law. In the course of the judgment of the Court Lord *Reading* C.J., speaking of all corroboration even at common law, said (3) :—"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by Statute. The language of the Statute, 'implicating the accused,' compendiously incorporates the test,

(1) 19 C.L.R., 409, at p. 415. (2) 12 Cr. App. R., 81.
(3) 12 Cr. App. R., at p. 91.

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applicable at common law in the rule of practice." So far the words of the learned Lord Chief Justice indicate that corroboration of whatever statement requires corroboration must be by independent testimony, and next that if it be required to implicate a person in a given act, the independent testimony must be such as of its own force to connect or tend to connect him with the act. Then the judgment proceeds to add observations as to what amounts to corroboration. Lord *Reading* says:—"The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused." In other words, the independent evidence must support the story both as regards the alleged crime and the alleged criminal. I do not quote the further observations which advert to the fact that the corroborative evidence may be circumstantial only.

Adhering therefore to my own view in *Eather's Case* (1), and applying it to the facts of this case, I entirely reject the mother's evidence for the purposes of corroboration, and regard the only independent evidence, namely Handley's, as insufficient. Consequently, so far as the summons is concerned, I agree that the provisions of sec. 4 were not complied with.

(B) *Prohibition.*—The next question is whether the common law writ of prohibition sought for is a proper remedy. The order *nisi* is to restrain the Children's Court and the mother from "further proceeding on or in respect of the summons"; and the one ground open to the appellant is stated in these terms, that the Children's Court has "no jurisdiction to hear the matter of the said complaint or to proceed in relation to the summons." This involves two points: first, whether the summons is a statutory condition of hearing the complaint, and, second, whether the corroboration is a statutory condition of the validity of the summons.

(1) 19 C.L.R., at p. 415.

I understand a distinction to be taken by my learned brothers which leaves the parties here free to proceed with the complaint provided no reliance is placed on the summons, but prohibits them from proceeding on the footing of there being a summons. I am personally unable to appreciate the distinction for the purposes of this proceeding, but will deal with the suggested distinction. The necessity for such a distinction, if the summons is incurably bad, is on the surface. Sec. 5 declares that the Court *shall* hear the complaint and determine the paternity and *may* make certain orders. That is a peremptory command, so far as the complaint is concerned. But if the distinction suggested is to prevail, then, as I shall endeavour to show, the command is really futile. Now, it is obvious that the want of corroboration prior to issuing the summons is either a condition precedent to jurisdiction which cannot be waived, or it is a mere irregularity which can.

Dealing with the point as to the summons first:—Is the defect incurable, or, could the defendant waive it so as to let the summons operate? For instance, under sec. 21 where a defendant has been summoned, but does not appear personally—perhaps to avoid being put into the witness-box on behalf of the complainant—there is power at the hearing to issue a warrant. Suppose his solicitor admits service of the summons, expressly states that he waives the defect here complained of, and elects to fight on the merits, is there no jurisdiction to issue a warrant? Is the summons irretrievably bad? I do not think so, but the view from which I unfortunately differ is that the summons is a nullity notwithstanding the express waiver of the defect, and that the defendant, or at all events a stranger, could obtain a writ of prohibition.

Looking at the Act first apart from authority and construing it for myself, two things are clear to me. The first is that the provisions both as to the mother's primary oath covering all the necessary allegations and also the required supplementary oath of corroboration, when getting the summons, were intended as a real protection to the man; and the second is that it was not intended that that protection should involve the woman, who is assumed to be in urgent circumstances, or the unborn infant by some one on it behalf, in the intricate, costly and dilatory proceeding in the

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Supreme Court of a common law writ of prohibition. In other words, an enactment designed to preserve innocent and helpless infant life, and having the dominant purpose of making timely provision before the birth of the infant in order to have protection ready for it when *born*, was never intended to let the child be born and perish while lawyers wrangled in various Courts over the delicate niceties of prohibition and conditions precedent to jurisdiction. I cannot attribute to the Parliament of New South Wales any intention to make its own dominant purpose ineffective by subordinating the child's life to such considerations. In this case the mother lodged her complaint on 20th August 1915, and the case was fixed for 17th September. Two days before it was to be heard the defendant, without venturing to deny the truth of what the mother swore, interposed by an order *nisi* for prohibition on technical grounds, and now in December 1916, nearly sixteen months afterwards, she is still struggling and in vain, to get the complaint even *heard*. I cannot believe that this was the sort of Tantalus remedy which the New South Wales Legislature provided for the relief of a distressed woman who was about to become a mother, and was seeking to make the man who neglected to recognize his natural duty provide in time for the life of his offspring. Nor can I believe that the New South Wales Parliament intended that, for a slip of this kind, the whole proceeding was to be a nullity so that the defendant could with impunity go into the witness-box if he chose and deliberately swear to what he knew was false, and afterwards escape the penalty of perjury on the ground that the whole proceeding was without jurisdiction. If all these things are possible under the New South Wales law, and they must be if the defect here shown to exist makes the whole proceeding a nullity, then the Statute which is called the "Infant Protection Act" might easily be more appropriately named. That does not mean the man is left without protection against a designing woman. The man is amply protected by the Act itself, without resort to the cumbersome, costly and dilatory process of prohibition. The first line of protection he has is that the magistrate will always look carefully to see that so far as he can ascertain there is some corroboration. The next line of protection is that if he is wrong, the defendant can object, and carry

his objection to the Court which is to hear the complaint, which *Mathew* J. said in a case to be mentioned is " the right time," following the opinion of *Erle* J. and other Judges in *R.* v. *Berry* (1). If still dissatisfied, then by sec. 26 he may go to the statutory Court of appeal, Quarter Sessions. He has thus plenty of protection, but comparatively quick and cheap, and protection which does not kill the protection to the infant whose existence is in jeopardy. It appears to me the helpless infant, which is the first consideration of the Legislature, is the one whose interests the present decision overlooks.

The opinion I have expressed is supported by authority of a high order, and it is impossible, in my opinion, to reconcile the view I oppose with the deliberate and sustained opinions of some of the most eminent Judges that have ever occupied the English bench. Of course those decisions were not on the New South Wales Act, but they were on Acts on which the New South Wales Act is modelled, and which, so far as concerns this case, present no point of distinction whatever.

In the English Act and in the New South Wales Act alike, the mother before getting a summons must swear to the paternity and other matters. That is the principal and primary oath required as the foundation of the process. Then in New South Wales, a supplemental oath of corroboration as to one of these matters, namely, paternity is also required. It is plain that the supplemental oath cannot be in any higher position than the main or principal oath which the Statute requires; and, as I have said, the two Acts are alike in this. Therefore, if the main oath of the mother is not a statutory condition of the validity of the summons, neither is the additional or supplemental oath, which may of course be much less precise, much less definite, and may be wholly circumstantial.

Now, the English authorities are clear and unequivocal that the primary oath is not a condition of jurisdiction to issue the summons, but is a mere provision which may be waived, and, if it is waived, the summons itself is perfectly good and enforceable.

In *R.* v. *Berry* (2), a case where the mother made a statement but not on oath at all, Lord *Campbell* C.J., speaking for himself and

(1) 8 Cox C.C., 121.

(2) 8 Cox C.C., at pp. 126-127.

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Crowder J., *Willes* J. and *Watson* B., said the proceeding was not *in pœnam* to punish for a crime but merely to enforce a pecuniary obligation and was a civil suit, and that although the summons could have been objected to on the ground of irregularity that objection could be waived. *Martin* B. dissented, and this fact is not without importance having regard to what followed. The distinction as to the character of the enactment—that is, whether it is civil or criminal—is a well recognized distinction in construing it so as to determine whether a given requirement is a condition of jurisdiction or not (*Ex parte Thomas Kinning* (1); *Alderson* v. *Palliser* (2)—the latter case, like that of *McIntosh* v. *Simpkins* (3), expressly depending entirely on this distinction).

In *R.* v. *Simmonds* (4), decided three months after *R.* v. *Berry* and on the same Statute, *Cockburn* C.J., *Erle* and *Crompton* JJ. and *Watson* and *Bramwell* B.B. held that the absence of the proof required by the section prior to the issue of the summons was not a "radical and incurable defect, and fatal to the jurisdiction of the magistrates who are afterwards called on to adjudicate on the *summons*." They said: "This is not a matter of substance essential to found the jurisdiction of the justices, but a matter of process only, which may be waived by the defendant if he chooses to waive it." And then the Lord Chief Justice added: "*It follows, therefore, that it is not of the essence of jurisdiction.*"

In the later case of *R.* v. *Fletcher* (5) *Bovill* C.J., *Martin* B. (who had by this time significantly changed his dissenting view in *Berry's Case*), *Bramwell* B., *Byles* J. and *Blackburn* J., took the same view. I refer particularly to the judgment of *Blackburn* J., who is clear as to the summons being mere procedure, and as to the defect being one of irregularity only and capable of being waived. The case stated was stated on the basis of the perjury being committed *on the hearing of the summons* (6), and the one question it reserved for the opinion of the Court was (7) "whether it is essential to give the magistrate jurisdiction to hear the application *summons*" that

(1) 4 C.B., 507.
(2) (1901) 2 K.B., 833, at p. 838.
(3) (1901) 1 K.B., 487.
(4) 8 Cox C.C., 190, at p. 193.
(5) L.R. 1 C.C.R., 320.
(6) L.R. 1 C.C.R., at p. 321.
(7) L.R. 1 C.C.R., at p. 322.

there should have been a written deposition on oath by the complainant when the application for the summons was made. The very point was therefore necessarily presented. Every one of the Judges in that case held that the magistrates had jurisdiction to proceed on the "summons" even if there had been no statement on oath at all. Some went so far as to say there was jurisdiction to hear the "complaint" even if there had been no summons. But certainly they held there was jurisdiction to "hear the summons."

There is another case of *R.* v. *Fletcher* (1), a bastardy case decided by *Mathew* and *Day* JJ. under the Act of 1872, which came into force a year after *Fletcher's Case* already quoted. Sec. 3 was the same as the earlier Act. Sec. 4 said that "after the birth of such bastard child, on the appearance of the person *so summoned*, or on proof that the *summons* was duly served on such person," &c., the Court could hear the case. Consequently, no question can arise as to dispensing with a summons under that Act. A summons is indispensable as a statutory condition of jurisdiction. There it was contended that a certain omission constituted a want of condition of jurisdiction, and that the order nevertheless made on the hearing was a nullity. That was even a stronger case than the present, because the summons was issued not by "such justice" as the Act required, but by another justice without any deposition being made before him—the only deposition being made before a previous justice who issued a summons which proved abortive. *Mathew* J. (with whom *Day* J. concurred) said (2), referring to *R.* v. *Hughes* (3), that the Court held the irregularity "was merely an irregularity in the issuing of process." Resting on that case, the learned Judge said:—"It is plain, therefore, that in this case *the justices had jurisdiction to hear and dispose of the matter as to the paternity of the child.* I quite agree that up to the point of hearing the case the non-compliance with the directions of the Statute as to the issuing of the summons was matter of substance, and might have been taken advantage of at the *right time.* That merely means that if the defendant had chosen he need not have appeared at all, or, if appearing, might have taken his stand

(1) 51 L.T., 334; 48 J.P., 407. (2) 48 J.P., at pp. 408-409.
(3) 4 Q.B.D., 614.

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on the objection. But the moment he appeared through his solicitor, and went into his defence, taking no objection at all to the process, he waived *all the previous irregularities.*" The kernel of the matter, as I think, appears in what *Mathew* J. said to the defendant's counsel during the argument (1). The learned Judge said: "You were entitled to take the point before the justices, and demand strict proof that the summons was issued by the justice who heard the application, but you omitted to do so."

That is a formidable array of authority; and if I am wrong in the opinion I have formed, as I must be in the circumstances, it is no little consolation to find that I am a humble companion in error with many of the most distinguished occupants of the English bench. So much for proceeding upon or in respect of the summons. The distinction leaves untouched the point raised by the order *nisi* of whether there is still jurisdiction to entertain the "complaint" as required by sec. 5—that is, of course, the existing complaint made on 20th August 1915. If a distinction is to be made on the strength of *R.* v. *Hughes* (2), it reduces these prohibition proceedings to an absurdity. The defendant gets no protection from them at all. For on that principle the complaint may be called on, the woman may there and then adduce the necessary corroboration to support her statements, and a warrant may be issued *instanter* to arrest the defendant, unless he is present and waives the necessity of a warrant or summons. These proceedings would mean in that case nothing but delay and expense, and peril to the infant.

But as a matter of law, I cannot conceive of the possibility of jurisdiction to comply with sec. 5 in respect of the present complaint if it is to be assumed that there is no summons. There is no difference between the absence of one in fact, or the existence of one which the law regards as a nullity incapable of being accepted as good notwithstanding irregularities. Sec. 5 says the Court "shall hear and determine so much of such complaint as relates to the paternity of the infant," that is, shall hear and determine conclusively, subject to appeal, whether the defendant is the father. But I cannot understand how there can possibly be jurisdiction to do that until the suit is instituted; and though a

(1) 51 L.T., at p. 336. (2) 4 Q.B.D., 614.

complaint, which is the act of the mother only, is made to a magistrate there is no suit instituted under this special statutory provision which provides for a specific procedure, until the magistrate accepts the complaint and acts on it by issuing in fact either a summons or a warrant. Only then is the complaint a matter to be heard and determined by the "Court"—not the magistrate to whom it is made. If the corroboration is a condition to the issue of the summons, it is equally a condition of all that the act of the magistrate connotes, namely, his acceptance of the complaint. But if judicial action in respect of a complaint is quite unnecessary, then there is jurisdiction to hear and determine, and indeed a duty to hear and determine, a complaint that has been made but has been actually rejected by a magistrate who has lawfully or unlawfully refused to issue either summons or warrant.

The case is quite different in the alternative position postulated in *R.* v. *Hughes*, namely, a charge made *instanter* in the presence of the accused and accepted by the Court, which calls on the accused to answer; jurisdiction is there given, though the requirements of justice must be satisfied. The jurisdiction in that case is as to an entirely new complaint. We have nothing now to do with any new complaint—which may never be made. All we are concerned with is the complaint of 20th August 1915, and as to that it seems to me (and I may add that this supposed distinction brings it home more clearly than ever to me) that either the provision as to corroboration is a statutory condition and unwaivable, and therefore prohibition lies both as to complaint and summons, or it is not such a condition, and therefore prohibition does not lie at all.

I would also add that if the present decision be sound, namely, that a summons is irremediably bad for want of the statutory corroboration, notwithstanding attempted waiver, so must a final order at the hearing be if a similar defect there appears, notwithstanding any waiver or concession on the point at the time.

GAVAN DUFFY AND RICH JJ. In this case the appellant seeks to prohibit the respondent May Maud Whipp and certain justices from further proceeding on or in respect of a summons issued by such justices on a complaint made by her under sec. 4 of the *Infant*

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Protection Act 1904. The summons has been served on the appellant, who, instead of appearing in obedience to it, has applied for a writ of prohibition on the ground that, when making such complaint, the respondent Whipp did not comply with the provisions of the section by producing evidence on oath, either oral or on affidavit, in corroboration in some material particular of the allegation as to the paternity of the infant. Two questions arise for consideration: (1) whether the respondent Whipp did in fact comply with the provisions of the section, and (2) whether, if she did not comply with them, the appellant is entitled to a writ of prohibition.

At the time the complaint was made the respondent herself gave evidence, and evidence was also given on her behalf by one John William Handley, and their testimony is relied on as satisfying the requirement that the complainant shall when making a complaint produce evidence on oath either oral or on affidavit in corroboration in some material particular of the allegation as to the paternity of the infant. In our opinion a woman making a complaint under sec. 4 must produce the independent evidence of some other person, and cannot by her oath afford the corroboration required by the section. We agree with what has been said by the Chief Justice as to the circumstances in which proof of opportunity for intercourse may amount to corroboration as to paternity, and we think with him that there is no such corroboration here. Handley's evidence corroborates part of the respondent's evidence and is consistent with the whole of it, but does not corroborate the allegation as to the paternity of the infant because it does not of itself show or tend to show the truth of such allegation (*R.* v. *Baskerville* (1)).

The next question is whether in these circumstances the appellant is entitled to a writ of prohibition. We think that compliance with the provisions of sec. 4 is necessary, and that the magistrate had no jurisdiction to issue a summons where the prescribed corroboration was wanting. The result is that the summons is a mere nullity and the appellant who is threatened with further proceedings on the summons may have such proceedings stayed by prohibition. We express no judicial opinion as to what would have

(1) 12 Cr. App. R., 81.

been the position of the appellant had he chosen to appear in Court to answer the complaint either in obedience to the summons or without any summons, or as to how far, if at all, the complaint will justify further proceedings though the summons is a nullity. At present we are disposed to think that the jurisdiction to make an order under sec. 5 is conditional on the issue of a summons and the appearance of the defendant in accordance therewith, except in the cases provided for by sec. 21; but it is unnecessary to enunciate anything beyond this simple proposition, that the summons which has been issued in this case does not itself afford ground for any further proceeding against the appellant.

We agree that the appeal should be allowed.

Appeal allowed. Order of the Supreme Court discharged except as to costs. Order absolute for prohibition. Appellant to pay the respondent Whipp's costs of appeal.

Solicitor for the appellant, *T. P. Moloney*, Goulburn, by *Murphy & Moloney*.

Solicitors for the respondents, *E. F. Thomas*, Goulburn, by *Myers & Hill*; *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.