[HIGH COURT OF AUSTRALIA.]

ANNIE RENTON . . . . . APPELLANT;
COMPLAINANT,

AND

SAMUEL RENTON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Husband and Wife—Maintenance—Husband leaving wife without adequate means of support—Husband in another State—Jurisdiction of State Court of summary jurisdiction—Issue of summons—Judicial exercise of jurisdiction—Inter-State Destitute Persons Relief Act 1910 (*S.A.*) (*No.* 1008), *secs.* 5, 7, 12—*Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 39—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 77.

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ADELAIDE, *Sept.* 30.

Barton, Isaacs, Gavan Duffy and Rich JJ.

The *Inter-State Destitute Persons Relief Act* 1910 (S.A.) provides, by sec. 5, that "(1) When in any State in the Commonwealth an Act is in force containing provisions substantially similar to those contained in, or for carrying out objects substantially similar to the objects of, sec. 6" (which provides for the service in South Australia of a summons for maintenance issued in another State when, *inter alia*, a husband leaves his wife without adequate means of support), "the Governor may by Proclamation published in the *Government Gazette* declare that Part II. of this Act shall be in force as regards such State, and such State shall thereafter be a State within the meaning of Part II." In Part II. it is provided, by sec. 7, that "Whenever in this State—(*a*) 1. Any husband leaves his wife . . . without adequate means of support . . . and (*b*) Such husband . . . goes to reside or resides, either temporarily or permanently, in any State other than this State, any justice for this State may, upon application made by or on behalf of the wife, . . . sign and issue a summons directed to the defaulter, to show cause why he . . . should not support or should not contribute towards the support of the complainant." By sec. 12 it is provided that "If at the hearing of a summons issued under section 7 . . . service of the summons is proved . . . the justice or justices may proceed to hear and may determine the summons, and may, if satisfied that the defendant is able to support or contribute towards the support of the complainant, make

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an order for the payment to or on behalf of the complainant of . . . such periodical sums as the justice or justices deem proper for future maintenance."

Held, that the issue of a summons under sec. 7 of the *Inter-State Destitute Persons Relief Act* 1910 is not a judicial exercise of jurisdiction by a Court within the meaning of sec. 39 (2) (*d*) of the *Judiciary Act* 1903-1915, and therefore the summons may properly be issued by a justice of the peace who is not a Stipendiary or Police or Special Magistrate.

Held, also, that the words "leaves without adequate means of support" in sec. 7 mean fails to provide with such means, and do not connote that, the husband and wife being together in South Australia, he went away from her.

A husband and wife being together in New South Wales, the wife with the husband's consent came to South Australia and thereafter remained there, and the husband failed to provide her with adequate means of support. On a summons under sec. 7 of the *Inter-State Destitute Persons Relief Act* 1910, taken out by the wife against the husband, who was then in Queensland, in respect of which State the Act was in force,

Held, that an order might properly be made under sec. 12 against the husband.

Decision of the Supreme Court of South Australia reversed.

APPEAL from the Supreme Court of South Australia.

On the hearing before a Special Magistrate of a summons under sec. 6 of the *Inter-State Destitute Persons Relief Act* 1910 (S.A.) taken out by Annie Renton against her husband, Samuel Renton, the Special Magistrate stated a special case for the consideration of the Supreme Court, which was substantially as follows :—

1. Annie Renton, the above named complainant, is the lawful wife of Samuel Renton, the defendant.

2. The said Annie Renton made application for the signing and issuing of a summons under the *Inter-State Destitute Persons Relief Act* 1910 against the defendant.

3. The said Annie Renton supported her said application by her affidavit.

4. A justice of the peace thereupon issued a summons to the defendant under the said Act.

5. Such summons was duly served upon the defendant in the State of Queensland.

6. The said summons came on before me for hearing, when Mr. *Mayo* appeared for the defendant and objected that the defendant

was not compelled to answer the said summons by reason that the said application, the affidavit in support thereof and the said summons did not, nor did any of them, allege that the defendant in the State of South Australia left his wife without adequate means of support; and he contended that, therefore, upon such summons I had no jurisdiction to proceed against the defendant. I overruled his said objection.

7. Upon the hearing the complainant proved the following facts :— The complainant and defendant were married in South Australia about twenty-three years ago. For about eight years they lived together at Broken Hill, in the State of New South Wales. The defendant then went to work upon a station property in New South Wales on half shares with his brother, and, the conditions not being suitable for his wife, sent her to Adelaide, and under the defendant's instructions the complainant went to live with her mother and brother at Queenstown, in this State, and the defendant continued to live upon the said station property in New South Wales. The complainant had offered to reside with the defendant there, but the defendant refused to take complainant there. During this period the defendant visited the complainant in South Australia every now and again (perhaps every year or two), and stayed about two months on each occasion. About three years ago the defendant sold his station in New South Wales and came to Adelaide and stayed for about two months, and then went to reside in Queensland ; and about August 1916 he requested the complainant and her mother to go to him there. The complainant went to Queensland with her mother, leaving Adelaide on 3rd August 1916. They lived with the defendant in Queensland for two or three months. At the end of that time the defendant told the complainant that he had sold his Queensland property and intended to return to South Australia. The defendant, with the complainant and her mother, thereafter left Queensland on the return journey to Adelaide and went to Sydney, New South Wales, and the day after their arrival in Sydney went together to a boat for Adelaide. When outside the gateway at the wharf the respondent gave the complainant his pocket-book (which the complainant subsequently found to contain a packet of playing cards) and the tickets for steamer, saying "I am taken short ; will

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be back in a minute; go on the boat." The complainant and her mother went on the boat, but the defendant did not come aboard. Later on, looking for defendant, the complainant found that the boat was under way, and she was handed a letter from the defendant by the purser. The complainant, with her mother, returned in the boat to Adelaide; and she has lived with her mother and brother ever since. The defendant gave his wife £50, £10 of which was there expended under the defendant's direction shortly before she left Sydney, but since that payment he has provided his wife with no means of support at all, and at the time she made the said application the complainant was without adequate means of support.

8. Upon the above facts I decided that the defendant had left his wife without adequate means of support, and I made an order against the defendant for payment of 25s. per week, with costs and fees £2 18s., and the sum of £15 for past maintenance at the rate of 10s. per week, subject, however, to this case.

The questions of law reserved for the consideration of the Supreme Court are:—

(1) (*a*) Was the said summons lawfully issued? (*b*) Had I jurisdiction to entertain the said application and summons?

(2) Upon the facts above set forth was I justified in law in making an order against the defendant?

If the Supreme Court shall answer any of the above questions in the negative, the said order shall be set aside, but otherwise shall stand in force.

The Full Court answered both questions in the negative, holding that the matter, being one between residents of different States, was justiciable according to the laws of the Commonwealth, and that the summons, not having been issued by a Stipendiary, Police, or Special Magistrate or a Magistrate of South Australia specially authorized by the Governor-General to exercise the jurisdiction, was of no effect.

From that decision the complainant, by special leave, appealed to the High Court.

F. Villeneuve Smith (with him *Abbott*), for the appellant. The

issue of the summons was not a judicial exercise of jurisdiction within the meaning of sec. 39 (2) (*d*) of the *Judiciary Act* and the summons might properly be issued by a justice (*Donohoe* v. *Chew Ying* (1)). The words "leaves . . . without adequate means of support" in sec. 7 of the *Inter-State Destitute Persons Relief Act* 1910 do not refer to a husband who, being in South Australia with his wife, goes away from her, but to a husband who fails to provide his wife with adequate means of support (*Chantler* v. *Chantler* (2)). [Counsel was stopped.]

Mayo, for the respondent. Part II. of the *Inter-State Destitute Persons Relief Act* 1910 purports to create a Federal jurisdiction, that is to say, a jurisdiction as to matters between residents of different States, which by sec. 39 (2) of the *Judiciary Act*, has been conferred upon State Courts, and to provide for the service of process in respect thereof in other States. See *Baxter* v. *Commissioners of Taxation* (N.S.W.) (3). The powers under Part II. are not derived from or through sec. 39 (2) of the *Judiciary Act* 1903-1915. A Special Magistrate sitting under sec. 12 does not sit in a Federal jurisdiction created by sec. 39 (2) of the *Judiciary Act*, but in a pseudo-federal jurisdiction which Part II. of the *Inter-State Destitute Persons Relief Act* purports to create. Since the Federal *Service and Execution of Process Act* 1901-1912 the power of a State to legislate for the service of process in other States has gone. [Counsel referred to sec. 79 of the *Judiciary Act*; *Ashbury* v. *Ellis* (4); *Piggott on Foreign Judgments*, 3rd ed., p. 211.] The Special Magistrate's Court, its process and order are therefore ineffective and cannot bind the respondent. The meaning of the word "leaves" in sec. 7 of the *Inter-State Destitute Persons Relief Act* is qualified by the subsequent words "goes to reside," and requires a going away by the husband from his wife in South Australia. Sec. 7 only intends to create an obligation binding upon persons who are directly subject to South Australian law. If it also purports to create an obligation binding upon a person in another State and not otherwise amenable to South Australian law and to give jurisdiction to enforce that obligation, it

(1) 16 C.L.R., 364, at p. 369.
(2) 4 C.L.R., 585, at p. 592.
(3) 4 C.L.R., 1087, at p. 1137.
(4) (1893) A.C., 339.

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is to that extent *ultra vires* (*Macleod* v. *Attorney-General for New South Wales* (1); *McKelvey* v. *Meagher* (2)). Here no act of the respondent was done in South Australia. [Counsel also referred to *Acts Interpretation Act* 1915 (S.A.), sec. 44; *South Australian Ordinance of* 1850, No. 6, sec. 11.]

[ISAACS J. referred to *Buckingham* v. *Weatherup* (3).]

BARTON J. I am of opinion that this appeal should be allowed. The Federal Constitution by sec. 77 gives power to the Parliament to make laws—"(I.) Defining the jurisdiction of any Federal Court other than the High Court: (II.) Defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States: (III.) Investing any Court of a State with Federal jurisdiction." Acting under that power the Parliament passed sec. 39 of the *Judiciary Act*, by which, after providing that the jurisdiction of the High Court should be exclusive of the jurisdiction of the several Courts of the States, except as provided in the section, it is enacted in sub-sec. 2 that "the several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject matter" (I call attention to the word "subject matter"), "or otherwise, be invested with Federal jurisdiction, in all matters in which the High Court has original jurisdiction" (a matter between residents of different States is one in which the High Court has original jurisdiction) "or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section, and subject to the following conditions and restrictions:— . . . (*d*) the Federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction." I am of opinion that in the proceedings in question here the judicial exercise of jurisdiction was really by the Special Magistrate who decided the case. In issuing the summons the justice was not acting as a Court acts. The judicial exercise of

(1) (1891) A.C., 455. (2) 4 C.L.R., 265, at p. 280.
(3) 29 V.L.R., 381; 25 A.L.T., 61.

jurisdiction in cases such as arise under this South Australian Act is well defined by *Griffith* C.J., with the concurrence of the other members of this Court, in these words: "The jurisdiction which is not to be judicially exercised is the jurisdiction to decide whether to convict or to discharge the accused, ..." (*Donohoe* v. *Chew Ying* (1)). The justice exercised no such jurisdiction as that. If the issue of a summons can be called an exercise of jurisdiction at all, it was not the jurisdiction so described, and, as I have said, a justice exercising that jurisdiction cannot be called a Court.

Then certain points were taken as to the construction of sec. 7 of the *Inter-State Destitute Persons Relief Act* 1910, which provides that "Whenever in this State—(*a*) 1. Any husband leaves his wife . . . without adequate means of support . . . and (*b*) such husband . . . goes to reside or resides, either temporarily or permanently, in any State other than this State, any Justice for this State may . . . sign and issue a summons directed to the defaulter, to show cause why he . . . should not support or should not contribute towards the support of the complainant . . . ." The first question is whether a man residing in another State—and *ex concessis* the respondent is so residing—has left his wife without adequate means of support if he has not furnished her with such means. In a certain sense of the word he has not "left" her, but that is not the sense in which the word is used in sec. 7. The judgment of this Court in the recent case of *Weiler* v. *Weiler* (2) shows the sense in which the *Matrimonial Causes Act* 1899 of New South Wales uses the words "has left" (his wife) "habitually without the means of support." It is really no act of locomotion that is aimed at, but the failure to provide the adequate support. The question of going from place to place is not a material question so far as that portion of sec. 7 is concerned. But it is said that the use of the expression "goes to reside" in another State than South Australia strengthens the construction that the word "leaves" means "leaves behind him" in the sense of motion. I do not think that it does. The words "goes to reside" and "resides" must be read together. The provision applies to a husband who, failing to provide his wife with adequate means of

(1) 16 C.L.R., at p. 369. (2) 25 C.L.R., 109.

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Barton J.

support, goes to reside or resides in another State, that is, whether he has always been residing in another State or whether he has been residing in South Australia and has gone to reside in another State. The law in fact aims at both states of things, and it seems to me that a fair reading of the section does not support Mr. *Mayo's* construction, ingeniously as it was urged.

The only remaining question is really that, to put it shortly, of extra-territoriality. That question is, I think, settled by *Ashbury* v. *Ellis* (1). The Legislature of South Australia has power for the peace, order and good government of that State to legislate in respect of the matter dealt with. How far the legislation is enforceable in another country is a question that we do not touch any more than did the Privy Council in the case I have mentioned.

I would add that sub-secs. XXIV. and XXV. of sec. 51 of the Constitution cannot be relied on for a general displacement of State legislation by Federal legislation on the matters there mentioned. Those powers are given as concurrent with the powers of the States. They are intended to be of assistance in obtaining as well as enforcing judgments of the State Courts. I see nothing in the Federal *Service and Execution of Process Act* to show that anything that might be done under the Act in question here would be in conflict with the former Act.

Under all the circumstances I think that the appeal should be allowed.

ISAACS J. I agree that the appeal should be allowed. Looking at this case, first, apart from the Federal Constitution, it stands in this position :—The respondent sent his wife from New South Wales to Adelaide to live, and he left her without adequate means of support in the sense that he failed to supply her with adequate means of support—left her to starve. In those circumstances she applied for a summons under the South Australian *Inter-State Destitute Persons Relief Act* 1910. That Act provides that in such a case any justice of the State may on an application made on behalf of a wife sign and issue a summons directed to the husband, who is called the "defaulter," to show why he should not contribute to the support of

(1) (1893) A.C., 339.

his wife. Then the summons, being issued, is intended to be served in the other State in which the husband is residing. In this case that State is Queensland, and in that State there is a reciprocal Act (the *Interstate Destitute Persons Relief Act of* 1914) which makes similar provisions. In both Acts there is not only a provision permitting the summons to be served in the State where the husband resides, but there is also a special Part dealing with the enforcement of orders made in other States. So that whatever order is made in one State is recognized and enforced in the other State. Apart from the Federal Constitution it appears to me that this is a stronger case than *Ashbury* v. *Ellis* (1), but it certainly falls within that decision, and the South Australian Courts must carry it out. The particular event upon which the Statute operates is the neglect or failure of the husband to do something in South Australia that he is under an obligation to do. His failure takes place in that State.

Then it is said that the Federal Constitution prevents the South Australian Court from making an order. That I am unable to see. The decision of the Supreme Court was that the Federal Parliament, under the power conferred by sec. 77 (II.) of the Constitution, had excluded a Court of a State having summary jurisdiction from any right to deal with certain matters unless it was presided over by a Stipendiary, Police or Special Magistrate or a Magistrate specially appointed by the Governor-General, and that in this case the justice who issued the summons did not fall within any one of those classes. The Court thought that sec. 39 (2) (*d*) of the *Judiciary Act* was therefore sufficient to invalidate what the justice had done in issuing the summons. But the answer is that, in doing what he did, the justice did not fall within the section at all. He was not acting as a Court when he signed and issued the summons, and, that being so, the objection falls to the ground. When the matter came up for adjudication it came before a Special Magistrate, and, assuming that tribunal to be a Court, it was in conformity with sec. 39 (2) (*d*).

For those reasons I think that the appeal should be allowed.

GAVAN DUFFY J. I agree that the appeal should be allowed.

(1) (1893) A.C., 339.

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RICH J. I agree with the conclusion arrived at on the ground that the issue of the summons under sec. 7 of the *Inter-State Destitute Persons Relief Act* 1910 is not a judicial exercise of jurisdiction by a Court within the meaning of sec. 39 (2) (*d*) of the *Judiciary Act*.

Appeal allowed. Order appealed from discharged and order of Special Magistrate restored with costs. Respondent to pay costs of appeal.

Solicitors for the appellant, *Rollison & Abbott.*

Solicitors for the respondent, *Mayo, Murray & Cudmore.*

B. L.

[HIGH COURT OF AUSTRALIA.]

BLUME . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1918.

MELBOURNE, *Sept.* 13.

Isaacs, Gavan Duffy and Rich JJ.

Crown Lands—Lease—Performance of conditions—Occupation—Continuous residence—Residence by bailiffs—Land Act 1910 (*Qd.*) (1 *Geo. V. No.* 15), *secs.* 89, 93, 133.

Sec. 89 of the *Land Act of* 1910 provides that "Whenever under this Act any land is selected subject to the condition of occupation during the whole term or during a specified period thereof as distinguished from the condition of personal residence, the condition of occupation shall be performed by the continuous and *bonâ fide* residence on the land of the selector himself or of a registered bailiff who is himself qualified to select a similar selection." Sec. 93 provides that the Land Court may suspend the condition of occupation in respect of any selection in certain specified cases or in "any other case in which the Court thinks that it is proper so to do." Sec. 133 provides that if it is established that the lease of a selection is liable to forfeiture "the Governor in Council may declare the lease forfeited."