[HIGH COURT OF AUSTRALIA.]

YIRRELL . . . . . APPELLANT
APPLICANT,

AND

YIRRELL AND OTHERS . . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1939.

SYDNEY, *Aug.* 2-4;

MELBOURNE, *Oct.* 17.

Latham C.J., Rich, Starke, Evatt and McTiernan JJ.

Maintenance—Husband and Wife—"Leave without support"—Husband in New South Wales—Wife in Victoria—Order by New-South-Wales court of summary jurisdiction—Prohibition—Absence of jurisdiction on face of complaint—Whether on face of proceedings—Discretion of court—Deserted Wives and Children Act 1901-1931 (*N.S.W.*) (*No.* 17 *of* 1901—*No.* 33 *of* 1931), *sec.* 4—*Justices Act* 1902-1931 (*N.S.W.*) (*No.* 27 *of* 1902—*No.* 17 *of* 1931), *secs.* 20, 85.

Sec. 4 of the *Deserted Wives and Children Act* 1901-1913 (N.S.W.) provided that "in any case where . . . any husband or father . . . has left" his "wife or child without means of support . . . any justice may, upon complaint on oath . . . issue his summons requiring such husband, father, or mother to appear before two justices to show cause why he should not support such wife or child."

A complaint purporting to be made under this section alleged that "on and since the fourteenth day of December 1925 in the State of Victoria the said defendant" (the appellant in the present appeal) "has left . . . his wife" (the respondent in the present appeal) "without means of support." Upon this complaint a Children's Court at Sydney, New South Wales, in 1925 ordered the appellant, who resided in Sydney, to pay certain weekly amounts for the maintenance of the respondent and the children of the marriage, all of whom, both prior to the complaint, and thereafter, resided in Victoria. The only record of the order of the Children's Court was a memorandum, apparently made under sec. 85 of the *Justices Act* 1902 (N.S.W.), which merely set forth that the husband had been ordered to make certain payments and the manner in and the dates upon which such payments were to be made; that the legal custody of the children had been committed to the wife and that the husband

H. C. OF A. 1939. YIRRELL v. YIRRELL.

had been ordered to enter into recognizances for the due performance on his part of the order. A rule nisi for prohibition obtained in 1939 by the appellant and directed to the respondent and others was discharged by the Supreme Court of New South Wales, which held that whether there was or was not want of jurisdiction it did not appear on the face of the proceedings, so that the court had a discretion to refuse a writ of prohibition on the ground of delay.

Held:—

(1) By the whole court, that the Children's Court had no jurisdiction to make the order.

(2) By *Latham* C.J., *Rich*, *Starke* and *Evatt* JJ. (*McTiernan* J. dissenting) that the want of jurisdiction appearing on the face of the complaint was a want of jurisdiction appearing on the face of the proceedings, so that the appellant was entitled to a writ of prohibition as of right.

Per Evatt J.: The Supreme Court could, and should, have required the production of a formal order. The order would have shown upon its face that the material leaving without support of the wife was alleged to have occurred outside the State of New South Wales and therefore would have shown the absence of jurisdiction.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

In a complaint made under the *Deserted Wives and Children Act* 1901-1913 (N.S.W.), on 21st December 1925, by Neville Kingsbury Purcell Cohen, as a "reputable person" within the meaning of the Act, on behalf of a wife, Lillian Ethel Yirrell, it was alleged that "on the 25th day of April 1908, she, the said Lillian Ethel Yirrell, was legally married to William Green Yirrell of 139 Albion Street, Sydney (hereinafter called the defendant), and that on and since the fourteenth day of December 1925, in the State of Victoria, the said defendant has left her, his wife, without means of support contrary to the Act in such case made and provided."

A special magistrate, sitting as such under sec. 96 of the *Child Welfare Act* 1923 (N.S.W.), in a Children's Court at Sydney in the State of New South Wales, ordered, *inter alia*, the defendant to pay thirty shillings per week to his wife and also five shillings per week for each of his two children for maintenance under the provisions of the *Deserted Wives and Children Act* 1901-1913 (N.S.W.).

The order was made by consent, after a warrant, which had been issued for the apprehension of the defendant as a defaulting husband, had been withdrawn.

On 9th February 1939 the defendant obtained an order nisi for a common law writ of prohibition, directed to the wife, the complainant and the magistrate, on the grounds that the magistrate had no jurisdiction to make the order ; that the complaint disclosed no offence ; and that there was not any evidence that at any material time the wife had been left without means of support in the State of New South Wales.

The defendant had not paid anything under the order and, if valid, the amount owing thereunder at the date of the commencement of these proceedings was more than nine hundred pounds.

It was admitted that the wife was not in New South Wales at the time when the complaint and order were respectively made, and there was not any dispute that she had not been in New South Wales since 1921.

The only record of the order of the Children's Court was a memorandum headed " Wife maintenance—Minute of Order of Court." In this memorandum it was stated that it was ordered and adjudged that the defendant should pay weekly and every week to the Officer in Charge of Police, at the Children's Court, Sydney, for the use of the defendant's wife, an allowance of thirty shillings, the first of such payments to be made on 28th December 1925 ; that the legal custody of the children be committed to the wife ; that an allowance of five shillings per week be similarly paid in respect of each child till the child should reach the age of sixteen years ; and that the defendant should enter into specified recognizances to perform the said orders for a period of twelve months. The memorandum was signed by the magistrate as " Special Magistrate and Children's Court." The Supreme Court of New South Wales held that, whether the Children's Court had jurisdiction or not, want of jurisdiction did not appear upon the face of the record, and that the Supreme Court had, therefore, a discretion to grant or refuse the writ. In all the circumstances the Supreme Court refused to grant the writ.

From that decision the husband appealed to the High Court.

Badham (with him *Larkins*), for the respondents Lillian Ethel Yirrell and Neville Kingsbury Purcell Cohen, on a preliminary objection. The appellant is not properly before the court. The order to pay

H. C. OF A. 1939.

YIRRELL v. YIRRELL.

the respondent wife the sum of two pounds per week was not at the time the order was made a matter at issue amounting to or of the value of three hundred pounds within the meaning of sec. 35 (1) (*a*) (1) of the *Judiciary Act* 1903-1937 ; therefore an appeal to this court does not lie as of right (*Coal Cliff Collieries Ltd.* v. *Austin* (1)). The fact that arrears under the order amount to approximately nine hundred pounds is nothing to the point. Special leave to appeal should not be granted because (*a*) there is not any general public interest involved ; (*b*) there are not any merits on the part of the appellant ; and (*c*) there is not any property or money involved.

Watt K.C. (with him *Smyth*), for the appellant. The appellant is entitled to an appeal as of right, but should the court be of a contrary opinion it is requested that special leave to appeal be granted.

LATHAM C.J. The court is of opinion that the matter should not be determined on the preliminary objection and that special leave to appeal should be granted.

Watt K.C. It appears clearly on the face of the proceedings that there was not any jurisdiction to make the order. In order to come within the scope of sec. 4 of the *Deserted Wives and Children Act* 1901 (N.S.W.) there must be a leaving without support in New South Wales (*Renton* v. *Renton* (2)). Here, the dereliction on the part of the husband occurred in Victoria (*Walker* v. *Walker* (3)) ; therefore the order is void for want of jurisdiction (*Ex parte Atkinson* (4)). The formal order made by the magistrate, and not merely the minute thereof, should be before the court. The formal order would have included the complaint which is made on oath and is of the essence of the jurisdiction. If the judgment of the court below be correct, then the very omission of the complaint is a ground for prohibition. The court presided over by the magistrate was not a court of record. An inferior court must show its jurisdiction (*Ex parte Fuller* (5)).

(1) (1919) 27 C.L.R. 355.
(2) (1918) 25 C.L.R. 291, at pp. 297, 299.
(3) (1937) 57 C.L.R. 630, at pp. 635, 637.
(4) (1911) 11 S.R. (N.S.W.) 80, at p. 83 ; 28 W.N. (N.S.W.) 27, at p. 28.
(5) (1844) 13 L.J. M.C. 141, at p. 144.

It must be expressly alleged that a particular matter is within the jurisdiction of an inferior court (*Mayor &c. of London* v. *Cox* (1)). Even in certiorari, if an incomplete record of the proceedings is sent the balance of the proceedings can be brought forward in order to complete the record (*R.* v. *Bolton* (2)). All that was decided in *R.* v. *Nat Bell Liquors Ltd.* (3) was that in certiorari the record of the proceedings cannot be looked at in order to ascertain whether the matter was within the competence and jurisdiction of the justice. Certiorari does not lie until the order or judgment in the court below, unlike prohibition which can be moved for at any time the defect is apparent. In certiorari regard is had to the ultimate record apart from the evidence (*R.* v. *Nat Bell Liquors Ltd.* (4)).

[STARKE J. referred to *Brookes* v. *Warburton Brothers* (5).]

The fact that the appellant consented to the making of the order did not cure the absence of jurisdiction; it is apparent on the face of the proceedings; therefore the appellant is entitled to prohibition (*Farquharson* v. *Morgan* (6); *Alderson* v. *Palliser* (7)). In *Ex parte Henderson*; *In re Gale* (8) the want of jurisdiction did not appear on the face of the record. Jurisdiction under sec. 4 of the *Deserted Wives and Children Act* does not extend beyond the territorial limits of New South Wales: See *Interpretation Act of* 1897 (N.S.W.), sec. 17.

[EVATT J. referred to *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (9).]

Badham. Upon its true construction sec. 4 of the *Deserted Wives and Children Act* applies not only to a case where a wife in New South Wales is unsupported by her husband wherever he may be, but also to a case where a husband in New South Wales omits to support his wife wherever she may be. The husband is amenable to the jurisdiction of the court in the State or place in which he resides (*Renton* v. *Renton* (10)). The condition of the wife must be regarded (*Walker* v. *Walker* (11)), but not necessarily the condition of the

(1) (1867) L.R. 2 H.L. 239, at p. 259.
(2) (1841) 1 Q.B. 66 [113 E.R. 1054].
(3) (1922) 2 A.C. 128.
(4) (1922) 2 A.C., at p. 155.
(5) (1933) 35 W.A.L.R. 105.
(6) (1894) 1 Q.B. 552, at pp. 556, 559, 562, 563.
(7) (1901) 2 K.B. 833.
(8) (1890) 7 W.N. (N.S.W.) 7.
(9) (1934) 50 C.L.R. 581.
(10) (1918) 25 C.L.R., at pp. 297-299.
(11) (1937) 57 C.L.R., at p. 637.

H. C. OF A. 1939. YIRRELL v. YIRRELL.

wife being in New South Wales; it need not be considered in the sense that the position of the wife determines the jurisdiction or the offence. The *Deserted Wives and Children Act* does in some circumstances operate in respect of persons who are not within the territorial limits of the State (*Nurmberger* v. *Reynolds* (1)). It was intended that New South Wales should not be a sanctuary for defaulting husbands. The failure on the part of the appellant took place in New South Wales. The words " or by any reputable person " in sec. 4 connote that the wife need not be within the State. This case is the converse case to *Ex parte Atkinson* (2). Here the erring party is in New South Wales. Upon the proper construction of sec. 4 the subject matter of the complaint is a " matter and thing in and of New South Wales " within the meaning of sec. 17 of the *Interpretation Act* 1897 (N.S.W.). The appellant being in New South Wales left his wife without support, that is, while in New South Wales he did not provide for her support. Assuming there was not any jurisdiction to make the order the want of jurisdiction not being apparent on the face of the record left it in the discretion of the Supreme Court to grant or refuse prohibition. That court having exercised its discretion, this court should not interfere. The court which made the order is a court of record (*Ex parte Scealy*; *In re Rouse* (3); *Ex parte Cranney*; *Re Lindfield* (4); *Gapes* v. *Gapes* (5); *Halsbury's Laws of England*, 2nd ed., vol. 8, p. 527; *Stephen's Principles of Pleading*, 6th ed. (1860), p. 25).

[EVATT J. referred to *Ex parte Mathews* (6).]

Under sec. 85 of the *Justices Act* 1902-1931 (N.S.W.) a magistrate is required only to make a minute or memorandum of any conviction or order made by him; nothing else is contemplated by that Act. For comparable statutory provisions, see *Halsbury's Statutes of England*, vol. 11, p. 280, p. 14. As the court which made the order is a court of record, this court is only entitled to have regard to the document that constitutes the record of that court, that is, the

(1) (1930) 25 Q.J.P.R. 110.
(2) (1911) 11 S.R. (N.S.W.) 80; 28 W.N. (N.S.W.) 27.
(3) (1927) 44 W.N. (N.S.W.) 20.
(4) (1930) 47 W.N. (N.S.W.) 57, at p. 59.
(5) (1924) 26 W.A.L.R. 144, at p. 158.
(6) (1918) 18 S.R. (N.S.W.) 316, at p. 321; 35 W.N. (N.S.W.) 97, at p. 98.

minute of the order made (*R.* v. *Nat Bell Liquors Ltd.* (1) ; *Ex parte Sigerson* (2)). The complaint is not part of the record (*Ex parte Lovell* ; *Re Buckley* (3)).

[STARKE J. referred to *Denton* v. *Marshall* (4).]

If there is herein a failure of jurisdiction it is not a failure that appears on the record ; therefore the circumstances should be taken into account. By virtue of sec. 20 of the *Justices Act* jurisdiction is presumed until the contrary is shown (*Carberry* v. *Cook* (5) ; *Ex parte Martin* (6)). The jurisdiction of the court was not challenged at the hearing of the complaint. In the circumstances the Supreme Court properly exercised its discretionary power and the decision so made should not be disturbed. In any event the respondents' costs should, in the circumstances, be paid by the appellant (*Medway* v. *Medway* (7) ; *Fremlin* v. *Fremlin* (8) ; *Halsbury's Laws of England*, 2nd ed., vol. 10, p. 851).

Watt K.C., in reply. Sec. 20 of the *Justices Act* is intended as a protection to justices in the discharge of their duties. The proof of jurisdiction is upon those who invoke its exercise (*Ex parte Smith* (9)). The jurisdiction of inferior courts is subject to the supervision of the superior courts. Sec. 85 of the *Justices Act* merely provides a convenient arrangement for a short notation of the effective part of a conviction or order (*Ex parte Attorney-General* ; *Re Cohen* (10)). Sec. 112 of the Act shows that the formal order need not be drawn up until or unless occasion requires it. The appellant did not have the carriage of the order. A distinction must be drawn between certiorari, where the question of record may become important because it only arises on conviction, and prohibition, which arises at any stage of the proceedings and primarily according to *R.* v. *Bolton* (11). Jurisdiction was not in issue in *Ex parte Sigerson* (12). It is immaterial whether the court which made the

(1) (1922) 2 A.C., at pp. 150, 151, 153, 159.
(2) (1863) 2 S.C.R. (N.S.W.) 353.
(3) (1938) 38 S.R. (N.S.W.) 153, at pp. 165-167.
(4) (1863) 1 H. & C. 654 [158 E.R. 1046].
(5) (1906) 3 C.L.R. 995.
(6) (1904) 21 W.N. (N.S.W.) 123.
(7) (1900) P. 141.
(8) (1913) 16 C.L.R. 212, at pp. 241 et seq.
(9) (1904) 4 S.R. (N.S.W.) 110 ; 21 W.N. (N.S.W.) 26.
(10) (1922) 23 S.R. (N.S.W.) 111, at p. 117.
(11) (1841) 1 Q.B. 66 [113 E.R. 1054.]
(12) (1862) 1 S.C.R. (N.S.W.) 30 ; (1863) 2 S.C.R. (N.S.W.) 353.

H. C. OF A. 1939. YIRRELL v. YIRRELL.

order herein is, or is not, a court of record; it is an inferior court. The fact that the appellant had a right of appeal to Quarter Sessions did not compel him to exercise that right to his prejudice. The fact that he did not so appeal is not a bar.

[STARKE J. referred to *Vadala* v. *Lawes* (1).]

The order was a nullity; therefore the appellant should not be mulct in costs; at worst, there should not be any order as to costs.

Cur. adv. vult.

Oct. 17.

The following written judgments were delivered :—

LATHAM C.J. On 21st December 1925 the appellant, W. G. Yirrell, was ordered by a Children's Court sitting at Sydney in the State of New South Wales to pay thirty shillings per week to his wife with five shillings per week for each of his two children for maintenance under the provisions of the *Deserted Wives and Children Act* 1901 (N.S.W.). By the same order the legal custody of the children was committed to the respondent wife. The order was made by consent, after a warrant which had been issued for the apprehension of the appellant as a deserting husband had been withdrawn. The appellant has paid nothing, and the amount now owing under the order, if it is valid, is more than eight hundred pounds.

On 9th February 1939 the appellant obtained an order nisi for a common law writ of prohibition on the grounds that the Children's Court had no jurisdiction to make the order, that the complaint disclosed no offence, and that there was no evidence that the wife had at any time been left without means of support in the State of New South Wales. The Supreme Court held that, whether the Children's Court had jurisdiction or not, want of jurisdiction did not appear upon the face of the proceedings and that the Supreme Court had therefore a discretion to grant or refuse the writ. In all the circumstances the court refused to grant the writ. The husband has appealed to this court. His right of appeal was challenged on the ground that the judgment was not given in respect of any sum or matter at issue amounting to or of the value of three hundred

(1) (1890) 25 Q.B.D. 310.

pounds and did not otherwise come within the provisions of sec. 35 (1) (*a*) of the *Judiciary Act* 1903-1937. Reference was made to *Coal Cliff Collieries Ltd.* v. *Austin* (1). After some argument, in view of the amount now actually involved, the court granted special leave to appeal.

The first question is whether the Children's Court had jurisdiction to make the order. The question which is raised relates to jurisdiction in respect of the subject matter of the complaint, and not to jurisdiction over the person against whom jurisdiction is sought to be exercised. It is conceded that in the former case consent does not give jurisdiction (*Ridley* v. *Whipp* (2)). Sec. 4 of the *Deserted Wives and Children Act* 1901, under which the order was made, was (so far as relevant) as follows :—" In any case where (*a*) any husband or father has deserted his wife or child, or has left such wife or child without means of support; or (*b*) . . . any justice may, upon complaint on oath being made by such wife or by the mother of such child, or by any reputable person on behalf of such wife, mother, or child issue his summons requiring such husband, father, or mother to appear before two justices to show cause why he should not support such wife or child."

The question is whether this provision applies only to wives and children who are left without support in New South Wales or whether, on the other hand, it applies to any case where a wife or child has been left without support in any part of the world if only the complaint is made in New South Wales, the defendant being duly served with process. A similar statutory provision has been considered in the cases of *Renton* v. *Renton* (3) and *Walker* v. *Walker* (4). In the former case it was held that a corresponding South Australian provision applied to the case of a husband who was in New South Wales and who failed to supply his wife, who was in South Australia, with adequate means of support. The failure to support took place in South Australia and therefore fell within the terms of the South Australian statute. In *Walker's Case* (4) a corresponding construction was given to the section of the New South Wales Act under which proceedings were taken in the present case. These cases do

(1) (1919) 27 C.L.R. 355.
(2) (1916) 22 C.L.R. 381, at p. 386.
(3) (1918) 25 C.L.R. 291.
(4) (1937) 57 C.L.R. 630.

H. C. OF A. 1939.

YIRRELL v. YIRRELL.

Latham C.J.

not, as a matter of actual decision, establish that such provisions are not applicable in any other case, as, for example, where, the applicability of the New South Wales Act being in question, the wife has not been left without means of support in New South Wales, but the husband is in New South Wales and is amenable to the process of New South Wales courts. The reasoning of the cases, however, is based upon the view that the object of the provision is to deal with husbands who are guilty of the act of failing to provide support for a wife or children, as distinct from physically leaving them, and with so failing within the jurisdiction, that is, in this case, within the State of New South Wales. Some limitation must be placed upon the generality of the provision. It cannot apply to all husbands, wives, and children throughout the world. In my opinion the limitation which is involved in the reasoning in the cases mentioned is that which ought to be applied, namely, that the legislation deals with the act or omission of the husband in leaving without support a wife who is within the jurisdiction of the court at a time when she is so left.

In the present case it is admitted that the wife was not in New South Wales at the time when proceedings were taken. Indeed, it is not disputed that she has not been in New South Wales since 1921. These facts, however, are not, in my opinion, directly important in this case. The question is not whether there was evidence to support an order. The order was made by consent. The important matter is the precise form of the complaint. Sec. 4 of the *Deserted Wives and Children Act* 1901, which I have already quoted, requires that a complaint on oath be made before a justice can issue his summons. Upon the hearing the justices are required to " inquire into the matter of the complaint " (sec. 7). There must be a complaint before jurisdiction arises.

The complaint alleged " that on and since the fourteenth day of December 1925 in the State of Victoria the said defendant has left her, his wife, without means of support contrary to the Act in such case made and provided."

It is quite clear that this complaint, made in New South Wales under the New South Wales Act, alleges, as the basis of the proceedings, a leaving without support in the State of Victoria. Upon the

construction of the Act which, for reasons which I have stated, I regard as correct, the complaint not only disclosed no ground upon which the court could exercise jurisdiction, but itself showed that the court had no jurisdiction to entertain it. In order to give the court jurisdiction the complaint should have stated that the defendant had left his wife without means of support in New South Wales. Thus the court had no jurisdiction to make the order against the husband, and his consent, as already pointed out, was not effective to give jurisdiction.

The next question is whether the husband is entitled to a writ of prohibition as a matter of right, or whether, on the other hand, the granting of the writ is within the discretion of the court. It is a well-settled principle that where total absence of jurisdiction appears on the face of the proceedings in an inferior court the court is bound to issue a prohibition, although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior court (*Farquharson* v. *Morgan* (1)). The question which has been debated upon this appeal is whether in this case the want of jurisdiction appears upon the face of the proceedings. The Full Court of the Supreme Court of New South Wales has held that the defect does not so appear, referring to *R.* v. *Nat Bell Liquors Ltd.* (2). The only record of the order of the Children's Court is a memorandum apparently made under sec. 85 of the *Justices Act* 1902. In this memorandum it is stated that it was ordered and adjudged that the defendant should pay weekly to a specified officer for the use of the defendant's wife an allowance of thirty shillings, that the legal custody of the children be committed to the wife, that five shillings per week be paid for each child till the child should attain the age of sixteen and that the defendant should enter into a specified recognizance to perform the said orders for a period of twelve months. The memorandum is not in the form provided in the second schedule to the Act—See form R.2—which is good, valid and sufficient in law (sec. 99). Form R.2 recites the complaint. If an order had been made in that form the want of jurisdiction would have appeared in the order itself. If, in order to determine whether a defect of jurisdiction appears upon the face of the proceedings, the superior

(1) (1894) 1 Q.B. 552.

(2) (1922) 2 A.C. 128.

H. C. OF A. 1939.

YIRRELL v. YIRRELL.

Latham C.J.

court can look only at the memorandum which was actually made by the Children's Court, then it must be admitted that absence of jurisdiction does not appear on the face of the proceedings. But is it the law that, in all cases, the order constitutes the whole of the relevant "proceedings"? It is so when, upon a writ of certiorari, an order and only an order is returned before the superior court. In *R.* v. *Nat Bell Liquors Ltd.* (1), Lord *Sumner* examined at length the procedure in certiorari and pointed out that, before *Jervis' Acts*, an order which was brought up to the Court of King's Bench upon certiorari was an order which recorded the various steps of the proceedings, but that, after *Jervis' Acts*, the order ceased to be a speaking order, and it became, therefore, much less easy to demonstrate lack of jurisdiction upon the face of the proceedings.

The general rule is that in the case of an inferior court nothing is intended in favour of jurisdiction (*Peacock* v. *Bell* (2); *Halsbury's Laws of England*, 2nd ed., vol. 8, p. 530). This principle has been modified in its application to justices in New South Wales by sec. 20 of the *Justices Act*, which is in the following terms: "In all cases every act done or purporting to have been done by or before any justice shall be taken to have been within his jurisdiction, without an allegation to that effect, until the contrary is shown." But this section, while removing the presumption against jurisdiction unless jurisdiction positively appears, still leaves it to the superior court to determine whether or not there was jurisdiction in a particular case.

In my opinion the case of *R.* v. *Nat Bell Liquors Ltd.* (3) cannot be regarded as concluding the matter. That case dealt very specifically with certiorari upon the basis—See the report (4)—that no such ground as "informality disclosed on the face of the proceedings" was to be found in the case. The question was not whether absence of jurisdiction appeared upon the face of the proceedings or not upon the face of the proceedings (which is the question in the present case) but whether absence of evidence in a case within jurisdiction deprived the court of jurisdiction. This question was answered in the negative. In the course of his speech Lord *Sumner* refers to

(1) (1922) 2 A.C. 128, at p. 159.
(2) (1667) 1 Wms. Saund. 69 [85 E.R. 81].
(3) (1922) 2 A.C. 128.
(4) (1922) 2 A.C., at p. 141.

many authorities dealing with certiorari and, *inter alia*, to *R.* v. *Bolton* (1), from which case he makes the following quotation: "Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us" (2). This statement does not support the contention of the respondent in this appeal that the information or complaint is not any part of the proceedings in even the most technical sense. The information was returned to the Queen's Bench in *R.* v. *Bolton* (1) and the judgment of Lord *Denman* C.J. refers at many points to the information actually laid as disclosing a charge well laid before the magistrate "on its face bringing itself within" (3) the jurisdiction of the magistrate. The case of *R.* v. *Nat Bell Liquors Ltd.* (4) does not, in my opinion, lend any support to the proposition that a want of jurisdiction appearing on the face of a complaint or an information is not a want of jurisdiction appearing on the face of the proceedings.

At a time when the courts were very strict and formal in relation to these matters it was clearly decided in the Court of Exchequer Chamber (a complaint upon which an order was made having been brought before the court in an application for a writ of prohibition) that a defect in the complaint was a defect appearing upon the face of the proceedings. The case is *Roberts* v. *Humby* (5), where the objection to jurisdiction was based upon the fact that, though the order which was made did in terms state that it was made in respect of a debt, and though the inferior court had jurisdiction in cases of debt, yet the summons upon which the order was made failed to state any facts constituting or creating a debt. Lord *Abinger* C.B. said (6):—"Here, upon the face of the proceedings, there is a want of jurisdiction. The summons states no other foundation for" the claim than facts which were plainly insufficient to support the

(1) (1841) 1 Q.B. 66 [113 E.R. 1054].
(2) (1922) 2 A.C., at p. 153.
(3) (1841) 1 Q.B., at p. 73 [113 E.R., at p. 1057].
(4) (1922) 2 A.C. 128.
(5) (1837) 3 M. & W. 120 [150 E.R. 1081].
(6) (1837) 3 M. & W., at p. 125 [150 E.R., a p. 1083].

H. C. OF A. 1939. YIRRELL v. YIRRELL. Latham C.J.

claim. Baron *Parke* agreed on the ground that "connecting the summons with the sentence" (that is, the order made by the inferior court) "a want of jurisdiction appears" (1). He referred to *Buggin* v. *Bennett* (2) as a case dealing particularly with what appears upon the face of the proceedings:—"If it appears upon the *face of the proceedings*" [*sic*] "that the court below have no jurisdiction, a prohibition may be issued at any time either before or after sentence; because all is a nullity; it is *coram non judice*. But where it does not appear upon the *face of the proceedings*" [*sic*], "if the defendant below will lie by, or suffer that court to go on under an apparent jurisdiction, as upon a contract made at sea, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the court below" (3). This quotation would have been quite out of place if, in *Roberts* v. *Humby* (4), a defect appearing upon the face of the summons was not a defect upon the face of the proceedings within the meaning of the doctrine which was under consideration. Baron *Alderson* was of the same opinion as the other judges and said: "It is quite clear upon the face of the proceedings, that there was a want of jurisdiction" (5).

In my opinion this case is conclusive upon the point whether the want of jurisdiction in the present case appears upon the face of the proceedings. See also *Farquharson* v. *Morgan* (6), where *Roberts* v. *Humby* (4) was described as a case in which the court granted prohibition at the instance of a party to the proceedings where the want of jurisdiction appeared upon the face of the proceedings even after sentence in the inferior court. In the same case (*Farquharson's Case* (7)), it was said that even where there was strictly no record in an inferior court the principle was applicable, because "the distinction does not, I think, depend on the existence of a formal

(1) (1837) 3 M. & W., at p. 126 [150 E.R., at p. 1083].
(2) (1767) 4 Burr. 2035 [98 E.R. 60].
(3) (1767) 4 Burr., at p. 2037 [98 E.R., at p. 61].
(4) (1837) 3 M. & W. 120 [150 E.R. 1081].
(5) (1837) 3 M. & W., at p. 126 [150 E.R., at p. 1084].
(6) (1894) 1 Q.B., at p. 562.
(7) (1894) 1 Q.B. 552.

record, but is one of substance, whether the defect is apparent or depends on evidence" (per *Davey* L.J. (1)). See *Alderson* v. *Palliser* (2), where it was held that, where a particular affidavit was necessary before a judge could make a particular order, a defect in the affidavit was a defect which appeared upon the face of the proceedings so as to entitle the defendant to a writ of prohibition as of course. It was said: "A statutory condition precedent to the jurisdiction is wanting, and that the defect appears on the face of the proceedings" (3). In my opinion identical reasoning applies to the complaint in this case.

In the present case the jurisdiction of the magistrate under the *Deserted Wives and Children Act* depends upon the making of a complaint on oath: See sec. 4. The statute requires that there shall be a complaint before the justice can act. In the present case there was a complaint and it was in writing. That complaint shows that the matter in respect of which the jurisdiction of the court was invoked was a matter as to which the court had no jurisdiction. The defect in jurisdiction therefore appears upon the face of the proceedings and the applicant is entitled to prohibition as of right.

The court, however, is entitled to exercise a discretion in relation to costs. This is a case in which a wife is supporting, both in the Supreme Court and in this court, an order made for maintenance of herself and her children. She should have her costs (*Medway* v. *Medway* (4); *Hope* v. *Hope* (5); *Terry* v. *Terry* (6)).

In my opinion an order should be made for a writ of prohibition but the husband should be ordered to pay the costs of the wife in the Supreme Court and in this court.

Rich J. In this case the Supreme Court of New South Wales refused to make absolute a rule nisi for prohibition on the ground that the absence of jurisdiction did not appear on the face of the proceedings, so that in the circumstances of the case the remedy of prohibition became a matter of discretion.

At the date of the order in question the husband charged was resident in New South Wales and the wife and children in Victoria.

(1) (1894) 1 Q.B., at p. 563.
(2) (1901) 2 K.B. 833.
(3) (1901) 2 K.B., at p. 836.
(4) (1900) P. 141.
(5) (1915) P. 125.
(6) (1915) 32 T.L.R. 167.

H. C. OF A. 1939. YIRRELL v. YIRRELL. Rich J.

The first question for our consideration is whether in the circumstances the Children's Court had jurisdiction to make the order. The *Deserted Wives and Children Act* 1901 (N.S.W.) is a consolidating Act, but it is, to use the words of *Wood* V.C. in *Cope* v. *Doherty* (1), "denuded of the preamble which has hitherto formed, in some degree, a key to" the "construction" of the original Act (4 Vict. No. 5, preamble; *Oliver's Statutes*, vol. 1, p. 666). In the case of a consolidating Act the prima-facie presumption is that the legislature intended to reproduce the existing position, but that presumption must yield to plain words to the contrary (*MacConnell* v. *E. Prill & Co. Ltd.* (2)). Accordingly, "the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view" (*Bank of England* v. *Vagliano Brothers* (3)). Sec. 4 of the *Deserted Wives and Children Act* 1901-1913 opens with very general words: "In any case where any husband or father (*a*) has deserted his wife or child; or (*b*) has left his wife or child without means of support; . . . any justice may, upon complaint on oath being made by such wife or by the mother of such child or by any reputable person on behalf of such wife or child, issue his summons requiring such husband or father to appear before two justices to show cause why he should not support such wife or child." But, "in the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject matter or history of the enactment, the presumption is that parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom" (*Maxwell* on *The Interpretation of Statutes*, p. 213, cited in *Tomalin* v. *S. Pearson & Son Ltd.* (4); *Jackson* v. *Federal Commissioner of Taxation* (5)). Adapting what was said by Lord *Hobhouse* in *England* v. *Webb* (6): "It can hardly

(1) (1858) 4 K. & J. 367, at p. 376 [70 E.R. 154, at p. 158].
(2) (1916) 2 Ch. 57, at p. 63.
(3) (1891) A.C. 107, at pp. 144, 145.
(4) (1909) 2 K.B. 61, at p. 64.
(5) (1920) 27 C.L.R. 503, at p. 510.
(6) (1898) A.C. 758, at p. 762.

be that the Parliament " of New South Wales intended to extend its protection to deserted wives and children " all over the world." " It seems . . . much more reasonable to suppose that in framing " sec. 4 the legislature was speaking of wives or children left without means of support within New South Wales. The law in question is one of local policy confined to the State of its origin and not intended to have general and unrestricted application. The legislature was providing against deserted wives and children being left so to speak on the parish and chargeable to the State of New South Wales.

The section imposes the necessity of a complaint on oath. That is not mere process to bring the person charged before the court. It is procedure which cannot be waived and is the foundation of jurisdiction. It is the charge which has to be inquired into. An order made without a complaint would, in my opinion, be bad, and the remedy of the prerogative writ of prohibition would be a proper one. In the same way an order made on a bad complaint would itself be bad and be subject to prohibition. The complaint in the present case was, in my opinion, bad. It was bad because it alleged a ground of complaint over which there was no jurisdiction and which could form no foundation for an order. The Act is concerned with wives and children who have been deserted in New South Wales or are in New South Wales without proper means of support. The legislation does not take under its protection the wives and children of the world or the wives and children of parts of Australia outside New South Wales. It is not necessary in this case to state what is a sufficient territorial connection with New South Wales to bring a case of wife or child desertion or a case of leaving a wife or child without support within the jurisdiction conferred by the Act. The complaint alleged as the fact was that " on and since the fourteenth day of December 1925 in the State of Victoria the said defendant has left her, his wife, without means of support contrary to the Act in such case made and provided." It is sufficient to say that such a case is outside the jurisdiction and from the facts of the case itself it appears that no amendment consistent with the facts could have been made attracting jurisdiction.

H. C. OF A. 1939. YIRRELL v. YIRRELL. Rich J.

The reasons, however, given in the Supreme Court assume that the order which the appellant seeks to prohibit was made without jurisdiction. The refusal of the court to send prohibition is placed entirely on the discretionary ground that great and unexplained delay had taken place and the appellant had never objected to the jurisdiction. There is no discretion to refuse prohibition on the grounds mentioned if on the face of the proceedings the order is void for want of jurisdiction. In the present case it is true that the memorandum stating the order does not show either jurisdiction or want of jurisdiction. But if the complaint on which it was made is connected with the order the want of jurisdiction appears. The point in the case is whether it is enough to exclude the discretion of the court to withhold prohibition that want of prohibition appears when the complaint and order are connected. I think it is enough in proceedings like the present, where no order can be made without a complaint, so that the existence of the complaint is a condition precedent to an order. If no valid order can be made without a complaint, surely you must look at the complaint to see whether the order is good. Here when you look you find that the order is bad not because there is no complaint but because the complaint shows that the facts occurred outside New South Wales.

In my opinion a writ should have been granted. The appeal should be allowed.

STARKE J. Appeal by special leave from a judgment of the Supreme Court of New South Wales discharging a rule nisi for a prerogative writ of prohibition.

In December 1925 a complaint was laid before a police magistrate in New South Wales that the appellant on and since 14th December 1925 in the State of Victoria left his wife, the respondent Lillian Ethel Yirrell, without means of support contrary to the *Deserted Wives and Children Act* 1901-1913. The phrase "left his wife without means of support" in this Act does not mean leaving her in the sense of going away or physically departing from her: it means that he fails to supply or provide her with adequate support (*Renton* v. *Renton* (1); *Usher* v. *Usher* (2)).

(1) (1918) 25 C.L.R., at p. 297. (2) (1901) 27 V.L.R. 163; 22 A.L.T. 231.

The constitutional authority of the Parliament of New South Wales to pass the Act is not questioned. But it is very general in its terms: "In any case where any husband . . . has left his wife . . . without means of support . . . any justice may upon complaint on oath . . . issue his summons requiring such husband . . . to appear before two justices to show cause why he should not support such wife." A reasonable limitation must be applied to words so general. States can legislate effectively only for their own territories. But consistently with this principle it is competent for States to legislate with respect to persons within their territories (*Croft* v. *Dunphy* (1); *Broken Hill South Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (2)). But the construction of the Act depends upon its terms. Its object is to provide for deserted wives and children. And when it makes provision for wives or children left without means of support the presumption, in the absence of any intention clearly expressed to the contrary, is that the wives or children so left without means of support are within the territorial limits of New South Wales and not beyond them (*Mynott* v. *Barnard* (3)). Domicile or permanent residence within the territory is not essential: it is enough if they are within the territorial limits of New South Wales without adequate means of support. It would no doubt be competent for the legislature to make provision for wives or children left anywhere without means of support if their husbands or fathers were within the territorial limits of New South Wales, but that is not the natural and ordinary meaning of the words used in the Act.

In the present case the complaint alleges that the wife was in the State of Victoria left without means of support and it was conceded at the bar that the wife was never in New South Wales at any relevant time. A consent order, however, was made in December 1925, which purported to be made under the Act, that the appellant pay weekly into the hands of the officer in charge of police for the use of the defendant's wife an allowance of thirty shillings, the first of such weekly payments to be made on 28th December 1925. But this order upon the proper construction of

(1) (1933) A.C. 156. (2) (1937) 56 C.L.R. 337.
(3) (1939) 62 C.L.R. 68.

H. C. OF A. 1939. YIRRELL v. YIRRELL. Starke J.

the Act cannot be supported: it is without authority and beyond jurisdiction. An additional order as to the custody and support of two children of the marriage of the appellant and his wife purporting to be made pursuant to sec. 7 (1) (*a*) of the Act falls with the order made in favour of the wife. It is likewise without authority and beyond jurisdiction.

The Supreme Court nevertheless refused, in the exercise of its discretion, to make the rule nisi for the prerogative writ of prohibition absolute inasmuch as the want of jurisdiction did not appear on the face of the proceedings. "The granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction" and "where the absence or excess of jurisdiction is not apparent on the face of the proceedings, it is discretionary with the court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled" (*Farquharson* v. *Morgan* (1); *Broad* v. *Perkins* (2)). But the nature of a defect on the face of the proceedings is more clearly indicated in *Mayor &c. of London* v. *Cox* (3). And more clearly still in such cases as *Roberts* v. *Humby* (4) and *Alderson* v. *Palliser* (5). In the former case a summons was issued by the Commissioner of the Court of Requests for Bath to the defendant to answer a demand made against him for ten shillings for attendance on the defendant's notice at the Revising Barristers' Court. An order was made that the defendant pay the plaintiff ten shillings for his debt and costs. There was no reference to the summons in the order. *Abinger* C.B.: "Here, upon the face of the proceedings, there is a want of jurisdiction. The summons states no other foundation for a claim of debt than that Roberts attended before the revising barrister, in consequence of a notice that his vote would be disputed. The attendance upon that notice does not constitute a debt" (6). *Parke* B.: "I entirely agree . . . that the rule must be absolute on the ground that, connecting the summons with the sentence, a want of jurisdiction appears" (6). In the latter case an application was made by the plaintiff for a judgment

(1) (1894) 1 Q.B., at p. 559.
(2) (1888) 21 Q.B.D. 533.
(3) (1867) L.R. 2 H.L., at pp. 282, 283.
(4) (1837) 3 M. & W. 120 [150 E.R. 1081].
(5) (1901) 2 K.B. 833.
(6) (1837) 3 M. & W., at p. 125 [150 E.R., at p. 1083].

summons which was required by county-court rules to be supported by an affidavit in a particular form. The affidavit was not in due form, but a summons was nevertheless issued. The summons with the affidavit was served upon the defendants. *Vaughan Williams* L.J. :—" It is conceded that . . . the existence of an affidavit substantially conforming to the form . . . is a condition precedent to the jurisdiction to make such an order as was made in this case. That being so, the question is whether the absence of this condition precedent appears on the face of the proceedings. In my opinion it clearly does. It is apparent on the affidavit, which is part of the proceedings, because, before the judge could have jurisdiction to make the order, he was bound to have the affidavit before him. We have it, therefore, that a statutory condition precedent to the jurisdiction is wanting, and that the defect appears on the face of the proceedings " (1).

Under the *Deserted Wives and Children Act* 1901-1913 jurisdiction is founded upon " complaint on oath." Connecting this complaint, which was in writing and on oath, with the minute of the order made on the complaint a want of jurisdiction appears. It is apparent on the face of the complaint, which alleges that the wife was in the State of Victoria left without means of support, and that complaint is the foundation of the proceedings. But the learned judges of the Supreme Court were of opinion that a minute of the order made pursuant to the *Justices Act* 1902 was the only document at which the court could look as the record of the proceedings. Sec. 85 enacts : " If the justice or justices convict or make an order against the defendant a minute or memorandum of the conviction or order shall be made at the same time." And sec. 20 enacts that " in all cases every act done or purporting to have been done by or before any justice shall be taken to have been within his jurisdiction, without any allegation to that effect, until the contrary is shown." The Act certainly makes the minute a sufficient record of convictions or orders made by justices, but the section does not preclude the drawing up of a formal conviction or order and that course, in some cases, might be desirable and even necessary. And sec. 20 appears to cut across the common-law rule that nothing should be

(1) (1901) 2 K.B., at p. 836.

H. C. OF A. 1939. YIRRELL v. YIRRELL. Starke J.

intended to be within the jurisdiction of an inferior court or of justices but that which is expressly alleged (*Mayor &c. of London* v. *Cox* (1)). But the court is still entitled to look at the "face of the proceedings," the process or documents founding the proceedings, to see that the inferior tribunal has not exceeded its jurisdiction. The position is thus stated by *Denman* L.C.J. in *R.* v. *Bolton* (2): "Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us."

It is claimed that a passage in *R.* v. *Nat Bell Liquors Ltd.* (3) nevertheless makes it clear that the want of jurisdiction, for the purpose of the rule stated in *Farquharson* v. *Morgan* (4), must appear on the face of the conviction or order or upon the minute thereof. Apart from questions of jurisdiction, the Judicial Committee, in the former case, denied the right of a superior court on certiorari to examine generally into the evidence on which a conviction was pronounced on the pretext of inquiry whether the conviction was within the jurisdiction of the justices: See *R.* v. *Nat Bell Liquors Ltd* (5). It referred incidentally, however, to cases in which justices were required to or did set out the evidence on the record of the conviction:—"If the court . . . stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it, a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by certiorari, and when so removed to pass judgment upon it, whether it should or should not be quashed. In that case, as I said just now, the jurisdiction of the Court of Queen's Bench was merely a jurisdiction to leave the order standing or to remove it out

(1) (1867) L.R. 2 H.L., at p. 259.
(2) (1841) 1 Q.B., at pp. 72, 73 [113 E.R., at p. 1057].
(3) (1922) 2 A.C., at pp. 156, 157.
(4) (1894) 1 Q.B. 552.
(5) (1922) 2 A.C., at pp. 156-159.

of the way. It was not a jurisdiction to substitute for it another or a different order; that would be making the Court of Queen's Bench, in the ordinary sense of the term, a court of rehearing or of appeal" (*Overseers of the Poor of Walsall* v. *London and North Western Railway Co.* (1); *R.* v. *Nat Bell Liquors Ltd.* (2); *R.* v. *Warnford* (3); *R.* v. *Justices of Galway* (4)). But that authority of the superior court has nothing to do with the question whether a want of jurisdiction is or is not apparent on the face of the proceedings.

In my judgment a want of jurisdiction was apparent upon the face of the proceedings in the present case. The writ of prohibition is of right in these circumstances, and no discretion exists in the court to refuse it.

The appeal should be allowed and the rule nisi made absolute.

EVATT J. By sec. 4 of the New South Wales *Deserted Wives and Children Act*, it is provided that where any husband "has left his wife . . . without means of support," any justice may, upon complaint on oath by such wife, or by any reputable person on her behalf, issue his summons requiring the husband to appear before two justices to show cause why he should not support such wife.

The cases of *Renton* v. *Renton* (5) and *Walker* v. *Walker* (6) strongly suggest, and I am of opinion, that, upon the true construction of sec. 4 of the Act, it is intended that the matter of the complaint should be confined to cases where the leaving without means of support has taken place within the State of New South Wales. If this construction is right, it is not disputed that when the justices proceed to inquire into cases where the leaving without means of support is alleged to have taken place outside New South Wales they are exceeding their jurisdiction, and not merely making an error of law as to the construction of the Act.

Upon complaint on oath made in December 1925 on behalf of the respondent wife by the respondent Cohen, the jurisdiction of the justices was invoked and exercised, although the complaint on its face alleged that the leaving without support occurred in the State

(1) (1878) 4 App. Cas. 30, at p. 40.
(2) (1922) 2 A.C., at pp. 155, 156.
(3) (1825) 5 Dow. & Ry. 489, at p. 490.
(4) (1906) 2 I.R. 446.
(5) (1918) 25 C.L.R. 291.
(6) (1937) 57 C.L.R. 630.

H. C. OF A. 1939.

YIRRELL v. YIRRELL.

Evatt J.

of Victoria, and not in the State of New South Wales. Subsequently, by consent, an order was made by the special magistrate at the Children's Court ordering that weekly payments be paid by the husband.

It is clear that this order was made without jurisdiction, and the sole ground upon which the present application for a common law writ of prohibition was denied by the Full Court was that the absence of jurisdiction did not appear on the face of the proceedings (*Farquharson* v. *Morgan* (1)).

In the present case, the order of the magistrate was not drawn up in proper form. Sec. 85 of the *Justices Act* requires that when justices convict or make an order against a defendant, a minute or memorandum of the conviction or order should be immediately made, no fee being payable for such a minute or memorandum. But this short note of the conviction or order is not intended to be a substitute for the formal order, as is plain from a perusal of other provisions of the *Justices Act*. Sec. 99 of the Act authorizes only the forms contained in the second schedule to the *Justices Act*, or forms to the like effect. Those forms do not include the minute or memorandum mentioned in sec. 85, although some of the forms, e.g., form T.7, viz., the warrant of commitment on non-payment of costs, contemplate service upon the defendant of a copy of the minute of the order of the justices. But the form of the order which follows upon a complaint is contained in form R.2. That form requires that there should, *inter alia*, be stated " the facts entitling the complainant to the order with the time and place when and where they occurred." Sec. 85 insists upon an immediate though informal record of a conviction or order, but does not exclude a full and formal document whenever the occasion warrants. This is made clear by sec. 73 whereby a conviction or order in proper form has to be furnished to persons interested but only after payment.

The *Justices Act* (e.g., sec. 65) contemplates that no effective objection shall be taken or allowed merely to an information or a complaint. But it is essential that, before a legal conviction or order can be made, the substance of the information or complaint shall be stated to the defendant (sec. 78 (1)). It is always desirable

(1) (1894) 1 Q.B. 552.

that if a conviction or order is made, and if subsequently such conviction or order is called into question in other proceedings, a formal conviction or order, including a statement of the facts warranting the conviction or entitling the complainant to the order, should be drawn up in substantial conformity with the forms R.1 or R.2. This seems to have been the practice adopted wherever doubts could arise, although very often the formal conviction or order became unnecessary, and in cases of statutory prohibition sec. 112 (3) of the Act provides expressly that the applicant may have the benefit of the provision although the conviction or order is not "drawn up in form." Despite this provision, it is usually convenient, even in cases of statutory prohibition, for the court or the parties concerned to have the conviction or order drawn up in form.

In some cases, the courts have been able to regard the absence of a formal conviction or order as immaterial, because the copy of the minute has been sufficient for the purpose in hand (*R.* v. *Pearson*; *Ex parte Smith* (1)); but there is no authority which would compel a superior court which is called upon to inquire into the jurisdiction of the justices to halt at the informal minute.

It follows from the above that the Supreme Court could, and should, have required the production of the formal order in this case. Such order would have shown upon its face that the material leaving without support of the wife was alleged to have occurred outside the State of New South Wales; it would, therefore, have shown the absence of jurisdiction in the inferior court. I do not think that this court should go through the form of requiring this to be done now. On the contrary, I think we should pronounce the order for prohibition which the Full Court would have pronounced had the order been drawn up in correct form.

I also think that sufficient appears from the minute of the court's order to shown absence of jurisdiction. The minute refers on its face to the respondent Cohen as the complainant, and to the appellant as the defendant. Further, the complaint must be on oath. I think that the court is entitled to regard as incorporated in the order the complaint between the same parties and in respect of the same matter. Such complaint is not within jurisdiction, and the proof

(1) (1880) 6 V.L.R. (L.) 329.

H. C. OF A. 1939. YIRRELL v. YIRRELL.

of excess of jurisdiction is therefore independent of evidentiary matters *dehors* the face of the proceedings.

I think the appeal should be allowed, and that there should be a rule absolute for a writ of prohibition.

McTIERNAN J. On 21st December 1925 the appellant appeared before the respondent Mr. Blix, a special magistrate, who with the appellant's consent made an order the only record of which before us is one entitled " Wife Maintenance—Minute of Order " and headed with the titles of three statutes, the *Deserted Wives and Children Act* 1901, the *Deserted Wives and Children (Amending) Act* 1913 and the *Child Welfare Act* 1923. This minute, after mentioning that the respondent Mr. Cohen was the complainant on behalf of the appellant's wife and that the appellant was the defendant, states that the special magistrate ordered and adjudged him to pay a certain allowance for the use of his wife, committed the custody of two of her children to her and ordered and adjudged him to pay a weekly allowance for the support of each of them.

Part XI. of the *Child Welfare Act* 1923 provides for the establishment of Children's Courts and for the constitution of each of such courts by a special magistrate. Every Children's Court so constituted has, by sec. 97 (*b*) of this Act, all the jurisdiction of a justice or justices of the peace to hear and determine complaints under the *Deserted Wives and Children Act* 1901. The jurisdiction thus given to a special magistrate sitting as a Children's Court is that given to two justices of the peace by sec. 7 of this Act. The provisions of this section were replaced by sec. 3 of the *Deserted Wives and Children (Amending) Act* 1913.

The grounds of the appellant's application for a writ of prohibition is that the order of Mr. Blix, who sat as a special magistrate constituting a Children's Court, was outside the jurisdiction conferred on him by the *Deserted Wives and Children Act*. Preceding the order there was a complaint made by the respondent Mr. Cohen under the authority given to " any reputable person " by sec. 4 of the *Deserted Wives and Children Act* 1901. This section (in its relevant parts) provides that " in any case where—(*a*) any husband or father has deserted his wife or child, or has left such wife or child without

means of support . . . any justice may, upon complaint on oath being made by such wife or by the mother of such child, or by any reputable person on behalf of such wife, mother, or child issue his summons requiring such husband, father, or mother to appear before two justices to show cause why he should not support such wife or child." It also provides that the justice of the peace may in certain circumstances issue his warrant for the apprehension of the defendant. The complaint made by Mr. Cohen is contained in the record of the justice of the peace to whom it was made. Such justice, it is to be observed, was not the special magistrate who made the order the minute of which is before us. This record shows that Mr. Cohen appeared before that justice of the peace and complained on oath that in the State of Victoria the appellant had left his wife without means of support and prayed that he would proceed in the premises according to law.

It was argued on behalf of the respondent that a complaint even in those terms is within the jurisdiction conferred on the special magistrate by the *Deserted Wives and Children Act*. But, having regard to all the provisions of the Act, it is to be presumed, I think, that parliament did not intend to give the court jurisdiction to make an order against a husband for the support of his wife when she is left without means of support beyond New South Wales: See *Walker* v. *Walker* (1). In my opinion, the order was outside the special magistrate's jurisdiction if it was made on a complaint in the terms appearing in the record which the justice of the peace made of the complaint which Mr. Cohen made to him. If the order was made on a complaint in those terms, and this fact appears on the face of the proceedings in the special magistrate's court, the appellant is entitled to a writ of prohibition as of course. But, on the other hand, if the proof of the terms of the complaint upon which the special magistrate made the order depends upon evidence *dehors* the record which we have of those proceedings, there is a discretion to grant or refuse the writ (*Farquharson* v. *Morgan* (2)). It may be repeated here that the only record of the proceedings before the special magistrate which is before the court upon this application for a writ of common law prohibition is the minute

(1) (1937) 57 C.L.R. 630. (2) (1894) 1 Q.B. 552.

H. C. OF A. 1939. YIRRELL v. YIRRELL. McTiernan J.

which the special magistrate made of the order of which the appellant complains. Sec. 78 of the *Justices Act*, so far as it is now material, provides that, where the defendant appears at the hearing, the substance of the complaint shall be stated to him and he shall be asked if he has any cause to show why an order should not be made against him : and if he thereupon admits the truth of the complaint and shows no sufficient cause why an order should not be made against him, then the justice or justices present shall make an order against him accordingly. It is to be observed that it is to the substance of the complaint as it is stated to the defendant at the hearing that he is required to plead, not to the substance of the complaint as made orally or in writing to the justice of the peace who issues the process whereby the defendant was made to appear before the special magistrate. Now, the defendant appeared before such special magistrate and consented to the order of which he now complains. Such consent would not, of course, have given the special magistrate jurisdiction to make that order if the fact is that the complaint which was stated to the appellant was in substance that made by Mr. Cohen to the justice of the peace. It was not necessary to the jurisdiction of the special magistrate that the defendant should have been called upon to plead to that very complaint (*R.* v. *Hughes* (1)). The appellant having appeared, it was within the jurisdiction of the special magistrate to make any order to which the defendant consented, even if the complaint to which he was called upon to plead was not in the same terms as that made by Mr. Cohen upon which the process was issued to secure his appearance ; provided, of course, that it was within the jurisdiction of the special magistrate to hear the complaint to which the defendant was called upon to plead. The minute of the order does not show upon its face that the complaint stated to the defendant at the hearing was one which the special magistrate had no jurisdiction to hear and determine. The minute does not set out the complaint made to the justice of the peace ; nor does it incorporate that complaint by reference. There is nothing upon the face of the complaint made to the justice or of the minute of the order which shows that the complaint stated to the defendant at the hearing

(1) (1879) 4 Q.B.D. 614.

when he consented to the order was substantially or in its very terms the same as that made by Mr. Cohen to the justice of the peace; nor is there any presumption to that effect. It cannot be assumed that, if the order had been formally drawn up, it would have stated that the complaint upon which it was founded was substantially like or in the terms of that made by Mr. Cohen to the justice of the peace. The minute of the special magistrate, which is the only record of his order brought before the court, does not show that the order is in excess of his jurisdiction. The minute has the inscrutable face of a sphinx (*R.* v. *Nat Bell Liquors Ltd.* (1)).

Sec. 85 of the *Justices Act* 1902 provides that, if a justice or justices make an order against the defendant, a minute or memorandum of the order shall be made at the same time. This section is made to apply to the hearing of complaints under the *Deserted Wives and Children Act* 1901 before a Children's Court by sec. 102 of the *Child Welfare Act* 1923: See also *Ex parte Sigerson* (2). The minute of the special magistrate's order describes itself as such; it does not, it is true, contain every allegation necessary to found the jurisdiction of the special magistrate to make the order. But it is clear that no presumption can be made against the jurisdiction of the special magistrate to make the order because the document which is merely a minute of the order lacks allegations necessary to found the order. I agree with the conclusion of the Full Court of the Supreme Court of New South Wales that it does not appear on the face of the proceedings, so far as it is revealed to the court, that the special magistrate's order was beyond his jurisdiction.

It is necessary for the appellant to adduce evidence in order to show what was the complaint stated to the appellant before the special magistrate upon which the order was made; because the fact necessary to prove that the order was an excess of jurisdiction does not appear from the minute of the special magistrate's order. It follows that the appellant is not entitled to the writ as of course. The Full Court of the Supreme Court, having taken the view that no excess of jurisdiction could be detected on the face of the proceedings before the special magistrate, refused the

(1) (1922) 2 A.C., at p. 159. (2) (1863) 2 S.C.R. (N.S.W.) 353.

H. C. OF A. 1939. YIRRELL v. YIRRELL.

writ. There is no ground for holding that it exercised its discretion to refuse the writ on any wrong principle.

In my opinion, the appeal should be dismissed.

Appeal allowed. Order of Supreme Court set aside except as to costs. Order absolute for writ of prohibition. Appellant to pay Lillian Ethel Yirrell's costs of appeal.

Solicitor for the appellant, *Alan E. Barnes.*

Solicitor for the respondents Lillian Ethel Yirrell and Neville Kingsbury Purcell Cohen, *N. K. P. Cohen.*

Solicitor for the respondent Arthur Blix, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.