[HIGH COURT OF AUSTRALIA.]

POSNER . . . . . APPELLANT;

AND

COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICTORIA) . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1946.

MELBOURNE, *Oct.* 7, 8; SYDNEY, *Dec.* 18.

Latham C.J., Starke, Dixon McTiernan and Williams JJ.

Husband and Wife—Maintenance of deserted wife—Enforcement in Victoria of order made in another State—Validity of order—Order made in absence of husband—Process not served—Maintenance Acts 1928-1938 (*Vict.*) (*No.* 3722-4550) *Part IV., Div.* 3—*Married Women's Protection Act,* 1922 (*W.A.*) (*No.* 28 *of* 1922), *ss.* 2, 4, 5, 12, 14, 18—*Justices Act* 1902-1936 (*W.A.*) (*No.* 11 *of* 1902—*No.* 11 *of* 1936), *ss.* 56, 57, 135.

In 1941 an order for the payment of a weekly sum for the maintenance of his wife was made against the defendant by a court of summary jurisdiction at Perth (W.A.), where he then resided. The defendant did not appear, but the summons in the proceedings was indorsed with a statement that he had been served personally. In fact he had not been served, and he had no knowledge of the proceedings until January 1946. In that month the defendant, who had come to reside in Victoria, was proceeded against in a court of petty sessions at Melbourne under Part IV., Div. 3, of the *Maintenance Acts* 1928-1938 (Vict.), and, notwithstanding an objection on his behalf that the Western-Australian order had been made without jurisdiction, an order was made against him in accordance with Part IV., Div. 3, for the enforcement of payment of the arrears due under the Western-Australian order.

Held, by *Latham* C.J., *Starke, Dixon* and *McTiernan* JJ. (*Williams* J. dissenting), that the fact that the defendant had not been served with the summons in the Western-Australian proceedings did not render the order made in those proceedings null and void; under the *Justices Act* 1902-1936 (W.A.) the Western-Australian court had jurisdiction to determine the fact of service, and by reason of s. 57 of that Act the indorsement on the summons was sufficient evidence of service; the order, therefore, was not made without jurisdiction, and, unless and until set aside by appropriate proceedings in Western Australia, it could properly be made the subject of proceedings under Part IV., Div. 3, of the Victorian Act; and, by *Starke, Dixon* and *McTiernan*

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

JJ., that in the circumstances of the case the order of the court of petty sessions at Melbourne had been rightly made, but, by *Latham* C.J., that an order should not have been made against the defendant under Part IV. Div. 3, unless he had first been afforded a sufficient opportunity of taking proceedings in Western Australia to have the original order set aside, and he had not in fact been afforded such an opportunity.

Decision of the Supreme Court of Victoria (*Gavan Duffy* J.), affirmed.

APPEAL from the Supreme Court of Victoria.

On 24th October 1941 an order for the payment of £2 a week for the maintenance of his wife was made against the defendant, Mordka Hirsch Posner, by a court of summary jurisdiction at Perth (W.A.), where he then resided. The defendant did not appear, but the summons in the proceedings was indorsed with a statement that he had been served personally. The fact, however (according to evidence which was accepted in the proceedings hereunder mentioned), was that the defendant had not been served with the summons or any other notice and had no knowledge of the proceedings until January 1946. In that month, by a summons issued out of the Court of Petty Sessions at Melbourne at the instance of the Collector for Inter-State Destitute Persons for Victoria under Part IV., Div. 3, of the *Maintenance Acts* 1928-1938 (Vict.), the defendant (now residing in Melbourne) was called upon to show cause why the amount of £440 which had accrued due under the Western-Australian order should not be levied against him by imprisonment.

On the return of this summons the defendant's solicitor objected to the jurisdiction on the ground that, as the original order had been made without notice to the defendant, it was a nullity and could not be the subject of proceedings for enforcement under the Victorian Act.

On the hearing of the summons one John Mahoney, a clerk in the office of the Collector for Inter-State Destitute Persons, appeared to assist the court and was allowed to examine and cross-examine witnesses, notwithstanding the defendant's objection that he had no right to appear as he was not the complainant or a qualified practitioner appearing for the complainant.

The police magistrate who constituted the court took the view that "the order should be set aside only in Western Australia" and that it was not open to him to treat it as a nullity; he made an order for payment of the amount of the arrears by instalments, in default of payment defendant to be imprisoned for six months.

This order was upheld on proceedings by the defendant by way of order to review in the Supreme Court of Victoria.

From the decision of the Supreme Court the defendant appealed to the High Court.

Gillard, for the appellant. Part IV. of the *Maintenance Acts* 1928-1938 (Vict.) does not create new rights; it merely enables the enforcement of orders duly obtained in other States. The order now in question, having been made without service of process, was null and void (not merely voidable) because service was the basis of the jurisdiction of the Western-Australian court. Such an order can be formally set aside, or (at all events, if it is the order of an inferior court) it can simply be ignored. In Western Australia the courts could disregard the order, and it should not be given any greater effect in Victoria. [He referred to *Craig* v. *Kanssen* (1); *Cameron* v. *Cole* (2); *Marsh* v. *Marsh* (3); *In re the affairs of Hart* (4); *Buchanan* v. *Rucker* (5); *Ferguson* v. *Mahon* (6); *Larnach* v. *Alleyne* (7); *Pemberton* v. *Hughes* (8); *Rudd* v. *Rudd* (9).]

[DIXON J. referred to the *Law Quarterly Review*, vol. 47, pp. 386, 557, "Observance of Law as a Condition of Jurisdiction," by *D. M. Gordon*; *R.* v. *Smith* (10).]

[MCTIERNAN J. referred to *Ex parte Scealy*; *In re Rouse* (11).]

The fundamental provision in the Victorian Act is the definition of "order" in s. 59. It should not be read as including something which merely purports to be an order but which is in fact shown to be a nullity in the State in which it is made. Moreover, the Act should not be construed as enabling the enforcement of an order made in such circumstances as to be contrary to natural justice: Cp. *In re Jordison*; *Raine* v. *Jordison* (12); *Ex parte O'Sullivan*; *In re Craig* (13). Alternatively, if the order is enforceable in Victoria, its actual enforcement is a matter of discretion under s. 78 of the Act, and it was not a judicial exercise of the discretion to enforce the order without first affording the defendant an opportunity to apply to have it set aside in Western Australia. The police magistrate acted wrongly in allowing Mahoney to appear and take part in the proceedings. [He referred to *McGrath* v. *Dobie* (14); *Ritter* v. *Charlton* (15); *Justices Act* 1928 (Vict.), ss. 79, 88 (1), (2), (10), 97, 200.]

(1) (1943) K.B. 256, at p. 262.
(2) (1944) 68 C.L.R. 571.
(3) (1945) A.C. 271, at pp. 275, 276.
(4) (1943) 169 L.T. 60.
(5) (1808) 9 East 192.
(6) (1839) 11 Ad. & El. 179 [113 E.R. 382].
(7) (1862) 1 W. & W. (Eq.) 342.
(8) (1899) 1 Ch. 781.
(9) (1924) P. 72.
(10) (1867) L.R. 1 C.C.R. 110.
(11) (1927) 44 W.N. (N.S.W.) 20.
(12) (1922) 1 Ch. 440, at p. 465.
(13) (1944) 44 S.R. (N.S.W.) 291, at p. 298.
(14) (1890) 16 V.L.R. 646.
(15) (1904) 29 V.L.R. 558.

H. C. OF A. 1946. POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Gowans, for the respondent. As to the appellant's second ground, magistrates are entitled to regulate their own procedure and to hear whomever they choose (*Collier* v. *Hicks* (1); *Bhenke* v. *Wechsel* (2); *Busato* v. *Dempsey* (3); *Brennan* v. *Alexander* (4)). As to the first ground, the Western-Australian order is an " order " within the literal meaning of the definition in s. 59 of the Victorian Act, notwithstanding that it could be set aside in Western Australia. Part IV., Div. 3, of our Act does not purport to transfer the order (as if it were a foreign judgment) into Victoria and enforce it. It could have been enforced under s. 62 of our Act and the *Service and Execution of Process Act*. The purpose of Part IV., Div. 3, is merely to collect what appears to be due on a certificate : See ss. 74, 75, as to the duties of the Collector. The order is not a nullity which would be the subject of prohibition or would be impeachable in collateral proceedings. The Western-Australian court had the power to determine the jurisdictional fact of service, and on the material before it (though it now appears that that material was not in accord with the fact) it properly exercised the power. [He referred to *Pritchard* v. *Jeva Singh* (5); *Backhouse* v. *Moderana* (6); *Ex parte M'Evoy* (7); *Courtney* v. *Simpson* (8); *Ex parte Roach* (9).] Accordingly, even if the order is to be treated as a foreign judgment sought to be enforced as such in Victoria, the jurisdictional fact of service is not examinable in a Victorian court : See *Pemberton* v. *Hughes* (10), which was approved in *Salvesen or Von Lorang* v. *Administrator of Austrian Property* (11); and cf. *Becquet* v. *MacCarthy* (12), which was criticized in *Crawley* v. *Isaacs* (13); see also *Duflos* v. *Burlingham* (14). *In re the Affairs of Hart* (15) is distinguishable ; in that case there was no evidence that any notice of the proceedings had been served so as to enable the court to assume jurisdiction.

[STARKE J. referred to *Elkan* v. *De la Juveny* (16).]

If orders were examinable as suggested by the appellant, the legislation would be rendered almost useless. The proper place in which to attack the order is the place where it was made ; if the order was set aside in Western Australia, there would then be no " order " for the purposes of the Victorian legislation (*Bailey* v. *Welply* (17); *Wotherspoon* v. *Connolly* (18); *Riley* v. *Rule* (19)).

(1) (1831) 2 B. & Ad. 663 [109 E.R. 1290].
(2) (1885) 2 Q.L.J. 85, at p. 88.
(3) (1909) 11 W.A.L.R. 238.
(4) (1932) S.A.S.R. 237, at p. 239.
(5) (1915) V.L.R. 510.
(6) (1904) 1 C.L.R. 675.
(7) (1880) 6 V.L.R. (L.) 424.
(8) (1940) 57 W.N. (N.S.W.) 5.
(9) (1908) 25 W.N (N.S.W.) 103.
(10) (1899) 1 Ch. 781, at pp. 790, 796.
(11) (1927) A.C. 641, at p. 659.
(12) (1831) 2 B. & Ad. 951 [109 E.R. 1396].
(13) (1867) 16 L.T. 529.
(14) (1876) 34 L.T. 688, at p. 689.
(15) (1943) 169 L.T. 60.
(16) (1900) 26 V.L.R. 186.
(17) (1869) 4 Ir.C.L. 243,at p. 245.
(18) (1871) 9 Macph. 510.
(19) (1930) 26 Tas. L.R. 31, at p. 32.

[STARKE J. referred to *In re Low*; *Bland* v. *Low* (1).]

[Counsel referred to *Cheshire* on *Private International Law*, 2nd ed. (1938), p. 586; *Hogan* v. *Moore* (2); *Ruby Extended Tin Mining Co. Ltd.* v. *Woolcott* (3).]

Gillard, in reply. Where jurisdiction depends on service, cases in which there has been some form of service, but it is defective, are to be distinguished from cases where there has been no service at all. [He referred to *Ferguson* v. *Mahon* (4); *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 333; *In re E. & B. Chemicals & Wool Treatment Pty. Ltd.* (5); *Williams* v. *North Carolina* (6); *Ex parte Penglase* (7); *Mackenzie* v. *Manwell* (8); *In re Low*; *Bland* v. *Low* (9).]

Cur. adv. vult.

Dec. 18.

The following written judgments were delivered:—

LATHAM C.J. On 16th January 1946 Mordka Hirsch Posner was served in Victoria with a certificate of a maintenance order which had been made against him in Perth, Western Australia, on 24th October 1941. On the same day a demand was made upon him by the Collector for Inter-State Destitute Persons for payment of £438 arrears due under the order. On 18th January 1946 a summons (in the form prescribed by regulations made under the *Maintenance Acts* 1928-1938 (Vict.)) was issued calling upon him to show cause why he should not be imprisoned for failure to pay moneys in accordance with the order. Upon the hearing of the summons Posner satisfied the Court of Petty Sessions, Melbourne, that he had not been served with any process relating to the proceedings in Western Australia and that he had become aware only on 16th January 1946 of the order which had been made in Perth in 1941. The court was of opinion that the order was a nullity, but that under the Victorian Act it was bound to give effect to it, and it accordingly ordered that in default of payment of £440 arrears of maintenance the defendant Posner should be imprisoned for six months, the money to be paid in instalments of £150 forthwith and £2 5s. per week. The defendant took proceedings by way of order to review. *Gavan Duffy* J. held that the Western-Australian order was a nullity but that nevertheless it was enforceable in Victoria by reason of the provisions of the

(1) (1894) 1 Ch. 147, at p. 163.
(2) (1884) 6 A.L.T. 156.
(3) (1880) 6 V.L.R. (L.) 301.
(4) (1839) 11 Ad. & El. 179 [113 E.R. 382].
(5) (1939) S.A.S.R. 441.
(6) (1944) 325 U.S. 226, at p. 228 [89 Law. Ed. 1577, at p. 1580].
(7) (1903) 3 S.R. (N.S.W.) 680.
(8) (1903) 20 W.N. (N.S.W.) 18.
(9) (1894) 1 Ch. 147, at p. 160.

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Latham C.J.

Maintenance Acts. Posner now appeals to this Court from the order of the Supreme Court discharging the order nisi to review and affirming the decision of the magistrate.

The Victorian *Maintenance Acts* make provision for the enforcement in Victoria of orders for maintenance made in other States. Section 59 defines "order" as meaning "an order or judgment whereby any person is adjudged, ordered or directed to pay money . . . for or towards the support of any person." Section 70 provides that the Collector for Inter-State Destitute Persons, upon receiving from a Collector appointed in any other State the original or a duplicate or a certified copy or a certificate of an order, an affidavit in the form in the fourth schedule to the Act and a request that the order be made enforceable in the State of Victoria, shall attend before a justice and apply to have the order indorsed as provided by s. 71. Section 71 provides that upon such an application being made to a justice and upon production of the documents mentioned the justice, if satisfied that the person against whom the order is made is resident either temporarily or permanently within the State of Victoria, shall indorse the original or duplicate order or certified copy or certificate with a direction that the order be enforced within the State, and shall sign the indorsement. Section 72 provides that upon obtaining such indorsement the Collector shall serve a copy of the order, certified copy or certificate, and of the indorsement thereon, certified as correct, upon the person against whom the order was made and that "such order shall thereupon be and continue to be enforceable in Victoria." Section 73 provides that the Collector shall then be entitled to collect moneys under the order. Under s. 74 it is the duty of the Collector to remit moneys so collected to Collectors appointed in other States. Section 78 (as amended by Act No. 4154 s. 9) provides that any order made under Part IV. of the Act and any order made enforceable in the State by virtue of the provisions of that part may be enforced by a court of petty sessions or justices by distress and in default of or without ordering any such distress by imprisonment for such period as the court or justices may fix.

All the proceedings required by the *Maintenance Acts* were duly taken. The appellant Posner had his first opportunity of being heard when he was called upon to show cause why he should not be imprisoned for failure to comply with the order which had been made against him without his knowledge five years before. As already stated, an order for imprisonment in default of payment was made. Proceedings which bring about such a result require careful scrutiny.

The Western-Australian order was made under the *Married Women's Protection Act* 1922 (W.A.). Section 2 enables a married woman whose husband has been guilty of wilful neglect to provide reasonable maintenance for her or any of her children to apply for summary protection under the Act. Section 4 gives jurisdiction under the Act to all courts of summary jurisdiction. Section 5 provides that an order for protection under the Act may relieve the applicant from any obligation to cohabit with her husband; may grant to the applicant the legal custody of her children; and may direct the husband to pay such weekly or other periodical sum as the court may consider reasonable for the maintenance of herself and children. Section 14 provides that applications under the Act shall be made by complaint, and that the provisions of all laws relating to summary proceedings before justices shall apply to all such applications.

The effect of s. 14 is to introduce the provisions of the *Justices Act* 1902-1936 (W.A.) relating to summary proceedings before justices. Section 56 of that Act, dealing with summary proceedings upon complaints, provides :—

"A summons must be served upon the person to whom it is directed by delivering a duplicate thereof to him personally, or, if he cannot be found, by leaving it with some person for him at his last known place of abode," with a proviso relating to service by post. In relation to service by post s. 56 provides that " the magistrate may accept as proof of service " a certificate of the clerk of petty sessions of due posting of the summons as a prepaid registered letter. Section 57 is as follows :—

" (1) The service of any summons, where service has not been effected by post, may be proved by an indorsement on the summons, signed by the person by whom it was served, setting forth the day, place, and mode of service; or such person may depose to the service on oath at the hearing.

(2) The signature to an indorsement of service shall be prima facie evidence that the indorsement was signed by the person whose signature it purports to be.

(3) Any false statement in an indorsement of service shall render the person making the same liable, on summary conviction, to imprisonment, with or without hard labour, not exceeding six months."

In the present case service of the summons was proved by an indorsement, purporting to be signed by one D. Keiller, stating that on 17th October 1941 he served the appellant Posner with the summons by delivering a duplicate of it to him personally. This

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Latham C.J.

indorsement provided the evidence of service required by the Western-Australian *Justices Act*. Upon the proceedings taken in Victoria for the enforcement of the order it was found as a fact by the Court of Petty Sessions that the statement in the indorsement was false and that the summons had not been served upon Posner. This Court must deal with the case upon the basis of this finding of fact. The Western-Australian court, however, had before it the evidence of service which the statute precisely prescribed and therefore prima facie had authority to proceed with the case.

A court is not deprived of jurisdiction by the fact that false evidence is given before it, but it is contended for the appellant that the Western-Australian court has now been shown to have had no jurisdiction because the defendant was not in fact served with any process and had no notice of the proceedings. It is argued that the Victorian *Maintenance Acts* relate only to orders which really are orders, and not to what merely purport to be orders, and that the Victorian court had authority to inquire into the jurisdiction of the Western-Australian court. It is urged that the order was a nullity in Western Australia and that therefore the necessary basis of any proceedings in Victoria was wanting and that the indorsement of the copy order by the Victorian magistrate was an act done without authority, with the result that the order for imprisonment of which the appellant complains was made without jurisdiction.

The first question which arises is whether the service of the summons in Western Australia was a condition of jurisdiction of the court of summary jurisdiction, or whether the absence of service was an irregularity which makes an order voidable in appropriate proceedings but not void so as to be a complete nullity.

The words of s. 56 of the Western-Australian Act are imperative. They are " a summons must be served upon the person to whom it is directed." In *R.* v. *Smith* (1), the Court of Queen's Bench considered a provision that " every summons shall be served . . . upon the person to whom it is directed by delivering it to him personally, or by leaving it with some person for him at his last known or most usual place of abode." Justices convicted the defendant, there being evidence of service in accordance with the statute. It was held, however, that service had not in fact been made in accordance with the Act and it was said that therefore the justices " acted without jurisdiction." The conviction was therefore quashed. In *Mitchell* v. *Foster* (2) improper service of summons was held to render a conviction void. In *Marsh* v. *Marsh* (3) the

(1) (1875) L.R. 10 Q.B. 604.
(2) (1840) 12 Ad. & El. 472 [113 E.R. 891].
(3) (1945) A.C. 271.

Privy Council considered the distinction between procedural irregularities which render a judgment or an order void and those which render it only voidable. It was held that if there were an irregularity which had caused a failure of natural justice the irregularity made the order void, but that if the irregularity was not of this description it made the order only voidable. In the judgment of the Board it was said that there was an obvious distinction between obtaining judgment on a writ which had never been served and one in which there had been a defect in the service but the writ had come to the knowledge of the defendant. In the present case the order was obtained on a summons which had never been served. According to the reasoning in *Marsh* v. *Marsh* (1) it would seem that the order should be held to be void. The Court of Appeal has recently taken the same view of the effect of complete absence of service in two cases; first, *Craig* v. *Kanssen* (2), where it was held that failure to serve process where service is required renders null and void an order made against the party who should have been served and that he is entitled *ex debito justitiae* to have it set aside; and secondly, *In re the Affairs of Hart* (3). Similarly, in *R.* v. *North*; *Ex parte Oakey* (4), it was held that in the absence of notice of proceedings a tribunal (in that case the Consistory Court) "had no jurisdiction" to make an order (per *Bankes* L.J. (5)). On the other hand, in *Ex parte Hopwood* (6) and *In re Shropshire Justices*; *Ex parte Blewitt* (7), the fact that there had been no service of a summons was held not to affect the jurisdiction of justices. In *Fry* v. *Moore* (8) there was an order for substituted service of a writ which was held to be "a bad order." The result was that the writ was not properly served. *Lindley* L.J. said: "But then arises the question, whether the order for substituted service was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity. If it was the latter, it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived" (9). It was held that the

(1) (1945) A C 271.
(2) (1943) K.B. 256.
(3) (1943) 169 L.T. 60.
(4) (1927) 1 K.B. 491.
(5) (1927) 1 K.B., at p. 500.
(6) (1850) 15 Q.B. 121.
(7) (1866) 14 L.T. 598.
(8) (1889) 23 Q.B.D. 395.
(9) (1889) 23 Q.B.D., at p. 398.

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Latham C.J.

defendant had waived the irregularity by taking certain steps in the action.

It is difficult, if not impossible, to reconcile all the decisions upon this question, but in the present case, in my opinion, sure ground is to be found in the answer to the next question which arises. If it be conceded that service of process is a condition of jurisdiction it is still necessary to determine whether the responsibility of determining whether process had been served has been committed to the tribunal by which the challenged judgment or order was made. In *Colonial Bank of Australasia* v. *Willan* (1) it was said in a well-known passage :—" There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes " (2). In *R.* v. *Nat Bell Liquors Ltd.* (3) Lord *Sumner* referred to " the not infrequent confusion between facts essential to the existence of jurisdiction in the inferior Court which it is within the competence of that Court to inquire into and to determine, and facts essential thereto which are only within the competence of the superior Court." See also *Amalgamated Society of Carpenters & Joiners (Australian District)* v. *Haberfield Pty. Ltd.* (4) and *R.* v. *Commissioner of Patents* ; *Ex parte Weiss* (5). Thus though service of process may be a condition of jurisdiction of a court, the question as to whether there has been service of process or not may be a matter to be decided by that court itself. Provisions conferring such authority upon a court are, for reasons which readily suggest themselves, much more usual than provisions which leave such a question outstanding for binding decision in collateral proceedings in some other jurisdiction : See *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (6).

Was it within the competence of the court of summary jurisdiction in Western Australia to inquire into and to determine the fact of service ? In my opinion the provisions of the Western-Australian *Justices Act* 1902-1936 show that it was intended that that court should consider and determine questions of service. In the first place, s. 56, which provides for the method of service, provides

(1) (1874) L.R. 5 P.C. 417.
(2) (1874) L.R. 5 P.C., at p. 442.
(3) (1922) 2 A.C. 128, at p. 158.
(4) (1907) 5 C.L.R. 33.
(5) (1939) 61 C.L.R. 240.
(6) (1938) 59 C.L.R. 369, at p. 391.

that the magistrate may accept as proof of service a certificate of the clerk of petty sessions. This provision shows that it is the duty of the magistrate to consider whether or not service has been proved. Section 57 provides that the service of any summons " may be proved by an indorsement on the summons " etc. This reference to proof of service is plainly a reference to proof in the proceedings before the justices. Section 135 provides that, if at the time and place appointed by the summons for hearing and determining a complaint the defendant does not appear when called " and proof is made to the justices, in manner hereinbefore prescribed, of due service of the summons upon the defendant a reasonable time before the time appointed for his appearance," the justices may either proceed ex parte or issue their warrant. These provisions, in my opinion, show that it was intended that the Court of Petty Sessions should itself determine whether the summons had been duly served. The decision that a summons has been duly served may be right or it may be wrong, but the court had jurisdiction to decide the matter. The jurisdiction to decide is not a jurisdiction to decide only if the court decides rightly : *R.* v. *Nat Bell Liquors Ltd.* (1).

The court of summary jurisdiction in Western Australia had before it the evidence of service which was sufficient under s. 57 of the *Justices Act.* The court had jurisdiction in respect of the subject matter of the complaint—leaving the wife without proper maintenance—and in respect of the persons to the complaint—the wife and husband. There was complete evidence of service as required by the statute under which the court acted, and, accordingly, in my opinion, the court had jurisdiction to deal with the case, and it cannot be held that the order made was a nullity. The order is, in my opinion, good until it is set aside in proper proceedings. The *Married Women's Protection Act,* s. 12, provides that a court of summary jurisdiction may, on the application of a wife or husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time alter, vary or discharge the order made under the Act. This section provides means whereby Posner, if he satisfies the court in Western Australia that he was not served with the summons in the prior proceedings, may get the order set aside.

It is argued, however, that even if the order is not a nullity in Western Australia, it should not be recognized in Victoria as a valid order and be made enforceable under the Victorian *Maintenance Acts* because recognition and enforcement of an order made without any service of process is not permitted by the principles of private international law with respect to the recognition of foreign judgments.

(1) (1922) 2 A.C., at pp. 151, 152.

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Latham C.J.

Our courts will not recognize and enforce a judgment of a foreign court where the proceedings of the foreign court are contrary to natural justice (*Ferguson* v. *Mahon* (1), per *Denman* C.J.). " When it appears, as here, that the defendant has never had notice of the proceeding, or been before the Court, it is impossible for us to allow the judgment to be made the foundation of an action in this country " : *Pemberton* v. *Hughes* (2), per *Vaughan Williams* L.J., who gives as an example of procedure contrary to natural justice " a case where there had been not only no service of process, but no knowledge of it " : *Rudd* v. *Rudd* (3).

The proceedings in the Victorian court, however, were not an action upon a foreign judgment. The Victorian Act provides means for collecting moneys due under an order made in another Australian State. When the moneys are collected they are forwarded to the State in which the judgment was given and are then paid out to the persons entitled to receive them. The Act requires the magistrate to indorse the order or the copy or certificate of an order when specified documents are produced to him. At that stage the person against whom the order is made is not present and has no opportunity of challenging the order, and the magistrate has no means whatever of knowing whether or not the order was made under circumstances which might be contrary to natural justice. The duty of the magistrate in signing an indorsement which makes the order enforceable is ministerial and not judicial. There is no room, in my opinion, for the application of the principles of private international law at this stage. When the indorsement has been made and notice has been given to the person against whom the order was made the result is that the order is enforceable in Victoria (s. 72). The only conditions which must be satisfied in order to produce this result are those specified in the statute. There is no warrant in the terms of the statute for adding to these conditions further conditions derived from rules of private international law relating to the recognition of foreign judgments.

But, though an order is made enforceable, execution does not issue upon it as a matter of course. Application to a court is necessary before the order can actually be enforced. If the intention of the statute was that an order which had become " enforceable " should be enforced by distress or imprisonment as of course, there would be no reason for requiring an application to a court in which the person affected is allowed to show cause why the order should not

(1) (1839) 11 Ad. & El. 179, at p. 183 [113 E.R. 382, at p. 384].

(2) (1899) 1 Ch. 781, particularly at pp. 796, 797.

(3) (1924) P. 72.

be so enforced. The contrary view is that the court of Petty Sessions was bound as a matter of course to make an order for enforcement by distress or imprisonment. But the first opportunity which a defendant has of contesting his liability in any way is when an application is made to the court for an order for enforcement by distress or imprisonment. Section 78 of the *Maintenance Acts* draws a distinction between the enforceability of the order and the actual enforcement of the order. The relevant words are " any order made enforceable in this State by virtue of the provisions of this Part, may be enforced by a court of petty sessions or justices by distress and in default of distress by imprisonment." Under the earlier provisions the order has already been " made enforceable " (s. 70 (1) (iii)). But the question whether it shall actually be enforced arises only when an application is made under s. 78. The words " may be enforced " can be interpreted so as to allow the court a discretion. Otherwise the court would act mechanically and whenever an order had been indorsed would be bound to make some order for enforcement either by distress or by imprisonment. In my opinion it was intended that on this, the first occasion upon which a defendant can be heard, he should have the opportunity of contesting the propriety of making an order for enforcement of the order made against him in the other State, and accordingly that the Victorian court should exercise a discretion in accordance with the circumstances of the case.

In this case the defendant satisfied the court that he had had no notice whatever of the proceedings in Western Australia. In such circumstances it was wrong to make an order directing the defendant to pay £150 forthwith and in default of payment for imprisonment for six months. This order should be set aside. But it would not be fair to the wife simply to decline to enforce the order. In my opinion the husband should be given an opportunity of applying in Western Australia to have the order of the Western-Australian court set aside. If he succeeds in that application, no question will arise under the *Maintenance Acts*. If he fails in such an application or does not take advantage of such an opportunity, the Court of Petty Sessions can then deal with the matter as it thinks proper. In my opinion this Court should allow the appeal, set aside the order of the Supreme Court and the order of the Court of Petty Sessions, and remit the case to the magistrate for rehearing. Upon such rehearing it will be open to the defendant to make an application for a reasonable adjournment so that he can take in Western Australia such proceedings as he may be advised.

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

STARKE J. Appeal from a judgment of the Supreme Court of Victoria discharging an order nisi to review an order of the Court of Petty Sessions at Melbourne enforcing an order for maintenance made in Western Australia.

The *Married Women's Protection Act*, 1922 of Western Australia provides that a married woman might apply for summary protection in certain cases to any court of summary jurisdiction. In 1941 Esther Posner complained to justices that her husband Mordka Hirsch Posner, the appellant, had been guilty of wilful neglect to provide reasonable maintenance for the complainant on a day within the period prescribed by the Act and on 17th October 1941 a summons was issued calling upon her husband Mordka Hirsch Posner to answer the application for protection on a named day at the Police Court, Perth, before a court of summary jurisdiction there sitting. Indorsed on the summons was a signed certificate that on 17th October 1941 Posner was served with the summons by delivery of a duplicate thereof to him personally at a named place. On 24th October 1941 a court of summary jurisdiction at Perth found that Posner had been guilty of wilful neglect to provide reasonable maintenance for her on the day named in the summons: and did "by consent"—

1. Relieve the complainant (Esther Posner) from any obligation to cohabit with the said Mordka Hirsch Posner.

Direct the said Mordka Hirsch Posner to pay to the Clerk of Petty Sessions, Perth the sum of two pounds per week first of such sums to be paid to the said Clerk of Petty Sessions, Perth on 31st October 1941 for the maintenance of the said complainant Esther Posner.

Both the complainant and her husband were resident in Perth at the time of these proceedings.

The *Married Women's Protection Act* provides that application under the Act should be made by complaint and that the provisions of all laws relating to summary proceedings before justices should apply to all such applications and that any court of summary jurisdiction might alter, vary or discharge any order or decrease or increase the amount of any payment ordered. The *Justices Act* 1902-1936 of Western Australia provides that a summons must be served upon the person to whom it is directed by delivering a duplicate thereof to him personally or if he cannot be found by leaving it with some person for him at his last known place of abode. And it is also provided that the service of any summons might be proved by an indorsement on the summons signed by the person by whom it was served setting forth the day, place and mode of service and that the signature to an indorsement of service should be prima-facie evidence

that the indorsement was signed by the person whose signature it purports to be.

Apparently the consent mentioned in the order is a document signed by the husband under which he undertook to pay to his wife £2 per week but which he now states that he did not understand and only signed because he was told that otherwise he would not get police permission to leave Perth.

The court of summary jurisdiction at Perth, which made the order, had jurisdiction over the subject matter of the complaint and over the parties thereto for both were resident in Perth. And service of process was proved in the manner allowed by the *Justices Act.* Moreover the order follows the form in the schedule to the *Married Women's Protection Act* which it is provided (s. 18) shall be valid and sufficient for the purposes of the Act.

No want of jurisdiction is apparent on the face of the order or the proceedings before the court of summary jurisdiction nor anything to suggest any want of regularity in the proceedings before that court.

In January 1946 the Collector for Inter-State Destitute Persons took proceedings to enforce the Western-Australian order pursuant to the provisions of Part IV. of the *Maintenance Acts* 1928-1938 of the State of Victoria. The Collector duly followed the procedure laid down in Part IV. of that Act and the Western-Australian order was indorsed in the manner prescribed by the Act and became enforceable in Victoria. And on 18th January 1946 a summons was obtained on the application of the Collector calling upon Mordka Hirsch Posner to show cause before the Court of Petty Sessions at Melbourne why the amount due under the Western-Australian order should not be levied by imprisonment.

The *Maintenance Act* 1928 as amended by the Act No. 4154 provides that any order made enforceable in Victoria by virtue of the provisions of Part IV. of the Act may be enforced by a court of petty sessions by distress and in default of or without ordering any such distress by imprisonment for such period as the court may fix. The court ordered that in default of payment of £440 arrears of maintenance by certain instalments that Mordka Hirsch Posner be imprisoned for six months An order to review this order was obtained from the Supreme Court of Victoria by Mordka Hirsch Posner but, as already stated, the order was subsequently discharged.

The main contention on the part of Mordka Hirsch Posner in the review proceedings was that the order of the court of summary jurisdiction in Western Australia was void on the ground that the complaint and summons were not served on Posner and that the

H. C. OF A. 1946. POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.). Starke J.

order was not therefore enforceable under Part IV. of the *Maintenance Acts* 1928-1938. The Police Magistrate who heard the summons to enforce the Western-Australian order found this fact in favour of Posner but was of opinion that the order was not void and could be set aside only in Western Australia. A void order, in this sense, is one, I apprehend, that has no effect or operation in law. Such an order is unenforceable in any legal proceedings and may be ignored (*Marsh* v. *Marsh* (1)), but it is also corrigible on appeal and subject to prohibition.

An order that discloses no jurisdiction upon its face is an order of this character (See for instance *Mitchell* v. *Foster* (2) ; *Brooks* v. *Hodgkinson* (3)). Orders, however, may not disclose any want of jurisdiction on their face and yet be without jurisdiction owing to some mistake of law or of fact. To this category may perhaps be assigned orders made " contrary to natural justice " or " so vicious as to violate some fundamental principle of justice " as if for example a suit was instituted and prosecuted to judgment in the absence of the party sued without summoning him or giving him any opportunity of defending himself (See *Marsh* v. *Marsh* (4) ; *Martin* v. *Mackonochie* (5) ; *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (6)). A party, however, executing the process of an inferior court in a matter beyond its jurisdiction is liable to action and cannot justify under such process whether he knows the defect or not but the magistrate is only liable if he knew of the defect of jurisdiction (*Calder* v. *Halket* (7) ; *Houlden* v. *Smith* (8) ; *Mayor etc. of London* v. *Cox* (9)). And an officer executing and obeying such process is protected (ibid).

Orders of this character are not, I apprehend, void in the sense already indicated for they have effect and operation in law though corrigible on appeal, where appeal lies, and are subject to prohibition.

Irregularities in procedure do not, it is clear, invalidate or make void orders within jurisdiction. When a court has jurisdiction over a proceeding and proceeds *inverso ordine* or erroneously that does not take away the jurisdiction of the court and make its order void. A party is not without remedy in such case : he may make application to the court itself or appeal where appeal lies (*Ex parte Story* (10)). But as the Lord Chief Justice *Coleridge* observed in *Martin* v. *Mackonochie* (11) what is procedure, and therefore, if wrong, matter of

(1) (1945) A.C. 271, at p. 284.
(2) (1840) 12 Ad. & El. 472 [113 E.R. 891].
(3) (1859) 4 H. & N. 712.
(4) (1945) A.C. 271.
(5) (1878) 3 Q.B.D. 730, at p. 739.
(6) (1938) 59 C.L.R. 369, at p. 384.
(7) (1840) 3 Moo. P.C. 28, at p. 78 [13 E.R. 12, at p. 36].
(8) (1850) 14 Q.B. 841 [117 E.R. 323].
(9) (1867) L.R. 2 H.L. 239, at p. 263.
(10) (1852) 8 Exch. 195 [155 E.R. 1317].
(11) (1879) 4 Q.B.D. 697, at p. 786.

appeal only; and what is jurisdiction, and if wrongly asserted, matter for prohibition, is almost impossible to define in general language. *Cotton* L.J., in the same case (1), said if the court of limited jurisdiction, in dealing with a matter over which it has jurisdiction, has fallen into an error of practice or of the law which it administers, this can only be set right by appeal, and affords no ground for prohibition. When, however, an Act of Parliament has imposed restrictions, as to the circumstances under which a court of limited jurisdiction is to act in matters otherwise within its jurisdiction, then, if the court of limited jurisdiction disregards the restriction so imposed, and acts in violation of the statutory restrictions, the party aggrieved has a remedy by prohibition, even although the court of limited jurisdiction may have put a construction on the Act, and there is an appeal from its decision. Orders made in violation of statutory restrictions and therefore without jurisdiction have already been discussed.

Irregularities in procedure in matters within jurisdiction are often called nullities but the proceedings are not void in the sense that they have no effect or operation in law and can be ignored. The procedure or order may be disallowed or set aside *ex debito justitiae* in some cases and the irregularity waived in others. It is unnecessary to discuss the line of demarcation between such irregularities in this case. *Smurthwaite* v. *Hannay* (2); *Anlaby* v. *Praetorius* (3); *Craig* v. *Kanssen* (4), however, illustrate irregularities that are often described as nullities though proceedings or orders in a superior court of record cannot be ignored and treated as of no effect or operation in law.

The order made in this case by the court of summary jurisdiction in Western Australia was within jurisdiction as already indicated. The service of process was not a condition or restriction upon jurisdiction of the court but the procedure whereby a party is brought before the court.

The *Justices Act* directs that service shall be effected but confides to the justices the determination of the question whether service has been effected in manner allowed by the Act. And service was in fact proved in manner allowed by the Act. So, it is plain that the proceedings before the court of summary jurisdiction were not "contrary to natural justice" or "so vicious as to violate some fundamental principle of justice."

Another objection taken to the order the subject of the order nisi to review was that the magistrate was wrong in permitting an

(1) (1879) 4 Q.B.D., at p. 735.
(2) (1894) A.C. 494.
(3) (1888) 20 Q.B.D. 764.
(4) (1943) K.B. 256.

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Starke J.

unqualified person to appear for the Collector for Inter-State Destitute Persons. The magistrate should not, I think, have allowed an unqualified person to conduct the proceedings but the matter is to some extent within his discretion and does not invalidate the order which he made.

The appellant did not apply to the magistrate or to the Supreme Court to adjourn the Victorian proceedings so that he might apply to the court of summary jurisdiction in Western Australia to set aside or vary the order there made. And I can see no good reason for this Court making any order for that purpose.

The appeal should be dismissed.

DIXON J. The subject upon which Div. 3 of Part IV. of the *Maintenance Act* 1928 of the State of Victoria operates is an order made by a justice or justices of another State whereby a person now residing in Victoria is required to make a payment or payments, or some other provision, for or towards the support of another person. The person in whose favour the order operates must be a resident of the other State whence the order comes: See s. 59, definition of "order"; s. 70 (1) (i) and s. 71. I think that the references to an order so defined mean more than a piece of paper expressed to have such an effect. A document purporting to be an order of the required character, but absolutely void and of no legal effect in the State of origin, would not, I think, fill the description. On the other hand, the application of Div. 3 to an order of another State would not be excluded by the fact that under the law of that State some ground existed upon which at the instance of the party affected, the order might be set aside or quashed as improperly made.

In the present case the appellant, who is the party adversely affected by the supposed order, which comes from Western Australia, alleges that it is completely void because it was made in his absence and no summons was served upon him. He has obtained a finding that he had not been served with a summons and was not aware of his wife's application for an order. The finding was made by a Victorian magistrate, who sat as a Court of Petty Sessions to hear an application under s. 78 to enforce the order. The rules provide for a summons calling on the person against whom the order of another State is to be enforced to show cause why it should not be levied by distress and, in default of distress, by imprisonment (r. 5 and Form VII. in the regulations made on 3rd November 1930). Imprisonment may now be ordered in the first instance (s. 9 of Act No. 4154) and that is what the summons in this case seeks. Under Div. 3 the application of the Collector or Deputy Collector under

s. 78, made in this way on summons, affords the party against whom the order is to be enforced his only opportunity of contesting his liability under the order. Sub-section (1) of s. 78 confers power to enforce orders. But clearly enough there may be some circumstances which would make it wrong to issue a warrant of distress or of commitment. For instance, the amount due under the order might have been paid or the order might have been vacated in the State of origin since its despatch, or the despatch of the duplicate or copy, to Victoria. Hence the expression "may be enforced." If the complete invalidity of the Western-Australian order were established, that might be a reason why it should not be enforced in Victoria. It certainly would be a reason, if I am right in the view I have expressed that a purported order completely void at law is no order for the purposes of Div. 3. But, even if the Division does not permit the Victorian Court of Petty Sessions to pass upon the validity of a document transmitted as an order, it might be right to defer the enforcement of a document impugned as bad in order to give the party adversely affected an opportunity of applying in the State of its origin to have it quashed or set aside. And that might be a proper exercise of discretion, even although the order was not void but only voidable.

The order in the present case appears upon its face to have been regularly made. It is true that it does not recite either the summoning or the appearance of the defendant, but that is not necessary and it is expressed to be an order by consent. It appears from his evidence that the defendant did in fact agree with the solicitor obtaining the order to pay the weekly sum stated therein, but he says that he was unaware of the pendency of any curial proceedings and was not in fact served with a summons. A summons was issued and returned with a regular indorsement of service. The certificate of the Clerk of Petty Sessions under s. 19 of the *Inter-State Destitute Persons Relief Act* 1912-1931 (W.A.) certifies that the order was made after due proceedings and inquiry. Further, under s. 18 of the *State and Territorial Laws and Records Recognition Act*, 1901-1928 (Cth) the Victorian magistrate was bound to give to the Western-Australian order such faith and credit as it has by law or usage in Western Australia, that is assuming that the order was proved as required by that Act.

In these circumstances, unless it were clearly shown that the Western-Australian order was, under the law of that State, completely void, it would not be right that the application to the Victorian court for its enforcement should be dismissed out of hand for the reason only that the evidence before the Victorian court led it to the

H. C. OF A. 1946. POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.). Dixon J.

conclusion that in Western Australia the summons had not in fact been served, as the magistrate making that order had believed. Under s. 57 of the *Justices Act* 1902-1936 (W.A.) the indorsement of service already mentioned provided sufficient proof and, if false, the person making it exposed himself to penal consequences. The question whether, upon proof by a preponderance of evidence that in fact service did not take place and the order was made in the absence of the appellant and without notice to him, the order is to be considered completely void depends upon the interpretation of the Western-Australian *Justices Act*. In deciding whether that Act means that convictions or orders shall be void altogether if, through non-service or otherwise, an opportunity to be heard has not been given to the party adversely affected, great weight must be given to the principle of the common law expressed in the Latin maxim about hearing the other side taken from the tag which *Coke* first quoted from *Seneca's Medea* : *Boswell's Case* (1). But attention should also be given to some distinctions which existed at common law in connection with the invalidation of convictions and orders by justices.

In the first place, it must be remembered that such convictions and orders might be quashed on certiorari for error appearing on the face of the record whether going to jurisdiction or not; and for certain kinds of error though not so appearing, called error in fact. In other words, a conviction or order may be liable to quashing by the writ, although it is not a nullity that may be ignored for all purposes but is binding or effective for all or some purposes until so quashed or otherwise set aside or discharged. Such a conviction or order may be described as not void but voidable. It is apparent that the distinction between a void order and a voidable order could not be material upon certiorari, and, consequently, cases decided under the writ are not to be relied upon as authorities upon the absolute invalidity of orders and convictions. In certain statutes, however, provisions were included taking away the writ in the case of convictions or orders thereunder except, according to the construction such provisions have received, when an order was made without jurisdiction, and decisions under those statutes might be more relevant.

In the next place, it must be borne in mind that a conviction or an order of justices in or out of sessions was required, on pain of invalidity or invalidation, to show certain matters on its face, among which was the fulfilment of all conditions going to jurisdiction. Now, as to service, it was clearly settled that orders need not show

(1) (1605) 6 Co. Rep. 46, at p. 52a [77 E.R. 326, at p. 331].

affirmatively that the party prejudiced appeared or was duly summoned, though there is a good deal of authority that in the case of a conviction it must so appear, the decisions not, however, being uniform (*R.* v. *Clegg* (1); *R.* v. *Austin* (2); *R.* v. *Venables* (3); *R.* v. *Alkington* (4); *R.* v. *Inhabitants of Oulton* (5); *R.* v. *Cotton* (6); *R.* v. *Hawker* (7)). It is, perhaps, interesting to see from these cases that when Lord *Camden* was Chief Justice his brethren of the King's Bench failed to reconcile him to the distinction between orders and convictions; and it will be further seen from them that, in the case of an order, if it affirmatively appeared that there was a bad summons or no summons at all and no appearance of the party against whom the order was made, the order was bad and liable to quashing: See *R.* v. *Venables* (3), per *Fortescue* J., and *R.* v. *Inhabitants of Oulton* (8); *R.* v. *Mallinson* (9); *Mitchell* v. *Foster* (10). That it was unnecessary for an order to show on its face either due service of a summons or the appearance of a party indicates that service or voluntary appearance was not regarded as a jurisdictional fact.

In the third place, important distinctions should be noticed which were maintained in actions of trespass to the person or to goods or of trover or the like for acts done in execution of convictions or orders. The rules in relation to mesne and final process in the common law courts supplied an analogy in cases of convictions or orders by justices. One such rule was expressed by *de Grey* C.J. in *Parsons* v. *Loyd* (11): an action for trespass against a party suing out a *ca. re.* which had been set aside. "There is a great difference" said the Chief Justice, "between erroneous process, and irregular (that is to say void) process, the first stands valid and good until it be reversed, the latter is an absolute nullity from the beginning; the party may justify under the first until it be reversed; but he cannot justify under the latter, because it was his own fault that it was irregular and void at first." Another rule was expressed by *Denman* C.J. in *Andrews* v. *Marris* (12). Speaking of one of the defendants, his Lordship said:—"He is the ministerial officer of the commissioners, bound to execute their warrants, and having no means whatever of ascertaining whether they issue upon valid

(1) (1721) 8 Mod. 3 [88 E.R. 3]; 1 Strange 475 [93 E.R. 643].
(2) (1725) 8 Mod. 309 [88 E.R. 220].
(3) (1725) 8 Mod. 377 [88 E.R. 268]; 2 Ld. Raym. 1405 [92 E.R. 415].
(4) (1726) Sess. Cas. 102 [93 E.R. 103].
(5) (1726) Sess. Cas. 146 [93 E.R. 148].
(6) (1733) 2 Barn. 241, 261, 282 [94 E.R. 474, 488, 501].
(7) (1733) Cas. T. Hard. 130 [95 E.R. 82]; see further, 1 Wms. Saund. 262c [85 E.R. 313].
(8) (1726) Sess. Cas. 146 [93 E.R. 148]
(9) (1758) 2 Burr. 679, at p. 681 [97 E.R. 509, at p. 510].
(10) (1840) 12 Ad. & El. 472, at p. 475 [113 E.R. 891, at p. 892].
(11) (1772) 3 Wils. K.B. 341, at p. 345 [95 E.R. 1089, at p. 1092].
(12) (1841) 1 Q.B. 3, at p. 16 [113 E.R. 1030, at p. 1036].

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Dixon J.

judgments or are otherwise sustainable or not. There would therefore be something very unreasonable in the law if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant. The law, however, is not so. His situation is exactly analogous to that of the sheriff in respect of process from a Superior Court; and it is the well known distinction between the cases of the party and of the sheriff or his officer, that the former, to justify his taking body or goods under process, must show the judgment in pleading, as well as the writ; but for the latter it is enough to show the writ only; *Cotes* v. *Michill* (1); *Moravia* v. *Sloper* (2). It was said, indeed, for the plaintiff, that these and the numerous other authorities which might be cited to the same effect all went upon the principle that the proceeding, however irregular, was the Act of the Court." Thus a conviction or order might be inefficacious in favour of a party but might have some operation as against the other party in favour of officers etc.

Again, it was the rule that, unless an order or conviction was bad upon its face or made altogether without jurisdiction, it stood in the way of an action against the justice until quashed or set aside. In *Goss* v. *Jackson* (3), which was an action against a justice and a constable for a seizure under a conviction by the justice, it was proposed by counsel at nisi prius to prove that the conviction had been made without hearing the plaintiff and without the issue of a summons. Thereupon, says the report, "Lord *Kenyon* interrupted him, and said . . . he could not in this action inquire into the regularity or irregularity of it; it was sufficient that there was a conviction." Apparently Lord *Kenyon* considered that a failure to summon did not show want of jurisdiction or complete invalidity. In *Mason* v. *Barker* (4) *Erskine* J. would seem to have taken the contrary view, for he allowed proof of non-service for the purpose of invalidating a conviction drawn up in a statutory form without a recital of a hearing on summons or warrant; and this, perhaps, is the view taken in *R.* v. *Totnes Union* (5). It was the view of the effect of the *Metropolitan Building Act* 1855 adopted in *Labalmondiere* v. *Frost* (6). The cases of *Painter* v. *Liverpool Oil Gas Light Co.* (7) and *Turley* v. *Daw* (8) may be referred to as illustrating the different positions of a party and an officer when process is founded on a bad order. But the badness of the order in *Painter's Case* (7)

(1) (1682) 3 Lev. 20 [83 E.R. 555].
(2) (1737) Willes 30, 34 [125 E.R. 1039, 1041].
(3) (1800) 3 Esp. 198 [170 E.R. 586].
(4) (1843) 1 Car. & K. 100 [174 E.R. 730].
(5) (1845) 7 Q.B. 690 [115 E.R. 649].
(6) (1859) 1 El. & El. 527 [120 E.R. 1007].
(7) (1836) 3 Ad. & El. 433 [111 E.R. 478].
(8) (1906) 94 L.T. 216; 22 T.L.R. 231.

depended upon the view taken of the defendant company's statute, and the case ought not, I think, to be regarded as laying down a rule about the effect of non-service necessarily applicable to other statutes.

It must also be borne in mind that, when a party is entitled as of right upon a proper proceeding to have an order set aside or quashed, he may safely ignore it, at all events, for most purposes. It is, accordingly, natural to speak of it as a nullity whether it is void or voidable, and, indeed, it appears almost customary to do so. Further, the observation of Sir *Frederick Pollock* about the use of the word " void " in relation to contracts is even more true of its use in connection with orders and judgments :—" The use of the word *void* proves nothing, for it is to be found in cases where there has never been any doubt that the contract is only voidable. And as applied to other subject-matters it has been held to mean only *voidable* in formal instruments and even Acts of Parliament " (*Principles of Contract*, 10th ed. (1936), p. 56). These considerations explain the language used in *Ex parte Price Jones* ; *R.* v. *Evans* (1); *R.* v. *Farmer* (2) ; *Craig* v. *Kanssen* (3) and *Marsh* v. *Marsh* (4).

When there has been a failure of the due process of law at the making of an order, to describe it as void is not unnatural. But what has been said will show that, except when upon its face an order is bad or unlawful, it is only as a result of the construction placed upon a statute that the order can be considered so entirely and absolutely devoid of legal effect for every purpose as to be described accurately as a nullity. Modern legislation does not favour the invalidation of orders of magistrates or other inferior judicial tribunals and the tendency is rather to sustain the authority of orders until they are set aside and not to construe statutory provisions as meaning that orders can be attacked collaterally or ignored as ineffectual, if the directions of the statute have not been pursued with exactness.

It is now necessary to turn to the *Justices Act* of Western Australia. The order was made under the *Married Women's Protection Act* 1922, but s. 14 of that statute makes applicable all laws relating to summary proceedings before justices and it follows that it is the provisions of the *Justices Act* that govern the present question. The structure and arrangement of the *Justices Act* do not support the conclusion that non-service or bad service renders an order absolutely void. Part III. deals with jurisdiction ; Part IV. relates to general procedure

(1) (1850) 15 L.T. (O.S.) 142 ; 19 L.J. M.C. 151.
(2) (1892) 1 Q.B. 637.
(3) (1943) K.B. 256.
(4) (1945) A.C. 271.

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Dixon J.

and is so headed, and Part VI. to "proceedings in case of simple offences and other matters." Sections 56 and 57, which occur in Part III., prescribe respectively how service of a summons must be effected and how it may be proved. Section 135, which occurs in Part VI., provides that, if at the appointed time and place, the defendant does not appear when called and proof is made to the justices in manner thereinbefore prescribed (*scil.* by s. 57) of due service of the summons upon the defendant a reasonable time before the time appointed for his appearance, the justices may either proceed ex parte to hear and determine the case in the absence of the defendant or issue their warrant for his apprehension. By s. 147 a restriction is imposed upon the use of certiorari, but it is not taken away completely: See *Paley* on *Convictions* 9th ed. (1926), pp. 804 et seq. and *Paul's Justices of the Peace* (1936), pp. 426-427. On the other hand, there appears to be no express power in the justices to set aside orders made in the absence of the defendant and to rehear the complaint such as that dealt with in *De la Rue* v. *Brown* (1), and it has been said that justices have no inherent power of that kind (*Gregory* v. *Murphy* (2)). Moreover, the time for obtaining an order to review is limited, though, perhaps, now there is some elasticity: ss. 197 and 206 (*b*). On an order to review there is power to take fresh evidence: s. 205. A party against whom an order has been made without his knowledge may, therefore, encounter some difficulty in having it set aside or quashed. That, no doubt, is an argument for treating the *Justices Act* as intending that non-service of a summons should be fundamental to the validity of an order made in the absence of a defendant. It is not clear that, except for bad faith or want of jursidiction, certiorari will still go for non-service: Cf. *R.* v. *Smith* (3); *R.* v. *Farmer* (4); *Colonial Bank of Australasia* v. *Willan* (5). But, however that may be, it appears to be very difficult to say that the *Justices Act* means that for no purpose shall an order made ex parte in purported pursuance of s. 135 have any validity, if it turns out that service was not effected duly or at all. That is an interpretation which, I think, the statute cannot fairly bear. But, unless the order is altogether void and for every purpose, it appears to me to be impossible to say that Div. 3 of Part IV. of the Victorian *Maintenance Acts* do not apply to it. The appellant's contention that the order is not one that is enforceable under Div. 3 must, in my opinion, fail.

(1) (1913) V.L.R. 150.
(2) (1906) V.L.R. 71, at pp. 76, 77.
(3) (1875) L.R. 10 Q.B. 604.
(4) (1892) 1 Q.B. 637.
(5) (1874) L.R. 5 P.C. 417.

It was, however, argued that the principles governing the enforcement by suit of foreign judgments might be invoked for the purposes of Div. 3, particularly in reference to the " discretion " implied in the word " may " in s. 78 (1). Under those principles it was said that the present order ought not to be enforced. I am unable to accept the view that the principles in question have any application in the interpretation or in the administration of the provisions of Div. 3. These provisions are of a special character and were not intended to be restricted by the introduction of rules of private international law.

It would, however, in my opinion, have been open to the magistrate to defer making an order under s. 78 until the appellant had an opportunity of seeking relief in Western Australia from the order had he been asked to do so. Possibly, independently of the procedure which to some extent I have already discussed, s. 12 of the *Married Women's Protection Act* 1922 might be invoked in Western Australia on the footing that the evidence of non-service was fresh evidence, though, doubtless, it was not the kind of evidence contemplated by the framers of the section. If, however, there were a remission to the Victorian magistrate, and he were disposed to adopt the course of adjourning the application, it would be a question for his consideration whether he would impose terms, particularly as to costs. But, so far as I am concerned, I think that at this stage the matter ought not to be remitted for the purpose, inasmuch as the magistrate was not asked to adopt such a course.

A minor matter of procedure was argued before us. A gentleman, who was said to be an assistant collector, was permitted to appear before the magistrate in Melbourne on behalf of the Collector. It was objected to on behalf of the appellant who contends that it vitiates the determination of the magistrate. Assistant collectors may be appointed under s. 69 (1). There appears to be nothing inconsistent with Victorian practice in the magistrate's permitting the officer so to appear: *Paul's Justices of the Peace*, (1936), p. 215. As the proceeding was necessarily between residents of different States, it would seem to be a matter of Federal jurisdiction and, on that footing, s. 78 of the *Judiciary Act* would apply. But, even if that section should be construed as implicitly negativing the right of the parties to appear otherwise than personally or by counsel or solicitor it does not affect the Court's discretion where otherwise it possesses one and, in any case, the point involves no substantial miscarriage.

I would dismiss the appeal.

H. C. OF A. 1946. POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

McTIERNAN J. In the proceeding instituted by the respondent under s. 78 of the *Maintenance Acts* 1928-1938, the appellant alleged that the order made against him at Perth was a nullity for the reason that he was neither served with the complaint upon which that order was made nor received notice of the complaint. The magistrate went behind the order to investigate this allegation and found that it was true. However, the magistrate directed that the order made at Perth be enforced under s. 78. His decision was upheld by *Gavan Duffy* J. The appeal raises the question whether, upon the application under s. 78, the magistrate was entitled to go behind the order which the respondent sought to enforce to inquire into the question whether there had been due service or notice of the complaint and, if he were so entitled, whether, having sustained the appellant's allegation about service or notice of the complaint, he should have held that the order was a nullity and consequently not an order which he had any power to enforce.

The question is governed by the construction of s. 78 and the other provisions of Part IV. of the Act. The operative words of s. 78 are " may be enforced." The word " may " is in itself potential. The effect of these operative words is that it is made lawful for a court of petty sessions or justices, in Victoria, to enforce any order of either class mentioned in s. 78 by distress or in default of or without ordering any such distress by imprisonment for such period as the court or justice may fix. One class of orders are those made under the provisions of Part IV. These are orders made in Victoria. The other class are orders made enforceable in Victoria by virtue of the provisions of Part IV. These are orders made in other States. Section 78 confers jurisdiction upon the Victorian court of summary jurisdiction to enforce orders of both classes in the manner specified in the section. The only distinction which the section makes between these two classes of orders is that it provides that any order of the latter class shall be enforced only at the instance of the Collector for Inter-State Destitute Persons or his assistant. The jurisdiction conferred upon the court of petty sessions or justices by s. 78 is limited to the enforcement of the order.

The order sought to be enforced was good and regular upon its face. In my opinion the court has not jurisdiction under s. 78 to go behind that order in order to rip open the decision of the court which made it on any question involved in the making of the order : cf. *Ex parte Penglase* (1) ; *Ex parte Roach* (2) ; *R.* v. *Swindon*

(1) (1903) 3 S.R. (N.S.W.) 680. (2) (1908) 25 W.N. (N.S.W.) 103.

Justices (1); *R.* v. *Lancashire Justices*; *Ex parte Tyrer* (2); *Cook* v. *Cook* (3).

The proof of the service of the complaint which the *Justices Act* 1902-1936 of Western Australia required was before the magistrate who made the order sought to be enforced in Victoria. It is evident that such magistrate accepted that proof and found that there had been service of the complaint. The question whether the complaint had been served or the appellant had received notice of it might have been reopened in an appeal against the order to the competent court in Western Australia or in any other way in which it was competent to reopen that question under the laws of that State. But the magistrate before whom the application was made in Victoria to enforce that order was not entitled under s. 78 to reopen that question.

In the view which I take, that the jurisdiction of the magistrate under s. 78 did not extend to the question of service into which he inquired, it is not necessary for me to deal with any other question argued in the appeal. I think that the appeal should be dismissed.

WILLIAMS J. On 24th October 1941 the Court of Petty Sessions at Perth made an order under the *Married Women's Protection Act* 1922 (W.A.) that the appellant pay the sum of £2 per week to his wife. Section 14 of this Act provides that applications under the Act shall be made by complaint, and the provisions of all laws relating to summary proceedings before justices shall apply to all such applications and informations. Section 56 of the *Justices Act* 1902-1936 (W.A.) provides that a summons must be served by delivering a duplicate thereof to the defendant personally or if he cannot be found by leaving it with some person for him at his last known place of address, with a proviso for service by post. Section 57 provides that the service of any summons may be proved by an indorsement on the summons signed by the person by whom it was served setting forth the day, place and mode of service. The order of 24th October 1941 was made after the summons had been indorsed as having been served on the applicant personally at a given address on 17th October 1941.

The *Maintenance Acts* 1928-1938 (Vict.) Part IV., Div. 3, provide for enforcing orders for maintenance made in another State. Section 70 provides that the Collector upon receiving from a Collector appointed in any State other than Victoria the original or duplicate of an order made by a justice for such State signed by him, or a copy

(1) (1878) 42 J.P. 407, 408.
(2) (1925) 1 K.B. 200; 27 Cox C.C. 711.
(3) (1923) 33 C.L.R. 369.

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Williams J.

of such order certified as correct under the hand of the justice by whom such order was made, or a certificate of an order under the hand of the Clerk of the Court; an affidavit in the form of the 4th Schedule; and a request that the order be made enforceable in Victoria shall attend before a justice and apply to have such original or duplicate order certified copy or certificate indorsed as provided by s. 71. Section 71 provides that a justice if satisfied that the person against whom the order was made is resident in Victoria shall indorse such document with a direction that the order be enforced within Victoria. Section 72 provides that the Collector shall serve a copy of the order or certificate and indorsement upon the person against whom the order was made, and that such order shall thereupon be, and continue to be, enforceable in Victoria.

In January 1946 the steps prescribed by the *Maintenance Acts* were taken to make the order of 24th October 1941 enforceable in Victoria and the defendant was ordered but failed to pay to the Collector the sum of £438 then due for maintenance under the order. Section 73 provides that the Collector may take all such steps for the recovery of the money as might be taken by the person in whose favour the order was made. Section 78 provides that an order made enforceable in Victoria may be enforced by a court of petty sessions by distress and in default of or without ordering any such distress by imprisonment for such period as the Court may fix.

On 18th January 1946 a summons was issued by the Court of Petty Sessions at Melbourne calling upon the applicant to show cause why the order of 24th October 1941 should not be levied by imprisonment. On 6th March 1946 an order was made by that court that in default of payment of the sum of £440 arrears as therein mentioned, the applicant should be imprisoned for six months. At the hearing the applicant gave evidence, which the magistrate accepted, that he had not been personally served with the summons or otherwise received notice of the application before the order of 24th October 1941 was made. The objection was taken that this order was therefore made without jurisdiction and was void, but the magistrate overruled the objection on the ground that the order was valid in Victoria until set aside, and that it could only be set aside in Western Australia.

On appeal to the Supreme Court *Gavan Duffy* J. held that the order of 24th October 1941 was a complete nullity in Western Australia, but that it derived efficacy from the *Maintenance Acts* and the Collector was entitled to enforce the order in Victoria.

There are many recent authorities which show that a statute which creates an inferior court may contain provisions relating to matters

of procedure which are intended to be mandatory in the sense that they must be complied with as a condition precedent to the court having jurisdiction to make a valid order (*Howard* v. *Graves* (1); *McIntosh* v. *Simpkins* (2); *Alderson* v. *Palliser* (3); *R.* v. *North*; *Ex parte Oakey* (4) (these are all cases where a writ of prohibition was granted on the ground that the order was made without jurisdiction): *In re the Affairs of Hart* (5); *Galos Hired* v. *The King* (6)).

It is a fundamental principle of British justice that a party should have notice of any proceedings which are brought against him. In *In re a Debtor* (7) Sir *Wilfrid Greene* M.R. said: "It is no exaggeration to say that the practice in regard to writs and the requirements of the law in regard to the service of writs are, and have always been, regarded as matters *strictissimi juris*." In *R.* v. *North*; *Ex parte Oakey* (8) *Atkin* L.J. said:—"To my mind if a Chancellor seeks to exercise any coercive power over a parishioner, or anybody else who comes within the scope of a general citation, he must see that the person against whom the coercive jurisdiction is sought to be exercised has in fact received special notice that proceedings are being taken upon which an order may be made against him; and in the absence of a special citation of that kind it seems to me that there can be no power in the Chancellor to exercise any such coercive jurisdiction. I think, therefore, that the Chancellor in this case had no jurisdiction to order the vicar to pay the expense of the restoration or the costs of the proceedings. Under these circumstances it appears to me that the vicar is entitled to a prohibition, the order being a breach of the fundamental principle of law, that a person is entitled to have notice of a claim against him and to be heard before he can be deprived of his property. The order, being made without jurisdiction, was wholly without effect, and nothing could validly be done under it."

An order of a superior court is never void, but only voidable. An order of a superior court, which is made in the absence of a person who has not been duly served, has often been described in judgments of the highest authority as being null and void and so lacking in efficacy that it can be disregarded. The latest of these authorities appear to be *Craig* v. *Kanssen* (9); *Marsh* v. *Marsh* (10). I take the expression "null and void" where it occurs in these judgments in reference to a superior court to mean that the person against whom the order is made may disregard it in the sense that

(1) (1885) 52 L.T. 858.
(2) (1901) 1 Q.B. 487.
(3) (1901) 2 K.B. 833.
(4) (1927) 1 K.B. 491.
(5) (1943) 169 L.T. 60.
(6) (1944) A.C. 149.
(7) (1939) Ch. 251, at p. 256.
(8) (1927) 1 K.B., at p. 505.
(9) (1943) K.B. 256.
(10) (1945) A.C. 271.

H. C. OF A. 1946.

POSNER v. COLLECTOR FOR INTER-STATE DESTITUTE PERSONS (VICT.).

Williams J.

it is so fundamentally impeachable that he is entitled to have it set aside in the inherent jurisdiction of the court which made it *ex debito justitiae* if at any time it is sought to be enforced against him. The contrast between the order of a superior and that of an inferior court is well illustrated by comparing the statements of *Vaughan Williams* L.J. in *Pemberton* v. *Hughes* (1), with respect to a superior court, and in *Alderson* v. *Palliser* (2) with respect to an inferior court.

Section 56 of the *Justices Act* (W.A.) requires, with certain immaterial exceptions, that the summons *must* be served on the defendant personally. "Must" is a word of absolute obligation and occurs in a section which is concerned with a fundamental principle of justice. It is not merely directory. Compliance is essential to an effective hearing of the summons. Section 135 provides that when the defendant does not appear the justices, on proof of due service of the summons, may proceed ex parte to determine the case in his absence, but this does not give them jurisdiction where the defendant was not in fact served at all (*Ex parte Price Jones*; *R.* v. *Evans* (3); *R.* v. *Farmer* (4)). I adhere to what I said in *Cameron* v. *Cole* (5), that "where (as in the present case) service of a particular nature is required to give an inferior court jurisdiction, failure to effect such service will make all the subsequent proceedings null and void."

I am unable to agree with the learned judge that the order of 24th October 1941, though void when made in Western Australia, could acquire any efficacy in Victoria from the provisions of the *Maintenance Acts*. Those Acts provide machinery for the extra-territorial operation of orders for maintenance made in another State and appoint the Collector to enforce the order in Victoria as the statutory agent of the person entitled to the benefit of the order. The only point of substance upon which the justice has to be satisfied under s. 71 before indorsing the order with a direction that it is to be enforced in Victoria is that the defendant is resident temporarily or permanently in Victoria. The order then becomes and continues to be enforceable against the defendant in Victoria after he has been served with a copy of the order and indorsement by the Collector. The provision that the order is to continue to be enforceable in Victoria only means that it will be enforceable in Victoria whenever the defendant is in that State, although he may leave the State and subsequently return to it. These provisions cannot, in my opinion,

(1) (1899) 1 Ch. 781, at p. 796.
(2) (1901) 2 K.B. 833.
(3) (1850) 15 L.T. (O.S.) 142; 19 L.J. M.C. 151.
(4) (1892) 1 Q.B. 637.
(5) (1944) 68 C.L.R. 571, at p. 604.

have the effect of imparting any additional virility to the order to that which it had at the time it was made. They merely provide the procedure for its enforcement. The Act does not provide any procedure by which the defendant when served with the copy of the order and indorsement can apply to a court to stay the enforcement of the order in Victoria or have it set aside. The first opportunity that the Act gives the defendant of objecting to the order in a court in Victoria is when the Collector seeks to enforce the order in a court of petty sessions under s. 78. It is clear that at this stage the defendant must be entitled to raise some grounds of objection. It is admitted that he must be able to raise matters which have occurred subsequently to the order being indorsed in Victoria affecting his liability to pay the amount claimed wholly or in part. The authority of the court of petty sessions under the section is simply to enforce in Victoria the order made in another State. An order of an inferior court which is made without jurisdiction and void can be shown to be so in collateral proceedings (*Bonaker* v. *Evans* (1); *Revell* v. *Blake* (2)). The present proceedings are not even collateral proceedings. They are proceedings for the direct enforcement in Victoria of an order made in Western Australia. But as that order was void *ab initio*, it was completely devoid of legal effect and, as *Atkin* L.J. pointed out in *R.* v. *North*; *Ex parte Oakey* (3), a mere *brutum fulmen*. Just as in *Galos Hired* v. *The King* (4) there was nothing which the Acting Secretary to the Government could validly confirm so far as the sentence of death was concerned, so here there was nothing for the Court of Petty Sessions at Melbourne to enforce.

For these reasons I would allow the appeal, set aside the order of the Supreme Court, and make the rule nisi absolute.

Appeal dismissed with costs.

Solicitor for the appellant: *A. L. Abrahams.*

Solicitor for the respondent: *F. G. Menzies,* Crown Solicitor for Victoria.

E. F. H.

(1) (1850) 16 Q.B. 162.
(2) (1873) L.R. 8 C.P. 533, at p. 544.
(3) (1927) 1 K.B., at p. 506.
(4) (1944) A.C. 149.