[HIGH COURT OF AUSTRALIA.]

OPIE . . . . . APPELLANT;

AND

OPIE . . . . . RESPONDENT.

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

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SYDNEY, *Aug.* 2, 3; *Sept.* 13.

Dixon, McTiernan and Williams JJ.

Bankruptcy—Bankruptcy notice—"Final judgment"—"Action in which judgment obtained"—Judgment entered in Supreme Court pursuant to magistrate's certificate—Bankruptcy Act 1924-1950 (*No.* 37 *of* 1924—*No.* 80 *of* 1950), *s.* 52 (*j*)*—*Deserted Wives and Children Act* 1901-1939 (*N.S.W.*) (*No.* 17 *of* 1901—*No.* 17 *of* 1939), *s.* 13A.

Section 13A of the *Deserted Wives and Children Act* provides "(1) Where an order has been made under s. 7 for the support of a wife or child . . . the magistrate may grant a certificate . . . stating the amount due under the order at the date thereof; (2) The person entitled to receive the money ordered to be paid may file . . . such certificate in the Supreme Court . . . and the Prothonotary . . . shall enter judgment for such person for the amount stated to be due on the certificate. . . . Such judgment may be enforced in any manner in which a final judgment in an action may be enforced."

Held that the judgment so obtained, not being a final judgment recovered in an action, was not a final judgment within the meaning of s. 52 (*j*) of the *Bankruptcy Act* 1924-1950 (Cth.), and a bankruptcy notice could not be issued in respect of it.

Ex parte Chinery; *In re Chinery*, (1884) 12 Q.B.D. 342; *Onslow* v. *Inland Revenue Commissioners*, (1890) 25 Q.B.D. 465; *In re Binstead*; *Ex parte Dale*, (1893) 1 Q.B. 199; *In re a Bankruptcy Notice*; *Ex parte Official Receiver*, (1895) 1 Q.B. 609, applied.

Decision of the Federal Court of Bankruptcy (*Clyne* J.) reversed.

* The relevant provisions of s. 52 (*j*) of the *Bankruptcy Act* 1924-1950 are set out in the judgment of *Dixon* and *Williams* JJ., at pp. 371, 372 (*post*).

APPEAL from the Federal Court of Bankruptcy, District of New South Wales and the Australian Capital Territory.

On 4th October 1949, at the Children's Court, Ryde, a magistrate made, under the provisions of the *Deserted Wives and Children Act* 1901-1939 (N.S.W.), an order that James McDougall Opie should pay to his wife, Ida Opie, the sum of £10 a week for her maintenance and the sum of £2 a week for the maintenance of a child of the marriage. On 21st September 1950, as the result of two variations made by the Court of Quarter Sessions, Parramatta, of the order made in her favour, the wife had become entitled to maintenance at the rate of £11 a week, and also on the same date there were pending in the Children's Court, Ryde, an application by the husband to vary the order for maintenance and two summonses issued by the wife against the husband for disobeying the order for maintenance.

Under s. 13A (1) of the *Deserted Wives and Children Act* the wife obtained a certificate from a stipendiary magistrate in which were set forth particulars as to the name of the complainant and of the defendant; the court at which the order was made; the date of the order and to whom and for whom it was payable; the amounts so payable and the name of the person (Ida Opie) entitled to receive the money ordered to be paid; and continued: "It having been made to appear on oath, to the undersigned, that an order (particulars whereof are set out above) has been made under section 7 of the above Act, that default has been made by the defendant in making the payments directed by such order, and that an amount of more than £10 0s. 0d. is due thereunder, I do hereby certify that the amount due under the Order at the date hereof is £261 0s. 0d. (Two hundred and sixty one pounds).

Dated at Ryde this nineteenth day of September 1950.

S. C. H. Thompson.
(Stipendiary) Magistrate."

Indorsed on that document was a certificate dated 19th September 1950, by the Chief Clerk of the Supreme Court of New South Wales in which he certified "this to be a true copy of the judgment signed herein and filed of record in the office of the Supreme Court of New South Wales."

The wife then applied for the issue of a bankruptcy notice against her husband, and by a bankruptcy notice dated 20th September 1950, the husband was required, *inter alia*, to pay to his wife the sum of £261 12s. 6d. claimed by her as being due on a final judgment obtained by her against her husband in the Supreme Court of New South Wales dated 19th September 1950.

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In the hope of satisfying that judgment the wife, in October 1950, obtained a charging order nisi over 3,000 shares owned by her husband in a company styled The John Gilmour Co. Pty. Ltd., in liquidation.

The husband, by an application dated 21st September 1950, applied to the Federal Court of Bankruptcy to have the bankruptcy notice set aside on the grounds: (i) that the judgment entered in favour of the wife under s. 13A of the *Deserted Wives and Children Act* did not create a debt due by the husband to his wife, and did not make the wife a judgment creditor and accordingly the wife did not have a final judgment within the meaning of s. 52 (*j*) of the *Bankruptcy Act* 1924-1950, and (ii) that a judgment entered under s. 13A merely gave to the wife a further method of enforcing an order of maintenance and that the judgment itself retained the characteristics of the order, one of which was that it could be varied, suspended or discharged.

The husband deposed in an affidavit in support of the application that the certificate under s. 13A was issued " in respect of the same moneys " as were alleged to be due in the two summonses issued by the wife, and then pending, against him for not complying with the order for maintenance.

The husband's application was refused on 13th November 1950, and a sequestration order was made against him on 19th December 1950, the act of bankruptcy being that he had failed to comply on or before 15th November 1950, with the requirements of a bankruptcy notice served on him on 20th September 1950.

From those decisions the husband appealed to the High Court.

During the hearing of the appeal an affidavit tendered on behalf of the husband to show that in fact judgment was not entered until just prior to the said hearing, was rejected by the Court.

The relevant statutory provisions are sufficiently set forth in the judgment of *Dixon* and *Williams* JJ. hereunder.

H. Snelling (with him *R. G. Henderson*), for the appellant. A judgment entered under s. 13A of the *Deserted Wives and Children Act* 1901-1939, does not amount to a final judgment under s. 52 (*j*) of the *Bankruptcy Act* 1924-1946. A perusal of the *Deserted Wives and Children Act* as a whole and a consideration of the nature and extent of the obligations thereby imposed upon husbands show that it was not and could not have been the intention of the legislature that a judgment so entered was a final judgment because it might be enforced in any manner in which a final judgment in an action might be enforced and execution

could issue thereon: see particularly ss. 7, 8, 8A, 9-11, 21 (4), (6), (7), 21A. Section 13A was introduced into the Act by the amending Act of 1931, with other provisions for facilitating the enforcement of maintenance orders, together with provisions for retrospective variations of orders and otherwise enlarging the discretion of the court. It could not have been and was not the intention to allow the wife by unilateral ex parte act to nullify and defeat the husband's statutory right to variation and reconsideration of accrued obligations. If the judgment were final—(a) a wife could, immediately upon application for variation by a husband, defeat his right to ask for a retrospective variation by obtaining and registering a certificate; (b) a wife, who knew that her husband had been or was ill or had lost his position, and thought he might apply for a retrospective variation, could obtain a certificate without notice; (c) a wife who had committed adultery might obtain a certificate either before or after the making of an application for retrospective variation by the husband based on her adultery; and (d) a wife, every time her husband made default to the extent of £10, could apply for and be entitled to a certificate and immediately acquire an indefeasible right to the amount involved. The fact that the certificate is obtainable ex parte strongly tells against any intention thereby to change the nature of the husband's obligation or deprive him of statutory rights. The purpose of the section was not to change the nature and quality of the obligation but to give the wife better remedies in respect of her rights; for example, execution against land (as indicated by s. 13A (2)); against equities of redemption; right to charging orders under the *Judgment Creditors' Remedies Act* 1901; right to attach debts (ss. 181 et seq. of the *Common Law Procedure Act* 1899); and see Supreme Court Rule 188 as to the necessity of a final judgment before execution is issued. There is not any indication that the registration of a judgment is intended to supersede and merge the original order, for example, so as to preclude committal proceedings. The judgment is merely collateral and ancillary and as such is subservient to the principal obligation, that is, the order. As there are not any legislative provisions dealing with the control of the registering court over the judgment, the rule that every court has unlimited power over its own process applies, and such court would have an inherent right to vacate or amend the judgment if a magistrate at any time retrospectively varied the order. As to what is a final judgment: see *Beatty* v. *Beatty* (1) and *In re Henderson* (2). *Pepper* v. *McNiece* (3) was

(1) (1924) 1 K.B. 807, at p. 815.
(2) (1888) 20 Q.B.D. 509.
(3) (1941) 64 C.L.R. 642.

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based upon the express provisions of the *Moratorium Act* 1932-1939 (N.S.W.) and is distinguishable. In *Ex parte Diggleman* (1) the Supreme Court held that an application to vary a maintenance order was really an application to bring up again for consideration the complaint upon which the order was made. Registration of a judgment does not normally confer new or different substantive rights (*Davis* v. *Davis* (2); *Commercial Bank of Australia Ltd.* v. *Hope Tribute Mining Co.* (3)). On the face of the proceedings, and, in fact, no judgment was entered by the Prothonotary in accordance with the Supreme Court Rules promulgated 22nd March 1932. Entry of judgment involves some formal recording intended to be the act of the court. The judgment, if any, was not a judgment in an action. That requirement has been repeatedly stressed by the Court of Appeal in a long series of decisions (*Ex parte Chinery*; *In re Chinery* (4); *In re Binstead*; *Ex parte Dale* (5); *In re a Bankruptcy Notice*; *Ex parte Official Receiver* (6); *In re a Bankruptcy Notice* (7)). The amendment of the section by the insertion of the words " or final order " supports this argument.

H. Wilshire Webb (solicitor), for the respondent. A right to have a judgment entered up is provided by s. 13A of the *Deserted Wives and Children Act* 1901-1931 subject to the observance of the prescribed procedure. It clearly describes the right of the complainant by the use of the word " judgment " and, by the language used in the second paragraph of sub-s. (2), recognizes its origin as being different from ordinary judgments, but nevertheless expressly vesting it with the fullest possible characteristics of a final judgment. Under s. 21 a magistrate may vary, suspend or discharge an order, but, under s. 7 (1) an order may be made adjudging an allowance to be paid for a wife or child to take effect as from a date not earlier than three months immediately preceding the date of the order. An order varying the amount to be paid under the original order and fixing a new amount is still adjudging an allowance to be paid and is therefore caught by the provision. To hold otherwise would enable a magistrate on an application to vary an order to go back earlier than three months prior to the date of the original order. The suspension and discharge positions are different. " Discharge " is not adjudging an allowance, nor is " suspend ". Under sub-s. (6) of s. 21 discharge operates as from

(1) (1923) 23 S.R. (N.S.W.) 576, at p. 580; 40 W.N. 133, at p. 134.
(2) (1922) 22 S.R. (N.S.W.) 185, at p. 196; 39 W.N. 60, at p. 61.
(3) (1879) 5 V.L.R. 1, at p. 15.
(4) (1884) 12 Q.B.D. 342.
(5) (1893) 1 Q.B. 199.
(6) (1895) 1 Q.B. 609.
(7) (1907) 1 K.B. 478.

the date of adultery. But the effect of these things happening upon a judgment for arrears once entered and enforced is an irrelevant consideration. Any order, whether final or not, is likely to have unhappy and irremediable results if a variation or discharge or suspension is given retrospective operation. The only relevant rule made by the court under s. 13A was made on 22nd March 1932, and provides that upon the granting of a certificate under s. 13A (1) the Prothonotary shall enter judgment pursuant to s. 13A (2) in a "Register of Judgments for Maintenance—Deserted Wives and Children Act" and shall pay the prescribed fees (a) "on filing certificate" and (b) "on entering judgment". To "enter judgment" must mean to record in some way the judgment, and, so far as the Act is concerned, it leaves the matter to the Prothonotary to enter in the records of the court. In this case the judgment was entered in the causes book as a general record of the court. The rules prescribe merely a separate method of keeping such records, which is, apparently, designed to enable them to be kept under the one heading. The reference to the book as a "Register of Judgments" indicates that what it contains is a registered record of judgments as distinct from the actual judgments themselves. The actual judgment is entered at the time the prescribed fee is paid. It cannot be entered in the book until the fee is in fact paid and it must be entered in the book after it is entered generally. What has gone awry is merely a record of the court made afterwards. Section 13A (2) prescribes an entering by the Prothonotary of a nature different from that prescribed in the first part of the rule. That merely means making an entry. The entering of the judgment means the actual giving of the judgment which is to be entered in the register later: see the *Common Law Procedure Act* 1899 (N.S.W.), s. 133, and *Supreme Court Rules* 173 and 174. The Supreme Court has power to regulate its own procedure and practice: *Supreme Court Procedure Act* 1900 (N.S.W.), s. 14. Non-compliance with the rules does not render any proceeding void (*Lewington* v. *Scottish Union and National Insurance Co.* (1)). The certified copy of judgment is under the seal of the court and is made evidence by ss. 20, 21 of the Evidence Act 1898 (N.S.W.): see also *State and Territorial Laws and Records Recognition Act* 1901-1928, ss. 17-19. A point not taken in the court below is not available upon an appeal from that court. As stated in *McDonald, Henry and Meek's Australian Bankruptcy Law and Practice*, 2nd ed. (1939), at p. 109, "a court of bankruptcy will not, as a matter of course, inquire into the

(1) (1901) 18 W.N. (Eng.) 275.

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validity of a judgment debt, but only when there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice (*Re Flatau*; *Ex parte Scotch Whisky Distillers* (1); *Re Caulfield* (2); *Ex parte Kibble*; *Re Onslow* (3); *Re Howell* (4); *Re Vernon Arnfield* (5)) ". The fact that a judgment may be irregular is not a sufficient reason for going behind the judgment. A judgment is conclusive unless the consideration can be questioned (*Re Beauchamp* (6)). The procedure in respect of bankruptcy notices is shown in *McDonald, Henry and Meek's Australian Bankruptcy Law and Practice*, 2nd ed. (1939), pp. 628, 629 and *Bankruptcy Rules* 144-149. Section 13A of the *Deserted Wives and Children Act* was considered in *Ex parte Borg*; *Re Forrest* (7) and *Re Partridge*; *Ex parte Maidens-Fuller* (8). Even assuming that the judgment was not obtained in an action, it was obtained in a proceeding (*Re Black*; *Ex parte Jeffery* (9)). For the purpose of s. 52 (*j*) of the *Bankruptcy Act* a judgment in an action must include an order in a proceeding. Those expressions are interchangeable. There are innumerable proceedings as distinct from actions in which a judgment can be obtained: see, for example, the *Companies Act* 1936 (N.S.W.), s. 308, and the *Workers' Compensation Act* 1926-1951 (N.S.W.), s. 36 (5) (a), (b). The expressions " liability under a judgment . . . in an action " and (liability) " under . . . a maintenance order " were included in s. 121 (1) (c) of the *Bankruptcy Act* and referred to in *Re Carter* (10).

H. Snelling, in reply.

Cur. adv. vult.

Sept. 13.

The following written judgments were delivered:—

DIXON and WILLIAMS JJ. These are two appeals from orders of the Federal Court of Bankruptcy (*Clyne* J.) which have been heard together as they relate to the same matter. The first is from an order dismissing a motion to set aside a bankruptcy notice made on 13th November 1950 and the second is from an order sequestrating the estate of the appellant made on 19th December 1950. The appellant is the husband of the respondent.

(1) (1888) 22 Q.B.D. 83, at pp. 86, 87.
(2) (1901) 27 V.L.R. 588.
(3) (1875) 10 Ch. App. 373.
(4) (1915) H.B.R. 173; 84 L.J. K.B. 1399.
(5) (1925) 25 S.R. (N.S.W.) 517; 42 W.N. 160.
(6) (1904) 1 K.B. 572.
(7) (1950) 50 S.R. (N.S.W.) 217, at pp. 218-221; 67 W.N. 125, at pp.127, 128.
(8) (1945) 13 A.B.C. 185.
(9) (1932) 4 A.B.C. 157, at p. 160.
(10) (1941) 12 A.B.C. 193, at p. 200.

He deserted his wife and child and left them without proper maintenance. The respondent obtained orders for maintenance for herself and child under the provisions of s. 7 of the *Deserted Wives and Children Act* 1901-1939 (N.S.W.), these orders being varied from time to time. In September 1950 there were arrears of maintenance under these orders amounting to £261.

Section 13A of the *Deserted Wives and Children Act* is in the following terms:—"(1) Where an order has been made under section seven for the support of a wife or child and it is made to appear upon oath to a police or stipendiary magistrate that default has been made by the defendant in making the payments directed by the order, and that an amount of more than ten pounds is due thereunder, the magistrate may grant a certificate in the prescribed form stating the amount due under the order at the date thereof without requiring notice of the application to be given to the defendant. (2) The person entitled to receive the money ordered to be paid may file or cause to be filed such certificate in the Supreme Court or in any District Court having jurisdiction within the district wherein the defendant resides or wherein any real property of his is situate, and the Prothonotary or the registrar of such District Court, as the case may be, shall enter judgment for such person for the amount stated to be due in the certificate together with the fees paid therefor and for filing the same and entering the judgment. Such judgment may be enforced in any manner in which a final judgment in an action may be enforced. Rules of court may prescribe the practice and procedure in the Supreme Court and in District Courts to be observed in connection with the filing of certificates and entering up of judgments thereon in pursuance of this section, and the fees to be paid."

The Rules of the Supreme Court made on 22nd March 1932 provide that (1) upon the filing of a certificate granted under s. 13A (1) of the *Deserted Wives and Children Act*, 1901-1931, the Prothonotary shall enter judgment pursuant to s. 13A (2) of the said Act in a book to be kept by him and to be called the "Register of Judgments for Maintenance—*Deserted Wives and Children Act*"; (2) the following filing fees shall be paid (a) on filing certificate 1s. 6d.; (b) on entering judgment 6s.

On 19th September 1950 a stipendiary magistrate certified under s. 13A (1) that the above sum of £261 was due under the above orders on that date. The certificate of the magistrate was filed in the Supreme Court on the same day. On the following day the respondent issued a bankruptcy notice in the usual form calling upon the appellant within seven days after service of the

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notice to pay her the sum of £261 12s. 6d. claimed by her as being the amount due on a final judgment obtained by her against the appellant in the Supreme Court on 19th September 1950. The 12s. 6d. was apparently added for court fees. The appellant did not comply with the notice, but moved the Federal Court of Bankruptcy to set it aside.

The hearing of the matter proceeded upon the basis that judgment had been entered for the respondent pursuant to the rules of court. The only evidence before his Honour, however, consisted of a copy of the certificate of the magistrate and a notation thereon certified by the Chief Clerk of the Supreme Court as follows:—"I certify this to be a true copy of the judgment signed herein and filed of Record in the office of the Supreme Court of New South Wales. Dated this nineteenth day of September A.D. 1950". Section 20 of the *Evidence Act* 1898 (N.S.W.), so far as material, provides that evidence of any judgment of the Supreme Court may be given by the production of a copy thereof certified under the hand of the Chief Clerk. Under s. 133 of the *Common Law Procedure Act* 1899 (N.S.W.) and rule 174 of the Rules of the Supreme Court, it is not necessary before issuing execution to enter the proceedings upon any roll, but an incipitur may be made upon paper shortly describing the nature of the judgment and judgment may thereafter be signed and the costs taxed and execution issued as upon a judgment duly enrolled. In *Storer* v. *Smith's Newspapers Ltd.* (1) *Jordan* C.J., in reference to s. 133, said, speaking of a judgment after a trial, that "the present practice is that the postea is constituted by an informal note of the jury's verdict; and judgment is signed by procuring the stamping of a separate incipitur of judgment which is prepared from the informal postea". A duly certified copy of an informal incipitur of judgment is therefore now sufficient evidence of the judgment under the *Evidence Act* and entry on the roll is unnecessary. But the document signed by the Chief Clerk on 19th September 1950 is not a certified copy of an incipitur of a judgment. It is merely a copy of the certificate of the magistrate pursuant to which it became the duty of the Prothonotary to enter judgment in the "Register of Judgments for Maintenance—*Deserted Wives and Children Act.*"

Accordingly it would seem that there was no evidence of a judgment of the Supreme Court before his Honour and that the motion to set aside the bankruptcy notice should have succeeded on this ground. On the contrary, inasmuch as the Chief Clerk

(1) (1939) 39 S.R. (N.S.W.) 77, at p. 79; 56 W.N. 42, at p. 43.

certified that a document not amounting to a judgment was " the judgment signed herein ", it may be said that it appeared affirmatively that in point of law there was not a judgment. An affidavit was tendered on the part of the appellant with a view of showing that in fact no judgment was entered until upon the eve of the hearing of this appeal, but, in accordance with the practice of this Court, we refused to admit further evidence on the hearing of the appeal. The appellant did not take before the Bankruptcy Court the objection that no formal judgment existed, but there can be no suggestion that the point might have been met by further evidence and it therefore remains open on appeal. The objection depends upon what doubtless is a matter of form; yet, even if it stood alone, it must be fatal to the orders under appeal. But it does not stand alone. For the appellant relies upon the substantial objection that the judgment, had it existed, would not have been a final judgment or final order within s. 52 (*j*) of the *Bankruptcy Act* 1924-1950 (Cth.). That objection the appellant took upon the hearing of the motion to the Bankruptcy Court to set aside the bankruptcy notice.

His Honour dismissed the motion on its merits. He held that the judgment of the Supreme Court was a final judgment within the meaning of s. 52 (*j*) of the *Bankruptcy Act* 1924-1950 (Cth.) and that the bankruptcy notice had not been complied with. He extended the time for compliance, but the debt was not paid within the extended time. The respondent then filed a petition to sequestrate the appellant's estate, the act of bankruptcy alleged being failure to comply with the bankruptcy notice. Upon this petition the sequestration order under appeal was made. The substantial question on the appeal is whether the bankruptcy notice was valid. If it was, it is not disputed that the sequestration order was properly made. Section 52 (*j*) provides, so far as material, that a debtor commits an act of bankruptcy if a creditor has obtained a final judgment or final order against him for any amount, and execution thereon not having been stayed, has served on him in Australia . . . a bankruptcy notice under this Act, and the debtor does not, . . . either comply with the requirements of the notice, or satisfy the court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action or proceeding in which the judgment or order was obtained. It was contended for the appellant that the bankruptcy notice was invalid on several grounds. One ground was that the judgment to which the Chief Clerk certified

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was for £261, whereas the bankruptcy notice alleged a debt of £261 12s. 6d. But s. 53 (ii.) provides that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mis-statement. The appellant gave the respondent no such notice so that this ground vanishes.

The substantial ground is that the judgment of the Supreme Court was not a final judgment within the meaning of s. 52 (*j*). It was contended (1) that the judgment was simply machinery for enforcing an order under the *Deserted Wives and Children Act* and depended upon the existence of such an order. As such an order was capable of being varied, suspended or discharged under s. 21 of that Act, it was not a final order and the judgment in the Supreme Court entered pursuant thereto was not a final judgment; (2) the judgment was not a judgment recovered in an action and final judgment in s. 52 (*j*) of the *Bankruptcy Act* means such a judgment and none other. The first contention raises a difficult question, but we do not find it necessary to discuss it because we are of opinion that the appellant must succeed on the second contention. Section 52 (*j*) includes final judgments and final orders. Before final orders were included it had been held on numerous occasions that a final judgment on which a bankruptcy notice could be founded was a final judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established—unless there is something to show an intention to use the words in a more extended sense (*Ex parte Chinery*; *In re Chinery* (1); *Onslow* v. *Inland Revenue Commissioners* (2); *In re Binstead* (3); *In re a Bankruptcy Notice* (4)). A judgment entered in the Supreme Court pursuant to a certificate of a magistrate under s. 13A of the *Deserted Wives and Children Act* is not a judgment in an action. The solicitor for the respondent relied upon the concluding words of the first paragraph of s. 52 (*j*) " which he (the debtor) could not set up in the action or proceeding in which the judgment or order was obtained ", as indicating that the sub-section contemplates that a judgment within its meaning can now be obtained not only in an action but also in a proceeding and submitted that the judgment under discussion was obtained in a proceeding. We cannot accept this construction. In their ordinary natural signification the words refer to judgments in

(1) (1884) 12 Q.B.D. 342, at p. 345.
(2) (1890) 25 Q.B.D. 465.
(3) (1893) 1 Q.B. 199.
(4) (1895) 1 Q.B. 609.

actions and orders in proceedings. It would require clear words to induce a court to hold that the legislature intended so to extend the settled meaning of what constitutes a final judgment for the purposes of a bankruptcy notice. If the words " in the action or proceeding in which the judgment or order was obtained " mean, as we think they must mean, the action in which the judgment was obtained and the proceeding in which the order was obtained, they are decisive to show that the judgments to which s. 52 (*j*) refers are judgments in actions; and that, of course, accords with the construction placed upon the provision judicially. It is scarcely necessary to add that a judgment entered in pursuance of s. 13A of the *Deserted Wives and Children Act* is not an order.

Section 13A of the *Deserted Wives and Children Act* provides that the judgment entered pursuant to the section may be enforced in any manner in which a final judgment in an action may be enforced. It is unnecessary to decide whether the issue of a bankruptcy notice is a method of enforcing a judgment. Assuming that it is, the provisions of s. 13A of the *Deserted Wives and Children Act* could not determine the meaning of a final judgment for the purposes of s. 52 (*j*) of the *Bankruptcy Act*, and the judgment could not be enforced by the issue of a bankruptcy notice unless it is a final judgment within the meaning of that sub-section. It may be a final judgment obtained in a proceeding. But it is not a final judgment obtained in an action. It is not, therefore, a final judgment within the meaning of the sub-section.

For these reasons the appeals must be allowed and the orders of 13th November and 19th December 1950 set aside. In lieu thereof orders must be made setting aside the bankruptcy notice and dismissing the petition.

McTIERNAN J. In my opinion a judgment entered pursuant to s. 13A of the *Deserted Wives and Children Act* 1901-1939 (N.S.W.) cannot be the basis of a bankruptcy notice, because it is not a final judgment or a final order within the meaning of s. 52 (*j*) of the *Bankruptcy Act* 1924-1950 (Cth.).

Section 13A provides a statutory procedure for summarily turning the liability of a person in default under an order made by virtue of s. 7 of the Act for the support of his wife or child into a judgment debt. The person for whom the judgment is entered necessarily becomes a judgment creditor, because what the section directs to be entered is described as " judgment ". Under the order itself the liability of the defaulter is not strictly a debt which is within the province of bankruptcy, but when judgment is

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entered pursuant to s. 13A the person entitled to receive the arrears of maintenance can claim to be a creditor within the meaning of s. 52 (*j*) of the *Bankruptcy Act*. In the case of *Ex parte Moore; In re Faithful* (1), the Earl of *Selborne* L.C. said: "I cannot accede to the argument that the word 'creditor' in sub-s. 1 (*g*) (of s. 4 of the *Bankruptcy Act* 1883) means only a person who was a creditor before the judgment. In my opinion, it means a creditor under the judgment—a judgment creditor".

The entering of a judgment pursuant to s. 13A is an administrative act done by an officer of the court under the direction contained in the section. It is not the recording of any judgment, order or act of the court in which the judgment is entered. The duty of entering judgment is imposed by s. 13A when the certificate for which the section provides is filed in court. The entering of judgment is not incidental to anything in the nature of an action or any judicial proceeding begun in the court. The judgment is not a judgment in an action or an order in a proceeding in the court. The final judgment of which s. 52 (*j*) of the Commonwealth *Bankruptcy Act* speaks is a final judgment in the technical sense. Section 13A provides that judgment entered pursuant to it may be enforced in any manner in which a final judgment in an action may be enforced. When judgment is entered nothing more has to be done and execution can at once issue. That is not sufficient to give the judgment the essential character of a final judgment upon which a bankruptcy notice can be founded. In *Ex parte Chinery; In re Chinery* (2) the question was whether a garnishee order absolute was a final judgment within the meaning of sub-s. 1 (*g*) of s. 4 of the *Bankruptcy Act* 1883 (Imp.). It was argued in that case that the order was a final judgment because execution could at once issue against the garnishee for the amount necessary to satisfy the judgment debt. This sub-section of that Act did not contain the words "final order". In the case, the court distinguished between a judgment and an order and held that the garnishee order was not a final judgment. In drawing the distinction the court went into the question of what is a final judgment within the meaning of sub-s. 1 (*g*). The words "a final judgment" in s. 52 (*j*) have the same meaning. *Cotton* L.J. said: "I think we ought to give to the words 'final judgment' in this sub-s. 1 (*g*) their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established—unless there is something to show an intention to use the words in a more

(1) (1885) 14 Q.B.D. 627, at p. 632. (2) (1884) 12 Q.B.D. 342.

extended sense. Is there then anything in this sub-section which shows such an intention ? Undoubtedly, a garnishee order absolute is a final order in the proceeding in which it is obtained, but is it a final judgment in the sense which I have mentioned ? I think there is a good deal to be found in this sub-section which is against that view. It speaks of a ' final judgment ' obtained by a creditor against his debtor. To my mind this points to a liability of the debtor to the creditor being established in an action " (1).

In *Ex parte Moore* ; *In re Faithful* (2) the Earl of *Selborne* L.C. said : " To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio*, and a final adjudication between the parties to it on the merits ".

More light is thrown on the meaning of the words " final judgment " in sub-s. 52 (*j*) by the observations made by *Vaughan Williams* L.J. in the case of *In re G.J. ; Ex parte G.J.* (3) : " There is a series of cases in which it has been held that in order to support a bankruptcy notice there must be what is properly called a ' final judgment ' against the debtor for a sum of money, and that the mere fact that the creditor is entitled to issue execution against the debtor for a sum of money is not conclusive that there has been a ' final judgment ' against him within the meaning of sub-s. 1 (*g*) of s. 4 of the *Bankruptcy Act*, 1883. . . . What has been held essential to constitute a ' final judgment' within sub-s. 1 (*g*) is that there must have been something amounting to a cause of action which has been dealt with on the basis of a cause of action, at any rate to this extent, that the debtor has had the opportunity of setting up a counter-claim, set-off, or cross-demand. And, if the debtor has not had the opportunity of doing that, the judgment or order does not come within the term ' final judgment ' as used in sub-s. 1 (*g*). This is what I understand was meant by *Cotton* L.J. in *Ex parte Moore* (4) when he said that a ' final judgment ' is a judgment in an action between parties brought to establish some right of the plaintiff against the defendant ". A judgment entered under s. 13A of the *Deserted Wives and Children Act* lacks the characteristics which, according to these decisions, distinguish a final judgment which can be the basis of a bankruptcy notice.

It follows that the bankruptcy notice and the sequestration order made in consequence of the failure to comply with it should be set aside.

(1) (1884) 12 Q.B.D., at pp. 345, 346.
(2) (1885) 14 Q.B.D., at p. 632.
(3) (1905) 2 K.B. 678, at pp. 680, 681.
(4) (1885) 14 Q.B.D., at p. 635.

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It may be added that if s. 13A brought into existence a final judgment within the meaning of s. 52 (*j*) of the *Bankruptcy Act*, and the words of s. 13A relating to enforcement were not capable of extending to bankruptcy proceedings, that would not prevent the judgment being the basis of a bankruptcy notice. In the case of *In re a Bankruptcy Notice* (1) *Fletcher Moulton* L.J. said: "In my judgment an application for a bankruptcy notice is not a method of enforcing a judgment. It is the commencement of proceedings of far wider effect". In this view of the limits of the language of s. 13A the result of deciding that a judgment entered under that section cannot support a bankruptcy, is not to deprive a wife or child of any relief which the State legislature might have contemplated would be available by reason of the enactment of the section.

In my opinion the appeals should be allowed but without costs, and the following orders made, in lieu of the orders made by *Clyne* J.:—Motion to set aside bankruptcy notice allowed without costs; petition dismissed without costs; bankruptcy notice and sequestration order set aside.

Appeals allowed: Order dismissing motion to set aside bankruptcy notice set aside: in lieu thereof order that motion be allowed without costs: sequestration order dated 19th December 1950 set aside and in lieu thereof order that petition be dismissed without costs: no order as to costs of either appeal.

Solicitor for the appellant, *N. G. Rudd.*
Solicitor for the respondent, *H. Wilshire Webb.*

J. B.

(1) (1907) 1 K.B. 478, at p. 482.