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Dec. 8, 11.

CRAIG *v.* KANSSEN.

Practice—Setting aside order—Inherent power of court—Order a nullity —No service of summons.

A person who is affected by an order of the court which can properly be described as a nullity is entitled ex debito justitiae to have it set aside. Failure to serve process where service of process is required renders null and void an order made against the party who should have been served. The court can set aside such an order in its inherent jurisdiction and it is not necessary to appeal from it.

Quaere, whether an appeal from such an order, assuming it to be made in proper time, would be competent.

APPEAL from Croom-Johnson J.

On January 18, 1940, the plaintiff was granted an order giving him leave under the Courts (Emergency Powers) Act, 1939, to proceed to the enforcement of a judgment which he had obtained against the defendant on January 12, 1937. The order of January 18, 1940, was obtained on an affidavit of service on the defendant which stated that the deponent had served on the defendant a true copy of the summons asking for the order by posting it in a prepaid envelope addressed to the defendant at an address which was alleged to be that of the defendant's place of business and residence. The address stated was not the address for service given in the action, and the defendant was not residing or carrying on business at the stated address and he never received the summons. On or about September 27, 1941, the defendant first learned that the order had been made. On September 23, 1942, he took out a summons asking that the order should be set aside, the grounds given for the application being that no summons for leave to enforce the judgment had been served on him as required by the Rules of the Supreme Court. On October 12, 1942, the master made an order that the order of January 18, 1940, should be set aside. The plaintiff appealed. Croom-Johnson J. took the view that, if the application was made under r. 1, of R. S. C., Or. LXX (1), the procedure adopted was not correct, the only way of getting the order set aside under that rule being, not by application to the master, but by an

(1) By R. S. C., Or. LXX., r. 1: "Non-compliance with any of "these rules, or with any rule "of practice for the time being in "force, shall not render any "proceedings void unless the court

Reported by F. R. R. Burford, Esq., Barrister-at-Law.

appeal from the order for which leave would have had to be obtained to appeal out of time. It was also submitted to him that, quite apart from Or. LXX., r. 1, the defendant was entitled to have the order set aside ex debito justitiae as a nullity. With regard to that, Croom-Johnson J. held that no such argument could be entertained, on the ground that the summons, which he interpreted as being confined to an application based on an irregularity under Or. LXX., r. 1, did not ask for any such relief, and in his discretion, he refused leave to amend. The defendant appealed.

Gallop for the defendant. The order of January 18, 1940, ought not to have been made, for it was obtained on a summons which was never served on the defendant. It ought, therefore, to be set aside under R. S. C., Or. LXX., r. 1, on the ground that it was made irregularly. The application to set aside must be made within a reasonable time: Or. LXX., r. 2; and the defendant, in the circumstances, has complied with that condition. There is no direct authority on the point, but a judgment by default will be set aside for irregularity under Or. XXVII., r. 15. [He referred to *Hamp-Adams* v. *Hall* (1).] Alternatively, the order was a nullity, and the court should set it aside in exercise of its inherent jurisdiction: *Fishmongers' Company of the City of London* v. *Donnington Finance Co.* (2). In *Anlaby* v. *Praetorius* (3), a judgment which had been obtained in default of defence was set aside ex debito justitiae. In the present case there was also a vital defect in the order.

Raeburn for the plaintiff. This is not a case where the court would be justified in exercising its inherent jurisdiction and setting aside the order. *Fry* v. *Moore* (4); *Hewitson* v. *Fabre* (5). [LORD GREENE M.R. referred to *Smurthwaite* v. *Hannay* (6).] In regard to the question of irregularity, the master was not entitled to set aside the order of January 18, 1940. The defendant's proper remedy was by way of appeal: *In re St. Nazaire Co.* (7); *Preston Banking Co.* v. *William Allsup and Sons* (8). There is no authority which could justify

" or a judge shall so direct, but " such proceedings may be set " aside either wholly or in part as " irregular, or amended, or other- " wise dealt with in such manner " and upon such terms as the " court or judge shall think fit."

(1) [1911] 2 K. B. 942.
(2) [1941] W. N. 17.
(3) (1888) 20 Q. B. D. 764.
(4) (1889) 23 Q. B. D. 395.
(5) (1888) 21 Q. B. D. 6.
(6) [1894] A. C. 494.
(7) (1879) 12 Ch. D. 88, 101.
(8) [1895] 1 Ch. 141.

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the setting aside of the order of January 18, 1940, by the master, and the reversal of his decision by Croom-Johnson J. should be upheld by this court.

LORD GREENE M.R. On the view which I take of this case, it is not necessary to discuss in detail the arguments which have been addressed to us on the basis that the failure to serve the defendant was a mere irregularity. Had that been the true view of the case, we should have had to consider whether Croom-Johnson J. was right in deciding that the only method of attacking the order was by way of appeal, and if not, whether in all the circumstances the defendant ought to have relief under Or. LXX. I express no opinion on that question. The second argument was more serious in its nature. It was that the order was a nullity, and that, therefore, the defendant was entitled to have it set aside ex debito justitiae irrespective of Or. LXX., r. 1. Before I go more closely into that matter, it is desirable to examine the distinction between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity. No definition is to be found in the rule which draws a line between these two classes. Exactly where that line lies may not be easy to discover in some circumstances. The existence of the distinction, however, has been recognized in many authorities.

The first case to which I need refer is *Smurthwaite* v. *Hannay* (1). A number of plaintiffs had been joined in the action, the causes of action of the several plaintiffs were separate and distinct, and, accordingly, there was no authority for the joinder, but it was argued that the misjoinder was a mere irregularity and that, as the application (which was an application to stay the action) had not been made within a reasonable time, the action ought not to be stayed. Dealing with that contention Lord Herschell L.C. said (2): "I cannot accede to the argument urged for the "respondents, that even if the joinder of the plaintiffs in one "action was not warranted by the rule relied on, this was a "mere irregularity of which the defendants, by virtue of "Or. LXX., could not now take advantage. If unwarranted by "any enactment or rule, it is, in my opinion, much more "than an irregularity": and Lord Russell of Killowen, said (3): "This objection is not, in my judgment, well founded.

(1) [1894] A. C. 494.
(2) Ibid. 501.
(3) Ibid. 506.

"In my judgment, such joinder of plaintiffs is more than an "irregularity; it is the constitution of a suit as to parties in "a way not authorized by the law and the rules applicable "to procedure; and apart altogether from any express power "given by the rules, it is fully within the competence of the "court to restrain and to prevent an abuse of its process." In Daniell's Chancery Practice, 8th ed., vol. i., p. 708, it is stated: "A judgment may also be set aside for irregularity. "If the irregularity consists in non-compliance with one of "the rules, the court or a judge may either set it aside, or "amend or otherwise deal with it in such manner and upon "such terms as the court or judge may think fit." After referring to Or. LXX., r. 1, the author then proceeds: "A "judgment obtained by some step not warranted by the "rules, or capable of being sanctioned, is wholly void and "must be set aside," and he cites *Smurthwaite* v. *Hannay* (1). Later, in referring to the need to show that an application under Or. LXX. is made promptly, he says: "The . . . . "provision only applies where the irregularity is capable of "being waived under Or. LXX., r. 1, but where the proceedings "are wholly void, they may be set aside at any time. In "such a case no defence need be shown, but it is otherwise "where the court has a discretion as to setting aside." He cites for that *Hamp-Adams* v. *Hall* (2), and continues: "Where a judgment against a party has been signed irregularly, "it is worse than a mere non-compliance with the rules, and he "is entitled ex debito justitiae to have it set aside, and the "court has no power to impose terms upon him, except as a "condition of giving him his costs."

To return to the authorities, the matter was fully discussed in *Anlaby* v. *Praetorius* (3). It is true that there judgment had been obtained in default of defence, but the reasoning of the court was of general application and not based on any special rule relating to default judgments. Fry L.J. said (4): "It follows that the defendant had ten days from the delivery "of the statement of claim, or from the time limited for "appearance, within which to deliver his defence; and as the "writ was served on January 21, and the time limited for "appearance was January 28, the last day for delivering the "defence was ten days from January 28, and the judgment "entered on February 7 was premature and irregular. In

(1) [1894] A. C. 494.
(2) [1911] 2 K. B. 942.
(3) 20 Q. B. D. 764.
(4) Ibid. 768.

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"such a case the right of the defendant to have the judgment "set aside is plain and clear. The court acts upon an "obligation; the order to set aside the judgment is made "ex debito justitiae, and there are good grounds why that "should be so, because the entry of judgment is a serious "matter, leading to the issue of execution, and possibly to "an action of trespass. We were pressed with the argument "that Or. LXX., r. 1, gives a discretion to the court which "applies here . . . . But in the present case we are not "concerned with an instance of non-compliance with a rule, "nor with an irregularity in acting under any rule. The "irregular entry of judgment was made independently of any "of the rules; the plaintiff had no right to obtain any judgment "at all. I do not think, therefore, that the case comes within "r. 1, and we must consider what is the right practice without "reference to that rule. There is a strong distinction between "setting aside a judgment for irregularity, in which case the "court has no discretion to refuse to set it aside, and setting "it aside where the judgment, though regular, has been obtained "through some slip or error on the part of the defendant, in "which case the court has a discretion to impose terms as a "condition of granting the defendant relief. But although the "court is bound to set aside an irregular judgment ex debito "justitiae, it has always exercised a discretion as to costs, and "has imposed terms as a condition of the exercise of that "discretion—a common term being that the defendant shall "not bring any action." Lopes L.J. said (1): "I entirely "agree that Or. LXX., r. 1, does not apply here. It was meant "to apply where a party had made some blunder in his pro-"ceedings, as by delivering a pleading too late; but the "present case seems to me altogether outside the operation of "r. 1, because the judgment was entered prematurely, without "any right whatsoever. To obtain that judgment was a "wrongful act, and not an act done within any of the rules. "The defendant is, therefore, entitled ex debito justitiae to "have it set aside." In *Hughes* v. *Justin* (2), the parties had come to an agreement after the issue of the writ and as a result a payment had been made, but, in spite of that, judgment was signed for the full amount claimed. It was held that the case fell within the class referred to in *Anlaby* v. *Praetorius* (3); and the defendant had a right ex debito justitiae to have the

(1) 20 Q. B. D. 770.
(2) [1894] 1 Q. B. 667.
(3) 20 Q. B. D. 764.

judgment set aside. In *Hewitson* v. *Fabre* (1), the defendant, who was not a British subject, had been served out of the jurisdiction with the writ instead of with notice of the writ as the rules provide, and it was held, by Field J. and Wills J., that there had been no service and the proceedings were void ab initio. *Hamp-Adams* v. *Hall* (2) was another case of default in appearance, but it appears to have been treated, not as a mere exercise of jurisdiction under the rules relating to default, but as an exercise of an inherent jurisdiction in the court. The writ was served, but the date of service was not endorsed on it within three days as required by the rules. The plaintiff signed judgment in default of appearance and a verdict for damages was given by a sheriff's jury. It was held that non-compliance with the rule which required due endorsement of the date of service was not an irregularity which could be waived, and that the plaintiff, not having complied with the rule, was not entitled to proceed by default and the verdict and judgment must be set aside. Vaughan Williams L.J. said (3): "It is contended for the plaintiff "that the non-compliance with the rule has been waived "by the defendant. In my opinion it was impossible for the "defendant to waive the defect, for the result of the non-"compliance with the rule was that there was no writ on "which the plaintiff was entitled to proceed. Then it was said "that at the most the case should be regarded as one in which "there has been a mere irregularity, and Or. LXX., r. 2, was "called to our attention as shewing how the right of a party "to take advantage of a defect in the nature of an irregularity "may be limited or taken away. In my opinion that rule "has no application to the circumstances of the present case. "It is said that it is a very severe penalty to put on a mistake "of this kind that all the subsequent proceedings should be "set aside. I am not at all impressed by that argument. "Where proceedings are taken by a plaintiff in the absence "of the defendant it is most important that there should "be at every stage a strict compliance with the rules, and "therefore it is a reasonable and proper thing in the case of "proceedings by default to treat non-compliance with such a "rule as Or. IX., r. 15, not as a mere irregularity which can be "waived, but as a matter which prevents any further pro-"ceedings from being taken on the writ." The difficulty of

(1) 21 Q. B. D. 6.
(2) [1911] 2 K. B. 942.
(3) Ibid. 943.

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defining the precise line which separates an irregularity from a defect which makes the order a nullity is referred to in *Fry* v. *Moore* (1). There Lindley L.J. said (2): "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." Lopes L.J. said (3): "It is said that the proceeding was a nullity, "and no doubt the distinction between a nullity and a mere "irregularity in procedure is often a very nice one. But in "the present case I think there was only an irregularity." Accordingly, the application to set aside the judgment was refused.

Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled ex debito justitiae to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it. I say nothing on the question whether or not an appeal from the order, assuming it to be made in proper time, would be competent. The question, therefore, which we have to decide is whether the admitted failure to serve on the defendant the summons on which the order of January 18, 1940, was based was a mere irregularity, or whether it gives the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an order which has been made in those circumstances is to be

(1) 23 Q. B. D. 395.
(2) Ibid. 398.
(3) 23 Q. B. D. 399.

treated as a mere irregularity and not as something which is affected by a fundamental vice. The affidavit of service in the present case was on the face of it insufficient, and no order should have been completed on the strength of it. The provisions as to service of proceedings under the Courts (Emergency Powers) Act, 1939, in force at the time are to be deduced from what was then the only rule affecting the matter, namely, r. 7 of the Courts (Emergency Powers) Rules, 1939, which provided: "In any proceedings under the Act "in the High Court the procedure shall be regulated by Rules "of Court subject to the provisions of these rules." That refers us to Or. LXVII., r. 2, which, in a case where personal service is not requisite, provides that service will be sufficient if the document to be served is left at the address for service of the person to be served, or if it is posted in a pre-paid registered envelope addressed to the person to be served at that address. In the present case, as appears from the affidavit of service, the summons was not sent to the address for service of the defendant, so the rule was not complied with and the alleged service mentioned in the affidavit was no service at all. It was clearly a mistake and there can be no suggestion of bad faith, but there was no warrant or justification in the Rules of Court for obtaining the order of January 18, 1940, in such circumstances. That order is a nullity, and it must be set aside.

GODDARD L.J. I agree.

Appeal allowed.

The following order was made: *The defendant by his counsel asking for costs, the court orders that he do have his costs both here and below; but the court imposes as a condition of making that order that no action shall be brought by the defendant based on the fact that the order complained of was improperly obtained. The costs will be set off against the judgment debt.*

Solicitors for plaintiff: *Samuel Tonkin & Co.*
Solicitors for defendant: *G. F. Wallace & Co.*