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Re **Pritchard**, decd.; **Pritchard** v Deacon

Jurisdiction: England & Wales

Judge: LORD JUSTICE UPJOHN

Judgment Date: 14 February 1963

Judgment citation (vLex): [1963] EWCA Civ J0214-2

Reported In: [1963] 2 WLR 685 , [1963] CH 502 , [1963] 1 All ER 873 , [1962] 1 WLR 870 , [1963] 1 CH 502

Date: 14 February 1963

Court: Court of Appeal

Case History: Resolves appeal against Re Pritchard, decd.; Pritchard v Deacon

Case Analysis

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Legal issue Is an originating summons issued from the District Registry and not from the Central Office of the High Court a nullity for the purposes of the Inheritance (Family Provision) Act 1938, even if it was accepted and sealed by the District Registry within the prescribed six months?

Headnote
INHERITANCE LAW. FAMILY PROVISION. The case concerns an appeal by a widow against the dismissal of her summons for provision out of the estate of her husband under the Inheritance (Family Provision) Act 1938, due to incorrect issuance of the originating summons. The court had to determine whether the originating summons could be deemed valid, despite being stamped with the seal of the district registry rather than the central office of the high court, and whether the proceeding issued was a mere irregularity or a nullity. The court held that there had been a fundamental failure to comply with the statute and that the summons was a nullity.

Key Paragraphs

Highlight key paragraphs

> "I am not so sure that it is so difficult to draw a line between irregularities, by which I mean defects in procedure which fall within Order 70, and true nullities, though I agree no precise definition of either is possible., I think part of the difficulty is that the phrase "ex deblto justitiae" has been taken as being equivalent to a nullity, but, with all respect to Lord Greene's Judgment in Craig v. Kanssen, it is not., The phrase means that the plaintiff is entitled as a matter of right to have it set aside., [...] , So in many of the cases where there are defects of procedure, even if the defects are mere irregularities for the purposes of Order 70

> so that the Court has a discretion, it must follow that the applicant, if he is in nowise stopped by conduct or waiver, is entitled to say: "I am entitled under Order 70 to have the order made upon me set aside ex debito justitiae"....”

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Key Phrases family provision, 1938 Act, originating summons, district registry, nullity

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In the Matter of the Inheritance (Family Provision) Act 1938

and

In the Matter of the Estate of Alfred **Pritchard** Deceased

Pritchard

Plaintiff Appellant

and

Deacon and others

Defendants Respondents

[1963] EWCA Civ J0214-2

Before

The Master of the Rolls

(Lord Denning)

Lord Justice Upjohn and

Lord Justice Danckwerts

In The Supreme Court of Judicature

Court of Appeal

From Mr Justice Wilberforce.

MR MARCUS ANWYL-DAVLES (instructed by Messrs Wrentmore & Son, Agents for Mr J. A. Fussell, Caerphilly, Glamorganshire) appeared as Counsel for the Appellant.

MR KENNETH RUBIN (instructed by Messrs Jaques & Co., Agents for Messrs Gwilym Jones & Davies, Mountain Ash, Glamorganshire) appeared as Counsel for the Respondents.

THE MASTER OF THE ROUS: Alfred Prit chard died on the 14 th Kerch, 1961. His executor proved his will on the 10th April, 1961. He was not a rich man. His estate was only worth £914. But he left it by his will to others and made no provision for his widow. She had, however, a right under the Inheritance (Family Provision.) Act, 1938, to come to the High Court and ask for reasonable provision to be made for her maintenance out of his estates She had to apply within six months of the probate of the will. That is, she had to apply before 10th October, 1961, She went to a solicitor in Mountain As and he prepared an originating summons for issue in the High Court. The summons named Mrs **Pritchard** as the plaintiff and the executors as the defendants. It asked is reasonable provision to be made for the widow. Her solicitor prepared it and on Friday, 6th October, 1961, he took it along to the local office of the High Court, which was at Pontypridd. It is called the Pontypridd District Registry. The officer at the Registry accepted it and sealed it with the seal of the High Court, dated 9th October, 1961. It was stamped in a circle with the words: "Her Majesty's High Court of Justice, District Registry, 9th October, 1961, Pontypridd". You might well think that Mrs **Pritchard**'s solicitor had done his duty. He had issued the summons in the High Court and received the official seal with the date 9th October, 1961, just within the six months. The executors accepted it as being in order. Their solicitor (also of Mountain Ash) entered an appearance in the Pontypridd District Registry. The solicitors on both sides then agreed that the residuary legatees should be added as defendants. This was done and the residuary legatees duly entered an appearance. None of the solicitors saw anything wrong with the procedure: and on 11th December, 1961, they attended before the District Registrar. He directed them to file affidavits verifying the statements of fact and matters on which each party relied. The District Registrar then adjourned the summons to 11th January, 1962, for these affidavits to be filed.

Before the next hearing, however, the District Registrar made a discovery: and on 11th January, 1962, when the parties attended before him, the District Registrar told them that he considered the proceedings had been wrongly issued in the Registry and that he had grave doubts whether he had power to deal with the matter. The reason he said this was because of Order 54, Rule 4(b) of the Rules of the Supreme Court which says that an "originating summons shall be sealed in the Central Office and when so sealed shall be deemed to be issued". In short, Mrs **Pritchard**'s solicitor, instead of taking the summons to the District Registry of the High Court at Pontypridd, ought to have taken it to the Central Office of the High Court in London where it would have been stamped in a circle with the words "Supreme Court of Judicature, 9 Oct. 1961, Central Office, writ, appearance, judgment".

In order to rectify the error Mrs **Pritchard**'s solicitor on 6th March, 1962, took out a summons before the District Registrar in which he made an application "why this cause having irregularly issued from the District Registry instead of from the Central Office of the Honourable High Court of Judicature this cause should not be removed to the Central Office". After hearing arguments the District Registrar refused the application) He held that the proceedings were not merely irregular but a nullity. Shortly afterwards Mr Justice Wilberforce directed that the matter should be brought before the Chancery Division to review the decision of the District Registrar. On reviewing it on 5th June, 1962, he held the proceedings were a nullity and dismissed the summons.

This would not have mattered very much if Mrs **Pritchard**'s solicitor could have issued another originating summons in the Central Office. It would have only meant some costs thrown away. But it was far too late then to issue a summons in the Central Office. The six months' limitation had longsince expired. So Mrs **Pritchard** appeals to this Court asking that the error be rectified.

Apart from authority, I should have thought that the High Court had ample jurisdiction to correct the error. It ought not to penalise the widow for a technical slip, especially when the defendants have not been in the least prejudiced by it, and indeed never raised it themselves. The Court ought to allow any necessary amendment to put it right.

I know that it has often been said that, once a defendant has acquired the benefit of a Statute of Limitations, the Courts will never allow the plaintiff to amend his proceedings or rectify any mistakes he has made, if by so doing the defendant would be deprived of the benefit of the statute. But that is far too wide a proposition. True it is that the plaintiff will not be allowed to introduce a new cause of action or substitute a fresh case, or rectify errors of substance, but he will be allowed to correct technical defects. If a plaintiff has commenced a known genuine case before the time limit has expired, but has made a technical slip in his procedure, then he will be allowed to rectify the defect if it can be done without injustice to the defendant. I will prove this by reference to cases old and new.

First, the old cases. The subject was much discussed in the time of Baron Parke. He was as much inclined as anyone to insist on a strict adherence to the technical rules of law, but nevertheless even he was ready to allow a plaintiff to amend a technical flaw in his process if the action would otherwise be barred by the Statute of Limitations. Thus, if the plaintiff had omitted to join as co-plaintiff someone who ought to be joined or if the plaintiff sued in the wrong capacity, e.g. his personal capacity instead of as assignee in bankruptcy, the Court would not force him to issue a new writ if by so doing it would mean that the action would be barred

by a Statute of Limitations. It would allow him to amend so that he shouldnot be barred by the statute: see *Brown v. Fullerton* (1844) 2 D. & L. 251, 13 M. & W. 557, *Christie v. Bell* (1847) 16 M. & W. 669. The history of the matter is most instructive. Before the Uniformity of Process Act of 1832 the Courts would have granted such an amendment. Shortly after that Act the Judges resolved not to allow it any more. But "that resolution", said Baron Alderson "was found to be productive of great evil in cases when the action would otherwise be barred by the Statute of Limitations. We thought it right, therefore, to retrace our steps and in such case to allow an amendment": see *Calverwell v. Nugee* (1846) 4 D. & L. 30, 15 M. & W. 559. And the rule was ultimately settled, in the words of Baron Parke: "If the penalty be merely the loss sustained by the necessity of issuing a new writ, we determined not to assist the party; but if the penalty be the loss of the entire debt, we thought ourselves bound to help him": see *Christie v. Bell*, 16 M. & W. at p. 671, *Goodchild v. Leadham* (1848) 1 Ex. At p. 769.

Now the new cases. It seems to me that history is repeating itself. We have gone through a period when the Judges have been very strict and have refused to allow a technical defect to be amended, if it would deprive the defendant of a defence under the Statute of Limitations. I refer in particular to the cases from *Hilton v. Sutton Steam Laundry*, 1946 K.B. 65, to *Finnegan v. Cementation Co. Ltd.* 1953, 1 Q.B. 688, on which Mr Rubin so much relied. In the last cited case a widow sued for damages, under the Fatal Accidents Act under which the action had to be commenced with in a year of the death. She sued within the year, but by a slip she was described in the title of the writ and the endorsement "as administratrix". She was not allowed to amend so as to describe herself "as widow". She was penalised for the slip by finding her claim barred by the statute. Lord Justice Singleton said that "these technicalities are a blot on the administration of the law". Since that time, however, we have begun to retrace our steps. This Court recently in *Pontin v. Wood*. 1962, 1 Q.B. 594 allowed aplaintiff to amend a technical flaw, even though the period of limitation had run. The writ was indorsed with a claim for damages for personal injuries only: whereas it should have added "caused toy the negligence of the defendant". Lord Justice Holroyd Pearce said that the Court should not refuse its aid simply because a question of limitation arose. If the plaintiff sought the aid of the Court, hot to set up a new cause of action or a new case, tout to regularise "the procedure of a known genuine case commenced before the time limit expired but containing technical defects", then the Court should exercise its power to amend to help him.

I would approach this present case in the same spirit. The widow commenced a known genuine case before the time limit expired. There was a technical defect in the procedure but it can be rectified without the least injustice to the defendant. Mr Rubin frankly admitted that he had no merits. We can easily remedy the error by ordering this matter to be removed to the Central Office and I think we should do it.

What is the objection to this simple remedy? It is said that because this originating summons was issued in Pontypridd instead of in London, it was a nullity and nothing can be done with it. It cannot be removed to London. It cannot be amended. It is as though it had never been issued at all. Even if the mistake had never been discovered till after the Judge had decided the case, his judgment would have been a nullity. I must say I think this argument is a flat defiance of the Rules of Court. True it is that when the originating summons was sealed in the District Registry, there was a non-compliance with Order 54, Rule 4(b), which says it is to toe sealed in the Central Office. But Order 70, Rule 1 says, as plainly as it can, that "Non-compliance with any of these rules shall not render any proceedings void unless the Court or a Judge shall so direct, tout such proceedings may toe set aside either wholly or in part as irregular, or amended or otherwise dealt with in suchmanner and upon such terms as the Court or Judge shall think fit". Surely under the saving power of this rule, this originating summons could be removed from the District Registry to London. I could understand that if Mrs **Pritchard**'s solicitor had failed to comply with the statute (as distinct from the rules), then it might have been difficult to put it right. But he complied with every word of the statute. He had to apply to "the High Court" within six months and he did so. He applied to the office of the High Court at Pontypridd and the proper officer there accepted his application. The only mistake the solicitor made was to overlook an obscure rule in the White Book for which he might well be excused. After all, the solicitors on the other side overlooked it as well. And I am sure most of us would have done too. We all know that on the technicalities of procedure such as these, we rely on the officers of the Court to keep us straight. If the officer at Pontypridd had himself noticed the error when the summons was presented to him, he would no doubt have warned the solicitor of it: and the solicitor would have sent it to London and got it issued in time. As it was, the officer himself did not notice it. He sealed the summons and issued it. He made a mistake himself. Hence all this trouble. When an officer of the Court itself makes a mistake, the consequences should not be visited on the unfortunate litigant, but they should be remedied by the Court itself. It is not even as if it was a serious error. As Mr Anwyl-Davies said, it is very like the mistake which you make if you post a letter in the "country" side of the post box instead of the "London" side. The posting is valid enough. The Post Office accepts it and sends it to the destination. It may be delayed by the irregularity but it is not a nullity. Nor was this summons a nullity by being taken to the Pontypridd office instead of the Central Office.

But what about the cases? We were referred to many cases on nullity and irregularity. They are most confusingbecause of the loose way in which the word "nullity" is used: and the sooner it is put in its proper place the better. Often a proceeding has been said to be a "nullity" when it would have been more correct to say that if the irregularity has not been waived, it will be set aside ex debito justitiae: Thus, a judgment by default which is signed irregularly will be set aside ex debito justitiae: see *Anlaby v. Praetorius* (1888) 20 Q.B.D. 764, *Hughes v. Justin* (1894) 1 Q.B. 667, particularly when it is signed in defiance of an express rule: see *Hamp-*

Adams v. Hall, (1911) 2 K.B. 942; but it is not a nullity. Even when an order is obtained without due service of process, it is not a nullity (despite what was said in *Craig v. Kanssen* (1943) K.B. 256), but it will be set aside ex debito justitiae, if it has not been waived: see *Hewitson v. Fabre* (1888) 21 Q.B.D. 6, (where the headnote is wrong in saying it was a nullity), and *Wiseman v. Wiseman* (1953) p. 79. There are many cases which show that non-service can be waived: for if a man knows of the process and allows execution to be levied against him without complaint, and does not apply to the Court to set it aside within a reasonable time, he may be too late to get any relief: see *Holmes v. Russel* (1841) 9 Dowling 487 (where there is a most instructive judgment by Mr Justice Coleridge), *Emerson v. Brown* (1844) 8 Scott N.R. 215, Archbold's Practice (1866) pp. 211-2. The case of *Fry v. Moore* (1889) 23 Q.B.D. 395 seems to me a simple illustration where the defendant had not in fact been served and yet it was held that he had waived the irregularity. Even *Smurthwaite v. Hannay* (1894) A.C. 494, is not a case of nullity. There was a misjoinder of causes of action contrary to the rules then in force. Mr Finlay, Q.C. argued that it was "a mere iregularity and that the application was not made within a reasonable time within Order 70 Rule 2" (see p. 498). Note he only put it on Order 70 Rule 2. The House "rejected that argument (see pp. 501, 506); and went on to restore the order of the Queen's Bench (p. 495) which was clearly based on Order 70 Rule 1.

There was a non-compliance with the rules and the Court dealt with the proceedings by allowing the plaintiffs to amend and elect as to which claim they would proceed with. Clearly the proceedings were not held to be a nullity: because you cannot amend a nullity. No other cases give rise to any difficulty. In most of them, I am glad to say, you will find that the Courts have refused to set aside process for technical irregularities: see *MacFoy v. United African Company*, (1962) A.C. 160, *Pontin v. Wood* (1962) 1 Q.B. 5914. The only true cases of nullity that I have found are when a sole plaintiff or a sole defendant is Ltd. dead: see *Tetlow v. Qrela Ltd.* (1920) 2 Ch. 24, or non-existent, see Bros. *Lagard Bros. v. Midland Bank* (1933) A.C. 289 at p. 296: and I would like to see the word "nullity" confined to those cases in future.

The cases, therefore, do not compel us to hold that this originating summons was a nullity. And there are many reasons why we should not do so. If the proceedings here had been commenced by writ instead of originating summons, the writ could have been issued in the District Regis' and it would have been good. No rule that I know of can prevent a plaintiff issuing a writ, if he pleases, instead of an originating summons. If a writ is not a nullity, why should an originating summons be? Again, if the summons had been taken out in the Green's Bench Division instead of in the Chancery Division or in the County Court instead of the High Court, it would not have been a nullity. There are special provisions which would enable a transfer to be made to the Chancery Division. If such mistakes are not fatal, why should this mistake be so?

In ray judgment this originating summons was not a nullity. I would remedy the error by removing the proceedings to the High Court here in London and allowing the widow's case to be heard. I would allow the appeal accordingly.

My brethren take a different view. They think the defect is fatal and that the widow must be driven from the Judgment seat without a hearing. I greatly regret that this shouldbe so: quite recently in *Pontin v. Wood* (1962) 1 Q.B. at p. 609 Lord Justice Holroyd-Pearce recalled the proud boast of Lord Justice Bowen: "It may be asserted without fear of contradiction that it is not possible in the year 1867 fpr an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation". The present case, and some others which I have quoted, show that in this year, 1963, the assertion can no longer be made. We have not followed the handwriting of our predecessors. We have marred our copy-book with blots, and the more's the pity of it.

LORD JUSTICE UPJOHN

On the llth March, 1961, the plaintiff's husband died leaving a will which made no provision whatever for the plaintiff. The will was duly proved by the first two defendants, the executors named therein, on the 10th April, 1961. On the 9th October, 19bl, the plaintiff caused an originating summons to be issued in the Pontypridd District Registry entitled "In the High Court of Justice, Chancery Division. In the matter of the Inheritance (Family Provisions Act, 1938" against the first two defendants claiming such reasonable provision as the Court might think fit to be made for her out of the estate of her husband. This summons, of course, bore the stamp of the Pontypridd District Registry.

Under Section 2 of the Act of 1938, as amended by the Intestates Estates Act 1942, application has to be made within six months of the will being proved, that is to say, in this case before the 10th October, 1961, though the time can be extended in certain circumstances, which both sides agree do not, however, apply in this case.

The originating summons was duly served on the defendants and proceeded in the normal way; appearances were entered in the District Registry by the defendants and the District Registrar gave directions from time to time as to adding the residuary legatees as defendants and as to filing of affidavits. Letit be said at once in fairness to the defendants that no point was taken upon the propriety of these proceedings in the District Registry, but in January 1962 the learned Registrar felt doubts about the jurisdiction of the District Registry in this matter and he directed the matter to be raised and argued before him. After full argument he came to the

conclusion that the District Registry had no jurisdiction in the matter at all and that the proceedings were a nullity. This view appealed to the learned Judge, Mr Justice Wilberforce, who affirmed the view of the learned Registrar: see *Re* ***Pritchard***, 1962 Ch. 913.

Mr Anwyl-Davies for the plaintiff concedes that the originating summons was wrongly issued in the District Registry but he contends that this is a mere irregularity in the proceedings to which Order 70, rule 1 applies. That rule is in these terms: "Non-compliance with any of these rules shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit".

Mr Rubin for the defendants virtually concedes that if the rule is applicable the Court should validate the issue of the originating summons.

The rule is wide and my approach to it is that the Court should give it a wide construction. The whole question is whether it does apply or whether in truth the originating summons is a nullity. If a nullity the proceedings fail and it is too late to start again.

In view of the admirable arguments which we have heard from Counsel on both sides and the number of authorities to which we have been referred, I propose in the first place to say a few words about Order 70 and the authorities on it. Notwithstanding the breadth of the rule, it is quite clear that some proceedings are such that they are properly described as a nullity and the rule cannot be applied to them. This is clearfrom the case in this Court of *Craig v. Kanssen* (1943) 1 K.B., 256, and in particular the Judgment of Lord Greene, Master of the Rolls, who dealt with the cases at length. He concluded his review of the authorities by a reference to the case, also in this Court, of *Fry v. Moore*, 23 Q.B.D. 395 and he quoted the observations of Lord Justice Lindley and Lord Justice Lopes, both of whom pointed out the difficulty of attempting to draw an exact line between an irregularity and a nullity. He concluded by pointing out: "Those cases seem 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". In that case the defendant had never been served with any proceedings at all. It was not a case of some failure to comply with the rules relating to service but the defendant was in the position where he could say that he had no knowledge of any proceedings against him at all until he learnt of them and then made application to have the order set aside. Lord Greene, with whom Lord Justice Goddard agreed, held that the order obtained without any service upon the defendant was a nullity and must be set aside.

On the other side of the line, but illustrating the proposition that there are some proceedings so defective that they may properly be described as a nullity, is the case in the Judicial Committee of the Privy Council, *MacFoy v. The United African Co. Ltd.*, (1962) A.C. 1 £2. Lord Denning, who delivered the Judgment of the Board, on page 160 dealt with the distinction between a nullity which was wholly void and something which, although improper, was voidable and capable of being cured. He pointed out that if a proceeding is a nullity, it is incurable and cannot be validated by any subsequent act of the parties by waiver or taking some step in the action. It is unnecessary to have an order setting aside a nullity although it may be convenient to do so. In that case it was argued that the delivery of a statement of claim in the long vacationwas a nullity and invalidated all the subsequent proceedings. One is not surprised to find that the West African Court of Appeal decided that it was a mere irregularity and that that decision was affirmed in the Privy Council.

I am not so sure that it is so difficult to draw a line between irregularities, by which I mean defects in procedure which fall within Order 70, and true nullities, though I agree no precise definition of either is possible. I think part of the difficulty is that the phrase "ex deblto justitiae" has been taken as being equivalent to a nullity, but, with all respect to Lord Greene's Judgment in *Craig v. Kanssen*, it is not. The phrase means that the plaintiff is entitled as a matter of right to have it set aside. Let me quote an analogy. The right to wind up a company is by statute a discretionary right. Yet the books and authorities point out that in many cases as against the company an unpaid creditor on a winding up petition is entitled to a winding up order ex debito justitiae. This means no more than that, in accordance with settled practice, the Court can only exercise its discretion in one way, i.e. by granting the order sought. So in many of the cases where there are defects of procedure, even if the defects are mere irregularities for the purposes of Order 70 so that the Court has a discretion, it must follow that the applicant, if he is in nowise stopped by conduct or waiver, is entitled to say: "I am entitled under Order 70 to have the order made upon me set aside ex debito justitiae". Indeed, the only difference between a nullity and an irregularity, to which such a principle applies, is where, being a nullity, it is too late to start again.

I propose to mention one or two of the earlier authorities, for I think they are no more than examples of irregularities where the Court, exercising its discretion, was bound to set aside the proceedings because the irregularity was such that the applicant ex debito justitiae was entitled to it. Thus in the earliest case in date cited to us by Counsel, *Anlaby v. Praetorius*, 20 Q.B.D. 765, judgment was signed before the time limited for defence expired and so was held bad. Of course it was. It was said that the parties were entitled ex debito justitiae to have it set aside, and I would have thought (with all respect to the Judgment of Lord Justice Pry and lord Justice Lopes) that this was really a case where it could be said that there had been a mere failure to comply with the rules and that judgment was obtained in default of defence when in fact the

time for defence had not expired. But it was plain that the defendant was entitled to have the judgment set aside ex debito justitiae he not having waived the point or taken any further step in the action. Suppose in *Anlaby v. Praetorius* the defendant, instead of applying to set the judgment aside, had compounded with the plaintiff and agreed to pay off the judgment by instalments upon the terms that if he fell into arrear, the whole of the judgment debt should become due, could it be said that on the happening of that event the plaintiff could not proceed to enforce his judgment and levy execution. I should have thought in such a case that the defendant would have been held to have waived what would have been an irregularity and there would be jurisdiction in such a case under Order 70 to make such an order as might be just.

Then consider the next case, *Hewitson v. Fabre*, 21 Q.B.D., 6, where a writ was served on a foreigner abroad instead of giving him a notice. It was held by the Divisional Court to be void. In the recent case of *Grohoho v. Guinea Press Ltd.*, 1962, 3 W.L.R., 1471, which was before this Court, Lord Justice Diplock doubted that case, and I agree with him. It seems to me that in *Hewitson v. Fabre* there was an irregularity which could have been waived by the defendant. If instead of taking proceedings to have service of the writ set aside he had challenged the case on the merits and if he subsequently failed on that, could it possibly be said that the proceeding was a nullity? I do not think so. I think that was a rule to which Order 70applied but as the plaintiff had obtained judgment by an improper service and the defendant had not waived that in any way, he was, of course, entitled ex debito justitiae to have it set aside. I think that the case of *Hughes v. Justitiae* (1894) 1 Q.B. 667, is also on the same lines.

The next case to which we were referred was *HampAdams v. Hall.* (1911) 2 K.B. 942. A writ was validly served upon the defendant but it was not endorsed as required by the rules within three days of service. The plaintiff subsequently signed judgment in default of appearance and obtained a verdict for damages by a jury in the Sheriff's Court. Lord Justice Vaughan Williams held that the failure to endorse the date of service on the writ within three days rendered the subsequent proceedings a nullity in effect and set aside the subsequent judgment and verdict. The decision was quite right but with the greatest respect to the learned Lord Justice, I find it very difficult to understand how it can be suggested that a failure to endorse the writ as required by Order 9 Rule 15 can be treated as rendering the subsequent proceedings null and void. I should have thought that the obligation to endorse might have been waived by the defendant by taking some other step to challenge the judgment such as appearing in the Sheriff's Court and bringing evidence before the jury on the question of damages. Lord Justice Buckley, who sat with Lord Justice Vaughan Williams, probably decided the case on the ground of irregularity to which Order 70 applied, but he held nevertheless that it was a case where the Court ought to set the verdict and judgment aside for all the proceedings were taken against

the defendant in his absence. He was really entitled to an order under Order 70 ex debito Justitiae. I would respectfully agree with the observations of Lord Justice Younger upon this Judgment in the subsequent case of *Smythe v. Wiles*, (1921) 2 K.B. 66, at the foot of page 89.

We were referred to a number of other cases, all of them cases of irregularities and not nullities; it is unnecessarythat I should refer to them for they do not run counter to my general view that Order 70 should be widely construed, nor on the other hand do they throw any light on the question whether in the particular case before us the proceedings should be regarded as a nullity.

We were referred to *Smurthwaite v. Hannay* (1894) A.C. 495. It is not entirely easy to see whether their Lordships treated the matter as a nullity or irregularity. It seems to me that Lord Herschell, Lord Chancellor, at the foot of page 501 was really treating the improper joinder of the parties under the then rules as a nullity rather than an irregularity capable of cure by virtue of Order 70. He said: nI 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 plaintiffs by virtue of Order 70 could not now take advantage. If unwarranted by any enactment or rule, it is in my opinion much more than an irregubrity". And Lord Russell of Killowen at page 506 put it in very much the same way. I find that case very difficult but it is unnecessary to say more about it as the Rules of the Supreme Court nave been altered so that that precise point can never arise again.

I do not think that the earlier cases or the later dicta upon them prevent me from saying that in my judgment the law when properly understood is that Order 70 applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity and should be anxious to bring the matter within the umbrella of Order 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the party entitled to complain of the defect ex debito justitiae. Lord Denning in MacFoy pointed out that a useful test was whether the defectcould be waived. I agree with that as a good common sense test but I also agree with Mr Hubin that it cannot be a completely legal test, for until you have decided whether the proceeding is a nullity, you cannot decide whether it is capable of waiver.

The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes, (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by

filing in default, or cases where service has properly been dispensed with: see e.g. *Whitehead v. Whitehead* (1962) 3 W.L.R. 884. (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings, (iii) Proceedings which appear to be duly issued but fail to comply with a statutory requirements see e.g. *Finnegan v. Cementatidn Co. Ltd.* (1953) 1 Q.B. 688.

Now for the argument on this particular point. The whole question is whether the originating summons has been issued or not. Mr Rubin's argument for the defendants is quite short. He submits that under Section 225 of the Judicature Act 1925 an action "means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court but does not include a criminal proceeding by the Crown". Now in this case the plaintiff has chosen not to go by writ but to issue an originating summons. Mr Rubin suggests that he might have been in a difficulty if the plaintiff had proceeded by writ (although she would have been as to some risk as to costs) because writs of summons for the commencement of actions may be issued in a District Registry. It may be that those proceedings could then have been validly transferred to London. However, it is not necessary to consider that matter further, for the plaintiff did not go by way of writ of summons. The action can therefore only be validly commenced if it wascommenced "in such other manner as may be prescribed by rules of Court". It is to be noticed that an originating summons is not dealt with in the Judicature Act at all, it is purely a creature of the Rules of the Supreme Court and you must look alone to the Rules of the Supreme Court for power to start a proceeding by originating summons. Order 54, provides that an application to the High Court under Section 1 of the Act of 1938 shall "be made in the Chancery Division by originating summons inter parties. Order 54, Rule 4B provides that an originating summons shall be in a certain form and continues: "It shall be prepared by the applicant or his solicitor and shall be sealed in the Central Office or in Admiralty matters in the Admiralty Registry and when so sealed shall be deemed to be issued". This, argues Mr Rubin, is mandatory and it is clear that this originating summons was not issued in the Central Office for it bears not the seal of the Central Office but the seal of a District Registry: therefore there has been no issue of any originating summons in accordance with Order 54, Rule B. He then points to the undoubted fact that apart from the provisions relating to the Liverpool and Manchester District Registries, there are no other provisions in the Rules of the Supreme Court which entitles the plaintiff to issue an originating summons dealing with the Act of 1938 in a District Registry. He contrasts mortgage cases where express provision is made for the issue of originating summonses in District Registries under Order 55, Rule 9A. He concludes by arguing that this originating summons issued in the District Registry at Pontypridd is a complete nullity for it is not a proceeding commenced in such manner as is prescribed by the Rules of Court and so is not a proceeding within the statutory authority conferred by Section 225 of the Judicature Act 1925.

Mr Anwyl-Davies submits that this argument is wrong, far too technical, and fails to give the proper scope to Order 70 which I have already said in this Judgment it should have,There is only one High Court though it operates in three Divisions. Had proceedings been issued in the wrong Division, no doubt it would have been transferred to the Chancery Division: see Sections 58 and 59 of the Judicature Act. Here he submits there has been a mere irregularity, for a District Registry is all part of the High Court and the District Registrars are officers of the Supreme Court: see Section 84(7) of the Judicature Act 1925. Furthermore, where a cause or matter is proceeding in any division in a District Registry, the Registrar may exercise all such authority and jurisdiction as may be exercised by a Master in that Division see Order 35, Rule 6. In this case, he submits, there is an action in being for the purposes of Order 1, Rule 1 of the Rules of the Supreme Court and a proper document has been validity issued and submitted to the Court. There is a mere irregularity in that the officer of the Supreme Court, charged with these matters, in fact affixed the wrong seal and it should be treated as though it was validly issued in the Central Office.

I am unable to accept Mr Anwyl-Davies's argument. Of course District Registrars have all the powers of officers of the Supreme Court and exercise all-the powers of Masters in matters properly proceeding in the District Registry. They have no power whatever in matters which are not proceeding in the District Registry and have no power to issue documents from the Central Office or from any Registry other than their own. True the error was most unfortunate and, of course, the originating summons ought never to have been accepted in the District Registry. That is the plaintiff's misfortune. I cannot see that the District Registrar was committing a mere irregularity in putting on the seal of his District Registry. He did so because he was empowered only to issue a proceeding in the District Registry: see Section 85 of the Judicature Act 1925 — "the seal of the District Registry shall be impressed on every writ and other document issued out of or filedin that Registry's He had no power to affix the seal of the Central Office, Accordingly this document bearing the seal of the District Registry cannot be treated as being issued out of any department of the High Court except that District Registry. It is clear that this document was not issued out of the Central Office as required by Order 54, Rule 4B. Accordingly it was not issued in accordance with the only relevant rule of the Supreme Court, (Order 54, Rule 4B) and so for the purposes of Section 225 no proceedings have been commenced. There has been a fundamental failure to comply with the requirements of the statute relating to the issue of the proceedings; it was not a mere irregularity. The all important and essential requirement of the issue of a proceeding, whether it initiates the action (or is some interlocutory proceeding in an already pending action) is that it must be issued with the seal of the issuing office. If the proceeding is issued from the wrong office and the statute or the rules give power to transfer to the right office, that may cure the defect but there are no such powers in this case. It seems to me that in Lord Herschell's words "it is much more than an irregularity". I think it is a nullity, and it is not possible for the defendants to waive that defect.

The truth of the matter is that even to-day the plaintiff can take this document or one like it and procure its issue in the Central Office, The Central Office would be bound to issue it and the proceedings would be properly begun. But alas for her the seal would bear a date which is much too late for the proceedings to be effective, I can see no answer to the defendants' argument here, much though I would like to.

I would dismiss this appeal.

LORD JUSTICE DANCKWERTS (read by LORD JUSTICE UPJOHN): I agree with the Judgment which has been delivered by Lord Justice Upjohn and, as he has dealt fully with the decisions which have been given on this matter and, in particular, on the effect of Order 70 rules 1 and 2, I need only add a few words.

Unfortunately for the appellant widow, whose rights under the Inheritance Act have now expired, in my view the position is not that of a mere irregularity. It is Quite plain that an originating summons is a procedure which can only be used in accordance with the Rules of the Supreme Court, It is no doubt true that the District Registrar is an officer of the Supreme Court, but he is an officer whose powers are limited. Except in very limited cases, an originating summons requires the seal of the Central Office of the High Court, and it is clear that the seal of the District Registry is not such a seal. The originating summons in this case, therefore, is a nullity and has no operation. It has no more application to the matter to be decided than a dog licence.

In this situation the provisions of Order 70 of the Rules of the Supreme Court have no application. The defect cannot be cured. It is impossible to transfer the proceedings to the Central Office because there are no operative proceedings to be transferred. Of course, as Lord Justice Upjohn has pointed out, there is nothing to prevent the testator's widow starting proceedings by originating summons issued under the seal of the Central Office, but, unfortunately, as the statutory period within which such proceedings must be begun has expired, such proceedings must inevitably fail. Nothing can be done about it, and the appeal must be dismissed.

Order: Appeal dismissed. Legal Aid taxation. Leave to appeal to House of Lords refused.