43/69

SUPREME COURT OF VICTORIA

KINGSTONE TYRE AGENCY PTY LTD v BLACKMORE

McInerney J

27-28 November 1969; 27 February 1970 — [1970] VicRp 81; [1970] VR 625

PRACTICE AND PROCEDURE – SPECIAL SUMMONS – MADE RETURNABLE AT 10AM WHEREAS THE *GOVERNMENT GAZETTE* PROVIDED 10:15AM – PARTIES APPEARED – DEFENDANT SUBMITTED THAT THE SUMMONS WAS A NULLITY – WHETHER DIFFERENCE TRIFLING – MAGISTRATE AGREED WITH THE SUBMISSION AND STRUCK THE SUMMONS OUT AND ORDERED COSTS AGAINST THE COMPLAINANT – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, S5, S99.

HELD: Order nisi absolute. Magistrate's order set aside. Remitted to the Magistrates' Court for hearing in accordance with the law.

1. The summons was not a nullity. In addition, the difference of time between the hour of 10 a.m. named in the summons and the hour of 10.15 a.m. appointed for the holding of the court was so small as to have made it a proper case for the application of the maxim *de minimis non curat lex* (the law does not concern itself with trifles), and for the exercise of the powers of amendment of the summons under s99 of the *Justices Act* 1958 ('Act'). In short, the magistrate ought to have held that this summons was sufficient in substance and effect, so that s5 of the Act would sustain any order made on the hearing of the summons.

***Ellis v Horsley Bros* [1898] VicLawRp 125; (1898) 23 VLR 609; 4 ALR 59, applied.**

2. It was open to the court—provided due service was established (and in the present case service was admitted) to overrule the objection and to proceed to hear and determine the complaint and summons. The flaw was one of procedure and not of jurisdiction.

3. To award costs to defendants in respect of interlocutory steps they have taken in proceedings which they claim are a nullity does not seem to be self-evidently just and proper. Indeed, it would tend to encourage defendants to take technical objections devoid both of substance and merit. Such objections seldom redound to the good name or good sense of those who take them.

McINERNEY J: On 17 March 1969, the solicitors for the complainant company caused to be issued a special summons against the above-named defendants, returnable at 10 a.m. on 7 May 1969, before the Court of Petty Sessions at Healesville, consisting of a Stipendiary Magistrate sitting without any other justice or justices. Subsequently at the request of the process servers—presumably to overcome difficulties or delays in effecting service, the complainant's solicitor caused the return date of the summons to be extended to 4 June 1969: see *Justices Act* 1958, s21(2). The hour at which the summons was attendable was left unchanged. In due course the summons as so extended was served on each of the defendants. With the special summons there were also served on the last-named defendant interrogatories on behalf of the complainant for his examination. On 30 May 1969 the solicitors for the first-named defendants requested the complainant's solicitors to agree to an adjournment to 16 July 1969, but the solicitors for the last-named defendant informed the complainant's solicitors that 16 July 1969 was not suitable and requested that the return date for the hearing of the summons be fixed for 2 July 1969. On 2 June 1969 the complainant's solicitors wrote to the clerk of courts at Healesville informing him that the solicitor for the last-named defendant had requested an adjournment of the summons to 2 July 1969 and stating that the solicitors for the first two named defendants had been informed of the adjournment. On 2 June 1969 the complainant's solicitor also wrote letters to each of the two solicitors for the defendants informing them of the adjournment, by request of the solicitor for the last-named defendant, to 2 July 1969. A certified extract of the register of proceedings kept at the Court of Petty Sessions at Healesville on 4 June 1969 records the summons as having been "Adjourned to 2.7.69" and in the remarks column there is an annotation "REQ. N/A", signifying that the adjournment was at the request of a party and that there was no appearance for any party on that day (4 June 1969).

On 23 May 1969 the last-named defendant swore answers to the complainant's interrogatories and those answers were served on the complainant's solicitors on 27 May 1969. On 26 May 1969 the solicitors for the defendants, Blackmore, served interrogatories for the examination of the complainant on the complainant's solicitors. The complainant swore answers to those interrogatories on 27 June 1969, which answers were served on the solicitors for the defendants, Blackmore. On 24 June 1969 the complainant's solicitors served on the solicitors for the defendants, Blackmore, interrogatories for their examination but no answers to those interrogatories were received.

On 2 July 1969 the special summons came on for hearing at the Court of Petty Sessions at Healesville constituted by a Stipendiary Magistrate sitting without any other justice or justices. Mr Bryson of counsel appeared for the complainant, Mr Henshall of counsel for the defendants, Blackmore, and Mr Mullet (solicitor) appeared for the defendant, Cherry. Both Mr Mullet and Mr Henshall announced that they were appearing for their respective clients under protest as to the jurisdiction of the court.

Shortly stated, the objection to the jurisdiction of the court was that the summons required the defendants to appear at 10 o'clock in the forenoon on the return date thereof, whereas the time appointed in the relevant *Government Gazette* for the sitting of the Court of Petty Sessions at Healesville was 10.15 o'clock in the forenoon. Consequently, it was said, the summons was a nullity and ought to be struck out and costs awarded to the defendants. It was at no time suggested that any prejudice had been suffered by the defendants as a result of this error in the summons and any such suggestion was expressly disclaimed before me. No evidence was tendered by any of the parties to the summons, but I assume that the Stipendiary Magistrate would have perused the court file and so become aware of the interlocutory proceedings taken by the various parties to which reference has already been made.

After hearing argument, the magistrate held that although the defendants did not show or allege prejudice, the insertion in the summons of the hour of 10 o'clock in the forenoon of the return day of the summons instead of the proper hour of 10.15 o'clock in the forenoon as appointed in the *Government Gazette* for the sitting of the Court of Petty Sessions at Healesville "rendered the summons a nullity and was not merely an irregularity in respect of which relief could be granted to the complainant". The Stipendiary Magistrate, therefore, struck the summons out and ordered the complainant to pay to the defendants Blackmore $130.25 costs and to the defendant Cherry $100.25 costs.

On 1 August 1969 Master Bergere granted an order nisi to review this decision on three grounds, namely:–

> (1) That the Magistrate was wrong in law in holding that the special summons issued on the complaint of the applicant was a nullity because it had been made returnable at 10 o'clock in the forenoon before a court for which time for the commencement of the sitting was appointed by the Governor in Council as 10.15 o'clock in the forenoon;
>
> (2) That the magistrate should have held that the insertion of 10 o'clock in the forenoon instead of 10.15 o'clock in the forenoon in the said summons as the time for attendance before the court constituted a defect only and that the magistrate should not have allowed any objection to be taken to the form of the said summons by parties who had appeared before the court in answer thereto; and
>
> (3) That in the circumstances of the case the magistrate should have proceeded to hear and to determine the said complaint.

Ground (2) appears to have been couched in terms of s200 of the *Justices Act*. That section is obviously based on the provisions of s1 of the *Summary Jurisdiction Act* 1848 (Eng.) (11 and 12 Vict. c.43 —*Justices Act*). For myself, I am disposed to think that s200 is confined to criminal proceedings before justices or courts of petty sessions, but it is unnecessary for me to decide this point.

The error attending the drafting and issuing of the special summons herein is one which many a practitioner would own to having perpetrated at least once in his active professional lifetime—usually during his period of services as an articled clerk. As perusal of the court file

in *Khyat v Schmidt* [1924] VicLawRp 83; [1924] VLR 499; 46 ALT 72; 30 ALR 352, reveals the perpetration of such an error is not necessarily a bar to the subsequent attainment of eminence in the profession. Such errors seldom come before this Court, usually, I suppose, because of the good sense of the practitioners involved. Probably this particular matter would not have found its way to this Court but for the order made as to costs.

Although the facts giving use to the present proceedings are of common enough occurrence, the legal problem emerging therefrom is one on which there is singularly little authority. At the same time it is one which magistrates and justices are from time to time called on to decide, often without any warning, frequently without the advantage of full argument or of an adequate library, and almost invariably in the face of a great pressure of business in their court.

The special summons issued and served on the defendants was in the form prescribed by Form 3 of the Second Schedule to the *Justices Act* 1958 and Forms 1, 3 and 5 of Pt II of the First Schedule of the forms prescribed by r10 and r51 of Chapter III of the *Justices Act Rules* 1963. It was addressed to defendants whose addresses, as stated in the summons, were in Healesville. It asserted a cause of action for damages in tort which was within the special jurisdiction conferred by s68 of the Act. In form it complied with the statutory requirements prescribed by the Act for a summons (see especially s20(1), s21(1) and s22) in that

(1) it named or otherwise described the persons against whom the complaint was made—the defendants (s20(1));

(2) it was expressed to be directed to the persons—viz. the defendants—named in the complaint as the persons against whom the said complaint was made (s21(1));

(3) it required the defendant to appear at the time therein mentioned—viz. at 10 a.m. on 7 May 1969 (s20(1));

(4) it required the defendants to appear at the place therein mentioned—viz. at the Court of Petty Sessions at Healesville;

(5) it required the defendants to appear at the said time and place before a Court of Petty Sessions—at Healesville—to answer to the said complaint and to be further dealt with according to law (s20(1));

(6) it stated shortly the cause of complaint (s21(1));

(7) it named or otherwise described the persons—viz. the defendants—against whom it was issued;

(8) it named or otherwise described the person—viz. the complainant—by whom or at whose instance the complaint had been made: see *R v Sturt; Ex parte Ah Tack* [1876] VicLawRp 70; (1876) 2 VLR (L) 103;

(9) it set out the address of the complainant at which all notices or documents might be served (s22);

(10) it appears to have been—and I assume it was—signed by the justice issuing the summons (s21(1)).

(It has been held—in *Huebel v Holt* [1969] VicRp 56; [1969] VR 462—that the requirement that the summons state shortly the name of the place where and the bailiwick in which the offence or matters is alleged to have arisen relates only to the contents of summonses issued upon information and not to the contents of summonses issued upon complaints.)

One flaw existed in the summons, viz. that the time at which the defendant was required to appear at the Court of Petty Sessions at Healesville in its special jurisdiction—viz. 10 a.m.—was not the time (namely, 10.15 a.m.) appointed under s63 of the *Justices Act* and r2 of Chapter III of the *Justices Act Rules* for the holding of that court. It was the argument of the defendants—accepted by the Stipendiary Magistrate that this one flaw invalidated the summons, deprived it of legal efficacy, so that it was, from its inception, a nullity.

The reasoning on which this conclusion was rested may be stated thus. In the first place (it was said) there is both historically (see Paul's *Justices of the Peace*, 1st ed., historical note pp52-4, 403 and 456) and in terms of the *Justices Act* a clear distinction between the function and powers of justices out of sessions (see now s112 and the last paragraph of s142, and s91(18))

and the powers and functions of justices sitting at Courts of Petty Sessions: see, for instance, the titles to Pt III ("The Powers of Justices Out of Sessions") and Pt IV ("Courts of Petty Sessions") of the Act.

To constitute a Court of Petty Sessions, it was said, the justices must be sitting at a time and place appointed under s64(1) for the holding of a Court of Petty Sessions (see s63), or at a time and place to which the court has been adjourned under subs(1) or subs(2) of s92, or postponed under s92(5). The point made by counsel for the defendant is set out clearly in Sir William Irvine's book *Justices of the Peace*, 1st ed., p62, in a passage which should, I think, be quoted in full:

> "When the time and place for holding a Court of Petty Sessions have been appointed, the court is constituted by the meeting together of a sufficient number of justices having jurisdiction in the place, for the purpose of hearing all matters cognisable in petty sessions. Two or more justices may meet at the place appointed at other times and transact important business there, but it must be remembered that such a meeting is not a Court of Petty Sessions, if not at the time appointed, or by adjournment from a duly constituted court, and that at such a meeting, only business which, like cases of commitment for trial, is within the jurisdiction of justices out of sessions, can be transacted. To constitute a Court of Petty Sessions there must be two or more justices present, or one police magistrate. But a single ordinary justice may hear and determine any case, if both parties to the proceeding consent in writing. The written consent giving jurisdiction in that case must be entered upon the minutes of the court. But a single justice can be constituted a Court of Petty Sessions only at the time and place appointed for holding a court; the parties coming before a justice at any other time or place cannot give him a summary jurisdiction by consent."

Proceeding, therefore, from these propositions, the validity of which counsel for the complainant did not dispute, counsel for the defendant argued that the summons in this case commanded the defendant to appear at a time when there was neither in fact or in law any Court of Petty Sessions at Healesville. Although the time named in the summons was only 15 minutes earlier than the time appointed for the holding of a court, the legal result was the same as if the summons had been expressed to be returnable at 10 a.m. on Monday 5 May 1969. *Khyat v Schmidt* [1924] VicLawRp 83; [1924] VLR 499; 46 ALT 72, 30 ALR 352, was relied on as authority for the view that in such a case the summons would have been a nullity.

Mr Bryson, for the complainant, in reply, contended first that the summons was a perfectly valid summons. He argued first that the justice of peace who issued the summons had authority or power under s31(1)(a) of the *Justices Act* 1958 to do so. The summons so issued complied literally with all the requirements of s20, s21 and s22 to which reference has already been made. Section 20(1) did not (he said) require either expressly or by necessary implication that the time specified in the summons as the time at which the defendants were required to appear at the Court of Petty Sessions at Healesville should be a time at which that court was appointed to sit. It was not to be expected that a justice should know each time appointed for the holding of a court and it was no part of his duty to inquire whether the time specified in the summons was a time appointed for the holding of the court at which the defendant was required to appear. If a summons, regular on the face of it (as this one was), was presented to him for issue, he was entitled to issue it, and, once issued, the summons was a perfectly valid document.

As to this argument I am of the opinion that the "time and place" mentioned in s20(1) must be a time and place appointed under s64 for the holding of the Court of Petty Sessions mentioned in the summons. A summons which names a time or a place at which the court therein referred to is not appointed to sit does not, therefore, comply with the requirements of s20(1). There was, therefore, a flaw or defect in the summons issued and served on the defendants.

Mr Bryson's next argument was that even if the summons was subject to that flaw or defect, it was not a nullity, but was a valid summons subject to an irregularity—a defect or error which the Court of Petty Sessions had power to amend under either s99 or s200 of the *Justices Act* 1958. The Court of Petty Sessions ought, therefore, he said, to have amended the summons by making it returnable at 10.15 a.m. on the return day or on the day to which the summons had, by consent, been adjourned.

An alternative submission for the complainant was that the summons was merely a process to ensure the attendance of the defendants at the court to answer a complaint for a cause of action

with respect to which the Court of Petty Sessions, in its special jurisdiction, had jurisdiction under s68(1) of the Act. Under s19 a complaint need not, except where otherwise expressly enacted, be in writing. Instances of enactments which expressly require that a complaint should be on oath are collected in Paul's *Justices of the Peace*, 1st ed., pp174, 175, 2nd ed., p25.

Section 68 nowhere expressly provides that a complaint for a cause of action determinable summarily must be in writing. In relation to the phrase "except where otherwise expressly enacted" there is authority for the view that "whatever the language used necessarily or even naturally implies is expressed thereby": see *Chorlton v Lings* (1868) LR 4 CP 374, at p387, per Willes J cited with approval by Gavan Duffy J in *Healey v Festini* [1958] VLR 225, at p228; [1958] VicRp 36; [1958] ALR 648, at p651. It was, therefore, argued for the complainant that in view of the distinction drawn in the Act and the forms prescribed thereunder between a complaint and a summons to answer a complaint (see s19, s20, s31(1)(a) and s31(1)(b), s34(2), s67(2) and s67(3) and the second proviso to s68(1), the language of that second proviso to s68(1) could not be construed as a provision which expressly enacted that a complaint in respect of a cause of action determinable summarily under s68 need be in writing. It was, therefore, argued that even assuming that the existence of a complaint for a cause of action determinable summarily was a condition of the exercise by a justice of his authority (under s31(1) and s34(2)) to issue a summons for a cause of action determinable summarily, it was the existence before the Court of Petty Sessions of a demand in respect of that cause of action determinable summarily which was the source of the jurisdiction of that court to hear and determine that cause of action.

It was said, therefore, for the complainant that even if the special summons was (as the Stipendiary Magistrate held—wrongly it was said) a nullity, nevertheless once the parties were before him, the Stipendiary Magistrate constituting the Court of Petty Sessions at Healesville in its special jurisdiction had jurisdiction to adjudicate then and there upon the cause of action asserted in the summons. For this conclusion reliance was placed on the principle discussed in *R v Hughes* (1879) 4 QBD 614, at p625, where Hawkins J (speaking of the summary criminal jurisdiction of justices), said:

> "The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid, that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place (unless under special statutory enactment). If a mere summons is required, no writing or oath is necessary. A bare verbal information is sufficient."

In the same case, at p633, Huddleston B said:

> "Principle and the authorities seem to show that objections and defects in the form of procuring the appearance of a party charged will be cured by appearance. The principle is, that a party charged should have an opportunity of knowing the charge against him, and be fully heard before being condemned. If he has the opportunity, the method by which he be brought before the justice cannot take away the jurisdiction to hear and determine, when he is before them."

See also *Turner v Postmaster-General* (1864) 34 LJMC 10; *R v Shaw* (1865) 34 LJMC 169; *R v Stone* [1801] EngR 335; (1801) 1 East 639, at p654; 102 ER 247, per Le Blanc J and *Eggington v Pearl* (1875) 40 JP 56. (See, however, *Dixon v Wells* (1890) 25 QBD 249, at p256, as to the position where the defendant appears under protest.) See also *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; (1938) 59 CLR 369, at pp379, 380; [1938] ALR 119, at p123, per Latham CJ; *O'Donnell v Chambers* [1905] VicLawRp 9; [1905] VLR 43; 10 ALR 224; *Ex parte Gobbert* (1941) 41 SR (NSW) 140, at p142; 41 SR (NSW) 140, per Jordan CJ; *Ex parte Walker, Re Goodfellow* (1944) 45 SR (NSW) 103, at pp106, 107, and 108; 62 WN (NSW) 58 per Jordan CJ; *Brown v Treynor* [1889] VicLawRp 81; (1889) 15 VLR 387; 11 ALT 26; *Ex parte Hawkins* (1866) 5 SCR (NSW) 152, and *Ex parte Findlay; Re James* (1953) 53 SR (NSW) 174, at pp176, 177; (1953) 70 WN (NSW) 115, per Owen J. Compare, however, *Davidson v McCarten* [1953] VicLawRp 96; [1953] VLR 697, at p703; [1954] ALR 42, at p48, where (in terms applicable to civil proceedings) Sholl J said:

> "No doubt, if a defendant appeared without objection, defective service might be waived; but if he did not, I should not have thought the Court could have proceeded in the face of a failure by a complainant or informant to comply with the express requirements of the section."

Khyat v Schmidt [1924] VicLawRp 83; [1924] VLR 499; 46 ALT 72; 30 ALR 352, was relied on by the defendants as authority for the proposition that a summons expressed to be returnable on a day not appointed for the holding of the court is a nullity. That proposition is not expressly asserted in the reasons for judgment delivered by Cussen ACJ, and it may be that the case is really authority for a different proposition, namely, that the powers conferred on a clerk or petty sessions by s92(5) are exercisable by him only on a day appointed for the holding of a court or a day to which the hearing of any summons has been adjourned or postponed. Certainly what is decided is consistent with either of these views. The case is reported in the *Victorian Law Reports*, the *Australian Law Times Reports*, and the *Argus Law Reports*.

In order to resolve doubts as to the facts of the case which could not be resolved from the various reports of the case, I caused the original court file of that case to be procured for me. The following statement is based substantially on the material in the court file.

In *Khyat v Schmidt*, *supra*, the complainant's solicitor caused to be issued a default summons returnable before the Court of Petty Sessions at Box Hill on Tuesday, 22 July 1924. He did so after consulting the Law List for the year and in ignorance of the fact that the day for the sittings of the court had been altered from Tuesday to Thursday. Within 48 hours of the return day, the complainant's solicitor received a notice of intention to defend, and, accordingly, on Tuesday, 22 July 1924, both the complainant and his solicitor and the defendant and her solicitor attended at the court house at Box Hill at the time named in the summons. There was no one else in attendance. Eventually a sergeant of police appeared who told the solicitors that the court only sat on Thursdays, that the court day had been changed, that since such change city solicitors had continued making summonses returnable on Tuesdays and that it was the custom of the clerk of petty sessions where cases were contested to postpone the hearing until the following Thursday. The next Thursday would have been 24 July. (It would seem that the sergeant of police must have had in mind the power of a clerk of petty sessions, under s89(5) of the *Justices Act* 1915 (92(5) of the 1958 Act) to postpone the hearing until the next day on which a Court of Petty Sessions will be held at the place mentioned in the summons.) The sergeant of police stated that the clerk of petty sessions would not be long in arriving. The complainant's solicitor asked the defendant's solicitor whether he would agree to wait to see if some justices could be found to hear the complaint, but the defendant's solicitor said, "I will agree to nothing" and then left. It does not appear from any of the reports whether either of the solicitors subsequently attended on the clerk of courts at Box Hill to request him to exercise the power of postponement or whether in fact the clerk purported to do so.

According to the *Victorian Law Reports* (at p502)—and an affidavit in the court file confirms this—the complainant's solicitor purported to arrange with the police sergeant at the court house at Box Hill that the hearing should, after one hour, be postponed by the clerk of petty sessions until the next court day (i.e. the following Thursday 24 July) in purported pursuance of s89(5) of the Act. Later in the same day, the complainant's solicitor attended at the office of the defendant's solicitor and advised him of what had been done. He was told that the whole thing was regarded as invalid and that he would have to issue a new summons. Later that day, the complainant's solicitor telephoned the defendant's solicitor and said that after consideration he was of the opinion that the summons would stand and that he intended to appear on the following Thursday and ask for judgment. He was told that the defendant's solicitor would not be able to attend and that if he obtained judgment, a rehearing would be sought. The complainant's solicitor then said that he would have the summons adjourned to the following Thursday (31 July) to which the defendant's solicitor then said that he would agree to nothing except a new summons. Thereupon the complainant's solicitor said he would issue an ordinary summons as well and if it was served in time he would proceed on that.

According to the *Victorian Law Reports*, on Thursday, 24 July, the complainant's solicitor attended at the Court of Petty Sessions at Box Hill but neither the defendant nor his solicitor attended. The magistrate—whether at the request of complainant's solicitor or not, is not stated—adjourned the hearing of the default summons until the following court day, namely, Thursday, 31 July. The report in the *Australian Law Times* (at p72) states that the summons was adjourned from 24 to 31 July by arrangement with the clerk of courts, but the *Victorian Law Reports* and the *Argus Law Reports* state that this adjournment was by the court. An affidavit on the court file states merely that on the day following the conversations referred to above (that is, on 23 July) the

complainant's solicitor received a message from the Court of Petty Sessions at Box Hill stating that the hearing would be adjourned to Thursday, July 31, and requesting him to communicate that fact to the defendant's solicitor. As the complainant's solicitor had already told the defendant's solicitor that the case would be adjourned to that day, he did not trouble to communicate the clerk's message to the defendant's solicitor. On 24 July, the complainant's solicitor prepared an ordinary summons returnable on 31 July, and presented it to the clerk of courts for issue and transmission to the police for service. The ordinary summons was not in fact issued, the clerk taking the view that it could not be issued until the default summons had been disposed of: see *Wilson v Cole* [1911] VicLawRp 76; [1911] VLR 423; 17 ALR 435. The defendant's solicitor had informed the defendant that she could expect a new summons but no such summons was served on her, nor was any message received that the default summons had been adjourned to 31 July. Consequently neither he nor the defendant was in attendance at the court on Thursday, 31 July (the next court day). The complainant's solicitor, however, attended with his witnesses and discovered, on inquiry, that the ordinary summons had not been issued. When the default summons was called on for hearing, the complainant's solicitor explained the position to the court and referred the justices to s89(5) of the Act. He then proceeded on the default summons, called his evidence, and, after consideration, the justices made an order for the amount claimed, with costs. This was, of course, so far as the defendant's solicitor was concerned, altogether unexpected. The various law reports state that a letter dated 31 July from the complainant's solicitor informing the defendant's solicitor of the making of the order was mislaid until after the expiration of the period of 21 days limited by s99(6) of the *Justices Act* 1915 (as amended by s2(1)(d) of Act No. 2771—the *Default Summons Act* 1915) for the making of an application to set aside on order made on a default summons. The material in the court file shows that the letter in question was forwarded on 7 August, and that in any event (as appears in the affidavit of defendant's solicitor in support of the application for an order nisi) the defendant's solicitor was, on 2 August, when he wrote requesting a consent to a rehearing, aware that an order had been made by the court. After further correspondence the complainant's solicitor, on 12 August, indicated that he would not consent to a rehearing. The defendant subsequently on 14 August 1924 gave notice of application (to be made on 21 August) under s66 of the *Justices Act* 1915 (69 of the 1958 Act) to have the order set aside. After an adjournment at the complainant's request the application was heard on 4 September. The complainant's solicitor said he would consent provided that he received £4 4s. costs. The defendant's solicitor refused to pay the sum requested and the presiding magistrate said that in the absence of consent an order made on a default summons where the defendant did not appear could be set aside only under the provisions of s99 and that s66 was not applicable in such a case. The application was refused on the grounds that the application was not made in accordance with the specific provisions of s2(1)(d) of Act No. 2771, it not having been made within the time prescribed nor being supported by an affidavit of merits.

On review, Cussen ACJ held that the magistrate had erred in holding that s66 was inapplicable to the case before him and he, accordingly, set aside the order refusing a rehearing and also the order made against the defendant on 31 July for the amount claimed on the summons together with costs, without prejudice to the complainant's rights to commence proceedings *de novo*.

On the question of the costs of the order to review it was argued by the complainant that on the return of the summons (i.e. on Tuesday, 22 July) there were no justices present sufficient to hear the case, the clerk of petty sessions might postpone, and it was suggested that he had postponed the hearing until the next court day, the Thursday, and the case was rightly before the court on the 24th, and that the defendant not appearing, it was rightly adjourned until the 31st and that the defendant again not appearing, the order was then rightly made (VLR at p504; ALR at p354).

As to this argument, Cussen ACJ, said (VLR at p504; ALR at p354):

> "On the whole, I have come to the conclusion that the provisions of s89(5) [Now s92(5) of the 1958 Act] do not apply to this case and that therefore the case was not rightly before the court either on the 24th or the 31st."

These observations of Cussen ACJ, have been interpreted as meaning that s92(5) has no application to a summons made returnable on a day on which there is no sitting appointed of

the court before which the summons is made returnable: see Paul's *Justices of the Peace*, 1st ed., p361; 2nd ed., p212.

It may be that from the words "the next day on which a Court of Petty Sessions will be held at the place mentioned in such summons", Cussen ACJ, inferred that the "day of the return of the summons" must be a day appointed for the holding of a Court of Petty Sessions at the place in question. It seems clear that the day of "any adjournment of the hearing" must be a day appointed for the holding of the court (see s92(1)) or a day appointed by the justices under s92(2) (or even under s92(6)(a)) and that the "time to which the same (i.e. the hearing) is postponed" (s92(5)) must be a "day on which a Court of Petty Sessions will be held" (see the concluding words of s92(5)). The requirement that the day to which the clerk of petty sessions may or shall postpone the hearing shall be the next day on which a Court of Petty Sessions will be held is obviously directed to preventing unnecessary delays in the hearing of summonses.

Proceeding from the premiss that the real *ratio* of *Khyat v Schmidt* was that a summons expressed to be returnable on a day not appointed for the holding of a court was a nullity and that the powers conferred by s92(5) were exercisable only in relation to a valid summons, the defendants argued that a summons which requires the defendant to appear at a court on a day appointed for the holding of that court but at an hour earlier than the hour appointed is a nullity.

The argument that a summons is a nullity where the hour at which it is made returnable is an hour in the day later than that appointed under s64(1) was emphatically rejected by the Full Court in *Ellis v Horsley Bros* [1898] VicLawRp 125; (1898) 23 VLR 609; 4 ALR 59.

In that case a summons was issued returnable at 2 p.m. on a day on which the court was appointed to sit at 10 a.m. At that hour, on the return day, the magistrate sat. (Whether this was at 10 a.m. or before 2 p.m. or at or after 2 p.m. does not appear in either of the law reports or in the affidavit filed in support of the application for an order nisi). When the information came on for hearing, Dr McInerney, for the defendants, appeared to object that the court had no jurisdiction to hear the information, as the summons ordered the defendants to appear at 2 o'clock, whereas the hour gazetted for sittings of the court was 10 a.m. The bench overruled the objection, proceeded with the case and convicted the defendants. An order to review the conviction was granted on a number of grounds of which the seventh was that the justices had no jurisdiction to hear the information. Madden CJ (VLR at p621; ALR at p63), said:

> "The seventh ground appears to us absurd. The summons was for 2 o'clock. The magistrates sat at 10 o'clock in the morning. All the parties were there and the case was proceeded with. It is quite ridiculous to contend that therefore the magistrates had no jurisdiction. The only possible ground of objection would be that the defendants were taken by surprise if the magistrates insisted upon going on then. That was a matter for the magistrates to decide, and there can be no possible objection to their decision on that ground."

If, or in so far as the reasons for judgment of Madden CJ, suggest that the objection to the validity of the summons was taken only after the information had been heard and the defendants convicted, that suggestion is without foundation, since the affidavit on which the order nisi was granted shows that the justices overruled an objection to the summons.

Holroyd J (VLR at p626; ALR at p65), expressed his agreement with the observations of Madden CJ, just quoted. The other member of the Court, Williams J, expressed no opinion on the point. It is to be observed that the decision of the Court making the order absolute on the first ground of the order nisi to review rendered it unnecessary for the Court to pronounce on the seventh ground, which raised the objection to the jurisdiction of the justices. Nevertheless two members of the Full Court pronounced on that ground and their view must, I consider be treated as part of the *ratio decidendi* of the case, by which I am bound: see *Cane v Royal College of Music* [1961] 2 QB 89; [1961] 2 WLR 571; [1961] 2 All ER 12, at pp24 and 29, and *Jacobs v London County Council* [1950] AC 361, at pp368, 369; [1950] 1 All ER 737, at pp740, 741, per Lord Simonds.

It is clear that the Full Court did not regard the error or defect in the summons as one which, in the circumstances, went to jurisdiction and I think it probable that they rejected the view that the summons was a nullity. I think they treated the fact that a return time of 2 p.m.

was named as a matter constituting only an irregularity which the magistrates could disregard if they thought justice and convenience so required.

It is possible that the members of the Full Court may also have had in mind the principles enunciated in *R v Hughes* (1879) 4 QBD 614, at p625, viz, that the subject-matter of the information being within the jurisdiction of the court and all parties being before the court, the justices had power, if they so decided, to proceed with the hearing of the case.

The complainant contended that where, as here, the summons named a return day which was in fact a day appointed under s64(1) for the sitting of the court, but specified an hour other than that appointed under s64(1), the decision in *Ellis v Horsley Bros*, *supra*, was authority for the view that the summons in such a case was not a nullity but was one the issue of which was attended by an irregularity only.

There is, of course, an obvious distinction between the present case and the case where the summons names an hour on a court day later than the hour at which the court is appointed to sit. In the latter case, the hour so appointed is the hour at which the sittings of the court on that day are to commence, and the court will sit from that hour onward at least until the business of the court on that day, concludes or the usual time for the rising of a court is reached. A summons expressed to be returnable at an hour later than the hour appointed names an hour at which the court may still be sitting, and it cannot be predicated in advance that the court will not be sitting at that hour. On the other hand, a summons made returnable at an hour in the day earlier than that appointed for the hearing means an hour at which it can be predicated in advance that no court will be sitting—and this would have been especially true of country courts in the days when a Stipendiary Magistrate's only means of transport was by railway or by public coach operating on regular timetables.

On the basis of this distinction counsel for the defendant argued that *Ellis v Horsley Bros*, *supra*, was not decisive of the present case, and that, on principle, the present summons must be regarded as a proceeding which was a nullity rather than as one attended by a mere irregularity capable of being waived by the defendant or amended or put right by the court.

The significance of the distinction is graphically stated by Lord Denning MR, in delivering the reasons for judgment of the Judicial Committee of the Privy Council in *Macfoy v United Africa Co Ltd* [1962] AC 152, at p160; [1961] 3 WLR 1405, at p1409; [1961] 3 All ER 1169, at pp1172, 1173, a case in which the defendant applied to set aside a payment signed against him in default of delivery of a defence set aside a payment signed against him in default of delivery of a defence to a statement of claim which, contrary to the *Rules of Court*, had been delivered during the long vacation. His Lordship said:

> "The defendant here sought to say, therefore, that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether it will set aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good, and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void. No court has ever attempted to lay down a decisive test for distinguishing between the two. But one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it, could he, afterwards, in justice, complain of the flaw?"

The distinction has indeed been repeatedly drawn, and classifications of proceedings which are to be considered nullities have been attempted, but the essential feature which makes any particular proceeding a nullity is seldom stated. Thus in *Re Pritchard, deceased* [1963] 1 Ch 502 at pp523, 524; [1963] 2 WLR 685 at pp698, 699; [1963] 1 All ER 873 at p883, Upjohn LJ said:

> "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 ...(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 requirement: see, for example, *Finnegan v Cementation Co Ltd* [1953] 1 QB 688; [1953] 1 All ER 1130."

The dissenting judge in that case (Lord Denning MR) would have confined the category of proceedings which are a nullity even more closely. He said ([1963] 1 Ch 502 at p517; WLR at p693):

> "The only true cases of nullity that I have found are when a sole plaintiff or sole defendant is dead: see *Tetlow v Orela Ltd* [1920] 2 Ch 24; [1920] All ER Rep 419, or non-existent: see *Lazard Bros and Co v Midland Bank Ltd* [1933] AC 289, at p296; [1932] All ER Rep 571, and I would like to see the word 'nullity' confined to those cases in future."

In *Plowman v Palmer* [1914] HCA 41; (1914) 18 CLR 339 at p347; 20 ALR 356, at p359, Isaacs J stated, as instances of proceedings which were nullities, the following:

> "A proceeding taken, where such proceeding is entirely forbidden or excluded by the rules (*Hewitson v Fabre* (1888) 21 QBD 6; 4 TLR 510) or is not permitted at all at the time it is taken (*Anlaby v Praetorius* (1888) 20 QBD 764; 58 LT 671; 57 LJQB 287; 4 TLR 439) and *Smurthwaite v Hannay* [1894] AC 494; [1891-4] All ER Rep 865, would be more than mere non-compliance with the rules."

Isaacs J went on to point out (CLR at p348; ALR at p359) that

> "The power to waive the objection is rather an accompaniment of mere irregularity than a standard of discrimination."

I think that, in *Re Pritchard*, *supra*, Upjohn LJ, would have agreed with Lord Denning's observation that

> "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 as *ex debito justitiae*"; [1963] 1 Ch 502 at p511; WLR at p692.

Lord Denning's observation might perhaps hold good of the decision of Edmund Davies J, in *Pontin v Wood* [1961] 3 WLR 1118; [1961] 3 All ER 992—reversed on appeal [1962] 1 QB 594; [1962] 2 WLR 258; [1962] 1 All ER 294—as also of the first and third of the classes mentioned by Upjohn LJ, perhaps in the passage cited above.

In *Marsh v Marsh* [1945] AC 271 at p284; 62 TLR 20, at p22, the Privy Council suggested that one test might be to inquire whether the irregularity had caused a failure of natural justice and suggested that if the defect in procedure had not caused a failure of natural justice the resulting order is only voidable. Tested in that light, there can, in my view, be no question of any failure of natural justice in the present case.

Another test was suggested in Chitty's *Archbold's Queen's Bench Practice*, 14th ed., p445, quoted with approval by Madden CJ in *Gregory v Murphy* [1906] VicLawRp 11; [1906] VLR 71 at p75; 11 ALR 507 at p509; 51 ALJR 145; 27 ALT 138 and by Bankes LJ in *Smythe v Wiles* [1921] 2 KB 66, at p76, namely:

> "Where the proceeding adopted is that prescribed by the practice of the Court, and the error is merely in the manner of taking it, such error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding itself is altogether unwarranted, and different from that which, if any, ought to have been taken, then the proceeding in general is a nullity and cannot be waived by any act of the parties against whom it is taken."

In relation to that test counsel for the complainant argued that the present summons was one prescribed by the practice of the court and the error was merely in the manner of taking it, and that there was, therefore, only an irregularity. Of course it could equally be said (and it was indeed said by counsel for the defendant) that the proceeding was unwarranted in that it named

a time at which the court did not sit, and to that extent was different from the proceeding which ought to have been taken.

In the case of tribunals of limited jurisdiction, observance of statutory procedures has often been treated as a condition of that jurisdiction: see e.g. the cases referred to by Williams J in *Posner v Collector for Interstate Destitute Persons (Vic)* [1946] HCA 50; (1946) 74 CLR 461, at pp488, 489; [1947] ALR 61. Indeed, in *R v Danaher* [1969] VicRp 55; [1969] VR 445, at p450, Newton J referred, in passing, to the provisos to s68(1) as examples of statutory limitations of the jurisdiction of a Court of Petty Sessions, non-fulfilment of which would render the proceedings a nullity. His remarks were clearly *obiter*, but they represent a view which has commanded professional acceptance for a number of years: cf. note (j) at p142 of Paul's *Justices of the Peace*, 2nd ed. Speaking for myself, I do not find it necessary in this case to determine whether the proper construction of the second proviso to s68(1) entails that consequence. It is to be observed, however, that while the jurisdictional grant in the first paragraph of s68(1) is expressed to be "subject to the provisions hereafter in this section contained":–

(a) the second proviso to s68(1) is not couched, as is the first proviso, in terms of prohibition: cf *R v Justices of Leicester* (1827) 7 B and C 6, at pp12, 13; [1827] EngR 526; 108 ER 627, at p629, per Lord Tenterden CJ;

(b) the second proviso appears to be intended to operate for the benefit of the defendant alone, and it would seem logical that the benefits thereby conferred on the defendant should be capable of being renounced by him;

(c) that the provisions of s23(1) as to service of summons to answer to information, which require service "at least five days before the time appointed in such summons for the hearing thereof" have been held not to exclude the operation of the principle enunciated in *R v Hughes* (1879) 4 QBD 337, viz. that, however, a person is brought before the court he must answer to any information then and there brought against him, subject to his right to ask for an adjournment if taken by surprise: see *McManamy v Fleming* [1889] VicLawRp 67; (1889) 15 VLR 337; *Gleeson v Boardman* (1895) 16 ALT 153; *McManamy v Mills* (1897) 3 ALR (CN) 21; *Johnston v Duncan* [1897] VicLawRp 3; (1896) 22 VLR 13; 2 ALR 129; *O'Donnell v Chambers* [1905] VicLawRp 9; [1905] VLR 43; 10 ALR 224;

(d) that a failure to comply with the requirements of s23(1) or s23(4) does not necessarily deprive a Court of Petty Sessions of jurisdiction to hear and determine an information: cf *Swastman v Clark* [1894] 16 ALT 37, and *Davidson v McCarten* [1953] VicLawRp 96; [1953] VLR 697; [1954] ALR 42.

In *Posner v Collector for Interstate Destitute Persons (Vic)* [1946] HCA 50; (1946) 74 CLR 461, at pp476, 477; [1947] ALR 61 at p68, Starke J said:

> "Irregularities in procedure do not, it is clear, invalidate or make void orders within jurisdiction. When a court has jurisdiction over a proceeding and proceeds *inverso ordine* or erroneously, that does not take away the jurisdiction of the court and make its order void. A party is not without remedy in such case: he may make application to the court itself or appeal where appeal lies (*Ex parte Story* [1852] EngR 1008; (1852) 8 Ex 195; 155 ER 1317). But as the Lord Chief Justice Coleridge observed in *Martin v Mackonochie* (1879) 4 QBD 697 at p786, what is procedure, and therefore, if wrong, matter of appeal only; and what is jurisdiction, and if wrongly asserted, matter of prohibition, is almost impossible to define in general language. Cotton LJ in the same case said (at p735) if the court of limited jurisdiction, in dealing with a matter over which it has jurisdiction, has fallen into an error of practice or of the law which it administers, this can only be set right by appeal, and affords no ground for prohibition. When, however, an Act of Parliament has imposed restrictions, as to the circumstances under which a court of limited jurisdiction is to act in matters otherwise within its jurisdiction, then, if the court of limited jurisdiction disregards the restriction so imposed, and acts in violation of the statutory restrictions, the party aggrieved has a remedy by prohibition, even although the court of limited jurisdiction may have put a construction on the Act, and there is an appeal from its decision. Orders made in violation of statutory restrictions and therefore without jurisdiction have already been discussed.
>
> "Irregularities in procedure in matters within jurisdiction are often called nullities but the proceedings are not void in the sense that they have no effect or operation in law and can be ignored. The procedure or order may be disallowed or set aside ex debito justitiae in some cases and the irregularity waived

in others. It is unnecessary to discuss the line of demarcation between such irregularities in this case. *Smurthwaite v Hannay* [1894] AC 494; [1891-4] All ER Rep 865; *Anlaby v Praetorius* (1888) 20 QBD 764; 58 LT 671; 57 LJQB 287; 4 TLR 439; *Craig v Kanssen* [1943] 1 KB 256; *sub nom Craig v Kanssen* [1943] 1 All ER 108, however, illustrate irregularities that are often described as nullities though proceedings or orders in a superior court of record cannot be ignored and treated as of no effect or operation in law."

In the same case Dixon J (as he then was), said: (CLR at p483; ALR at p71)

"It must also be borne in mind that, when a party is entitled as of right upon a proper proceeding to have an order set aside, or quashed, he may safely ignore it, at all events, for most purposes. It is, accordingly natural to speak of it as a nullity, whether it is void or voidable, and indeed, it appears almost customary to do so. Further, the observation of Sir Frederick Pollock about the use of the word 'void' in relation to contracts is even more true of its use in connection with orders and judgments—'The use of the word void proves nothing, for it is to be found in cases where there has never been any doubt that the contract is only voidable. And as applied to other subject-matters it has been held to mean only voidable in formal instruments and even Acts of Parliament' (*Principles of Contract*, 10th ed. (1936), p56). These considerations explain the language used in *Ex parte Price-Jones; R v Evans* (1850) 15 LT (OS) 142; 19 LJMC 157; *R v Farmer* [1892] 1 QB 637; [1891-4] All ER Rep 921; *Craig v Kanssen* [1943] KB 256; *sub nom Craig v Kanssen* [1943] 1 All ER 108, and *Marsh v Marsh* [1945] AC 271.

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

In the course of the argument in *Posner's Case*, *supra* (CLR at p463; ALR at p62), Dixon J drew attention to an article in 47 LQR pp386 and 557, entitled "the Observance of Law as a Condition of Jurisdiction", by Mr DM Gordon. In that article, Mr Gordon (at p565) stigmatized as a "superstition" the idea that where the procedure of a judicial tribunal is prescribed by a statute not merely directory, observance of that procedure is a condition of jurisdiction. He pointed out (at p566) that "acceptance of the idea that statutory procedure goes to jurisdiction has been far from general", and he cited (pp566, 567) authorities for the proposition that "non-observance of statutory procedure" is mere irregularity, i.e. error at most, that non-observance can be waived or cured by acquiescence, that non-observance makes adjudications voidable not void, that the only test of jurisdiction is whether the tribunal is dealing with a subject-matter committed to it, and that "illegality" of proceedings does not necessarily involve incompetence; all which rulings in effect deny that procedure, even when statutory, has any bearing on jurisdiction.

The decision in *Posner's Case* may be said to represent an adoption of Mr Gordon's views. In the present case it is clear that the Court of Petty Sessions has jurisdiction over the cause of action asserted in the complaint and summons, and if the summons be valid, it has jurisdiction over the defendants since they have at all material times been within Victoria and were served with the summons.

In the present case there has been no judgment or order in favour of the complainant founded on the complaint and summons herein and I am not, therefore, faced with the problem whether such a judgment would be void or voidable; the flaw or defect or irregularity has been intercepted and passed upon at an earlier stage of the proceedings. Nevertheless a useful test of the validity or otherwise of the summons is that suggested by Mr DM Gordon (pp583, 584) in the article referred to above, namely, to inquire whether, if the defendants had refrained from raising any objection to the validity of the summons and had contested and won the case on the merits, could the complainant thereafter have asserted that the order of the court dismissing his complaint was a nullity, Logically, if the summons is a nullity he must be able to make this assertion, for as Mr Gordon points out (*op. cit.* at pp583, 584), "what is void for one person is void for all the world: a tribunal lacking jurisdiction lacks it for everyone alike".

I doubt if an absolute line, in terms of black-and-white, between what constitutes an irregularity only and what nullifies a summons can be laid down.

A useful approach—in this case, at all events—is to look at the nature of the irregularity or flaw or error in the summons and the practical consequences of a summons containing that flaw or error. Suppose the summons requires the defendant to appear before a Court of Petty Sessions at a place not appointed as a place to the holding of a court. Obviously such a summons must be regarded as of no coercive legal effect for the reason that the complainant cannot procure a court to sit at that place. If in such a case the parties agree that the summons shall be brought on for hearing at a court in another place, the principle enunciated in *R v Hughes* (1879) 4 QBD 614, in relation to criminal cases may be applicable so as to make the cause of action justiciable in that other court. The complainant could not compel the defendant to appear in that other court and the defendant would commit no default if he refused to appear at that other court: cf. *Paley on Summary Convictions*, 9th ed., p213. If a summons expressed to be attendable before a court in a specified place names a return day on which a court is not appointed to act at that place, that summons must equally be of no coercive legal effect—for the reason that there will be no court sitting at that place on that day, and the complainant cannot procure one to sit on that day.

If, however, the parties agreed to bring the complaint and summons on for hearing on some other day, then it would be open to the court on the basis of the principle in *R v Hughes*, *supra*, the parties being then and there before it, to deal with the matter.

It would seem legitimate (in a case such as this) to take into account also the inconvenience to which a defendant would be put if required to fulfil the literal requirements of the summons and to attend at that hour and at the hour lawfully appointed for the holding of the court. Could the defendant, for instance, reasonably assume that there would be no magistrate or justice in attendance at the hour named in the summons? Could he reasonably assume that the court would treat the difference between the time named in the summons and the time appointed for the holding of the court as so substantial that the court would not proceed at the later time to deal with the case in the event of his not being there in attendance at the court?

One can envisage cases where the time named in the summons differs so little from the time appointed for the holding of the court that a defendant ought reasonably to foresee that the court would treat that difference as immaterial—e.g. a summons expected to be returnable at 10 a.m. at a court for which the appointed time was 10.15 a.m.

What I am about to say is not said in relation to a case where the summons is expressed to require a defendant to appear at 10 a.m. before a court which is not appointed to sit until 2.30 p.m. on that day. In such a case it may be very inconvenient to the defendant to attend both at an hour long before that at which the court is appointed to sit and at the later hour also and it may be very unlikely that a magistrate or justices will be in attendance. In such a case the defendant may safely ignore the summons, and if the court at or after 2.30 p.m. made an order against him in his absence, he would be entitled *ex debito justitiae* to have that order set aside. But this is by no means to say that the summons is a nullity. Suppose the defendant attended the court at 2.30 p.m. and consented to the information or complaint being then and there dealt with, the order determining the information or the complaint on the merits would not, in my view, be a nullity. If the court dismissed the complaint, the complainant could not, in my view, contend that the dismissal was a nullity. If the defendant attended at 2.30 p.m. and objected to the court then proceeding to hear and determine the information or complaint the court would nevertheless, on the principle of *R v Hughes*, *supra*, have power to overrule his objection and then to hear and determine the matter: see *Posner's Case* [1946] HCA 50; (1946) CLR 461 at p476; [1947] ALR 61, at pp66, 67, per Starke J, and see also *Ellis v Horsley Bros* [1898] VicLawRp 125; (1898) 23 VLR 609; 4 ALR 59.

In the present case, I am of the opinion that the summons was not a nullity. I think that conclusion flows from the decision in *Ellis v Horsley Bros*, *supra*. In addition, the difference of time between the hour of 10 a.m. named in the summons and the hour of 10.15 a.m. appointed for the holding of the court is so small as to have made it (in my view) a proper case for the application of the maxim "de minimis non curat lex" (cf. the notes in *Broom's Legal Maxims*, 10th ed., pp88-90), and for the exercise of the powers of amendment of the summons under s99. In short, the

magistrate ought to have held that this summons was sufficient in substance and effect, so that s5 of the *Justices Act* 1958 would sustain any order made on the hearing of the summons.

In short, the summons herein though tainted by an irregularity was not, in my view, a nullity. Furthermore, it was open to the court—provided due service was established (and in the present case service is admitted) to overrule the objection and to proceed to hear and determine the complaint and summons: see *Ellis v Horsley Bros, supra.*

I would add that had the defendants appeared at 10.15 a.m. on the original return date and objected to the sufficiency of the summons, while it would have been open to the magistrate to make an order striking the summons out, I doubt whether the matter would have fallen within s91(18). In my view, for the reasons I have already advanced, the flaw here was one of procedure and not of jurisdiction. I think the Court of Petty Sessions had jurisdiction to hear and determine the subject-matter of this complaint. Certainly the court would have had such jurisdiction had the defendants waived the objection to the form of the summons. Indeed, it seems clear, from the decisions in *R v Hughes* (1879) 4 QBD 614, and *R v Shaw* (1848) 34 LJMC 169, and the observations of Lord Coleridge CJ in *Dixon v Wells* (1890) 25 QBD 249, at p256, as well as from the decision in *Ellis v Horsley Bros* [1898] VicLawRp 125; (1898) 23 VLR 609; 4 ALR 59, that notwithstanding the defendants appeared only to object to the sufficiency of the summons, it would have been open to the court to overrule that protest and proceed to hear and determine the case.

Alternatively, if satisfied that the defendants would be prejudiced by being required to go on immediately, the court could in its discretion, have adjourned the hearing of the complaint and summons to some appropriate date.

However, the defendants took a different course, and having regard to their conduct in seeking an adjournment, delivering interrogatories and answering interrogatories, the magistrate ought to have held that they had waived the initial irregularity of the summons, and he should have overruled their objections to its sufficiency.

Having regard to the view I have expressed that the court did have jurisdiction to deal with the matter, it is clear that the case is not one for the application of the principle stated by Davey LJ *Farquharson v Morgan* [1894] 1 QB 552, at p560; [1891-4] All ER Rep 595, that "the parties cannot by agreement confer upon any court or judge a coercive jurisdiction which the court or judge does not, by law possess". See also *Alderson v Palliser* [1901] 2 KB 833, at p836, and *Simpson v Crowle* [1921] 3 KB 243; [1921] All ER Rep 571.

I may say, in passing, that even if I had been of the view that the magistrate was correct in law in striking the summons out under s91(18) of the *Justices Act* 1958, I would still have found his order as to costs somewhat surprising. To award costs to defendants in respect of interlocutory steps they have taken in proceedings which they claim are a nullity does not seem to me to be self-evidently just and proper. Indeed, it would tend to encourage defendants to take technical objections devoid both of substance and merit. Such objections seldom redound to the good name or good sense of those who take them. I make these observations conscious of the difficulties which magistrates face and to which I have referred at the outset of these reasons for judgment.

The present case aptly illustrates the good sense of the views expressed two centuries ago by Hawkins in his *Pleas of the Crown*, vol. 2, ch. 27, s102:

> "If a defendant appearing on erroneous process expressly except to it before he has pleaded over there have been many authorities that he ought to be discharged, and the new process shall issue where the defect first happened. But there is a greater number of authorities to the contrary, by which it appears that if the original be good and the defendant present in court, he shall be compelled to answer it, let the process whereon he came in or the execution of it be never so erroneous or defective...for the end of process is to compel an appearance; and that end being served, and a legal charge being appearing against the defendant...the law will not so far regard a slip in the process as to let the defendant out of court only to have him brought in again in better form...".

And (at s103):

> "Would it not be altogether as trifling in this, as in any other case, to dismiss a person only to send for him again? And in criminal cases this could not be of the utmost ill consequence, by giving the defendant, who is actually in the power of the court, an opportunity of escaping."

In the result, all three grounds of the order nisi are made out, and the order nisi will be made absolute on each of those grounds, with costs, the order of the court below set aside, and the complaint and summons will be remitted to that court to hear and determine according to law.

The formal order will be:–

Order nisi granted on 1 August 1969 is made absolute on all three grounds, and the order of the Court of Petty Sessions at Healesville made on 2 July 1969, striking out the summons herein and ordering the complainant to pay to the defendants Blackmore $130.25 costs and to the defendant Cherry $100.25 costs, is set aside. Order that the complaint and summons herein be remitted to the Court of Petty Sessions at Healesville to hear and determine according to law. Order that the costs of the complainant of and incidental to this order nisi, including any reserved costs, be taxed and that when so taxed the amount thereof be paid in full or to the extent of $120 whichever be the less.

Solicitors for the complainant: Gillott, Moir and Winneke.
Solicitors for the defendants: Mullett and Langford.
