[PRIVY COUNCIL.]

In re JOHN McLAUGHLIN.

J. C.*
1905
April 6.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES IN LUNACY.

New South Wales Lunacy Act, 1898, s. 106, *sub-s.* 2; s. 110—*Substituted Service on alleged Lunatic—Service on Master in Lunacy—Jurisdiction to dispense with Examination of Lunatic.*

By s. 106, sub-s. 2, of the New South Wales Lunacy Act of 1898, according to its true construction, personal service on an alleged lunatic of a petition by his wife to declare him of unsound mind may be dispensed with when there is evidence on which the Court can conclude that it is inexpedient.

The rules of Court provide that substituted service should be effected on "some adult inmate at the dwelling-house." Where the wife and his two attendants are the only adult inmates, it is within the jurisdiction and discretion of the Court to order service on the Master in Lunacy.

It is also within the jurisdiction of the Court under s. 110 to dispense with any examination of the alleged lunatic, if there is evidence on which it can find that it is inexpedient to examine him.

APPEAL from an order of the above Court, sitting as the Full Court in Lunacy (May 28, 1903), affirming an order of the Chief Judge in Equity (March 10, 1903), whereby he refused to rescind or discharge certain orders made by him on August 1 and 7 and November 18, 1902, and directed a certain account to be taken, and allowed certain costs, charges, and expenses to the person purporting to be the committee of the estate of the appellant.

The question at issue was whether, under the circumstances stated in the judgment of their Lordships, the said order of August 7, 1902, declaring the appellant of unsound mind and giving consequential directions for the management of his affairs, was wrongly made and ought to be rescinded, either on the ground that it was in fact made ex parte and without notice to the appellant; or on the further ground that such

* *Present:* LORD DAVEY, LORD ROBERTSON, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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order was made without any examination of the appellant, and without any reason for dispensing with such examination; or on the further ground that in obtaining the said orders the persons applying therefor acted malâ fide and with the deliberate intention of preventing the appellant from being heard. The first ground raised another question, whether a previous order of August 1, 1902, ordering substituted service of the notice on the Master in Lunacy, was rightly made.

Sargant, for the appellant, contended that the effect of the order of August 1, 1902, was to dispense with service altogether. It did not direct substituted service in any proper sense of the term. He referred to the Lunacy Act, 1898, and contended that s. 106 provides that notice shall be given to the alleged lunatic, and, though personal service may be dispensed with if inexpedient, the object aimed at by substituted service is still a real though indirect one: see rule 13, made under s. 169 of the Act. The person directed to be served should be one likely to bring the matter to the notice of the person affected. The Master in Lunacy would refrain from doing so unless expressly directed. The evidence did not justify the making of such an order. The order of August 7 was made without any notice. Sect. 110 prescribes an examination of the alleged lunatic. There was none, and there was no evidence which justified the Court in dispensing with it. The appellant's adjudication as a lunatic ex parte and without examination was contrary to natural justice as well as to the legislation of the Colony. Reference was made to *Hope* v. *Hope* (1) as to the principle on which substituted service is ordered, that there is reasonable ground to suppose that the service will come to the knowledge of the party concerned.

The judgment of their Lordships was delivered by

Lord Davey. This is an appeal by a gentleman who was at one time mentally afflicted, but has now recovered and is in full possession of his mental faculties, from an order of May 28, 1903, made by the Supreme Court of New South

(1) (1854) 4 D. M. & G. 328.

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Wales sitting as the Full Court in Lunacy. That order confirmed an order of March 10, 1903, made by the Chief Judge in Equity, which latter order was made upon an application (which their Lordships will assume was properly made) to set aside certain previous orders of the Court in Lunacy of August 1, August 7, and November 18, 1902. The substance of the matter is that the appellant desires to set aside an order by which he was pronounced to be of unsound mind, and a previous order by which service of the application to bring him under the jurisdiction of the Court was directed to be made in a particular manner.

The material facts of the case are as follows. The appellant, who was formerly and, for aught their Lordships know to the contrary, still is, a solicitor in good practice in New South Wales, was admittedly for about two years prior to July, 1902, more or less mentally afflicted. The degree to which his affliction amounted to unsoundness of mind probably varied from time to time, but that he was what is commonly called of unsound mind for those two years, at any rate, was not questioned by his counsel. In July, 1902, Mrs. McLaughlin presented a petition to the Supreme Court for the purpose of having him declared a person of unsound mind and incapable of taking care of himself or managing his affairs, and for the appointment of a committee. Thereupon, on August 1, 1902, an order was made that service of Mrs. McLaughlin's petition and the affidavits sworn and filed in support thereof upon Henry Francis Barton, Master in Lunacy of the Court, should be deemed good and sufficient service of such petition and affidavits upon Mr. McLaughlin. This is the first order which the appellant desires to get rid of.

The power to make an order for substituted service is given by s. 106, sub-s. 2, of the Lunacy Act of 1898, which is in these words: "Where personal service cannot be effected or is inexpedient, then substituted service may be effected in such manner as may be prescribed by rules of Court, or as may be ordered by the Court." Three constructions have been given to that section. One construction—the construction adopted by Walker J. in the Full Court—was to the effect that the

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sub-section is to be read reddendo singula singulis, i.e., that where personal service cannot be effected, substituted service may be effected in such manner as is prescribed by rules of Court, but where personal service is inexpedient, then substituted service may be effected as ordered by the Court. Their Lordships do not think that that is the true construction of the sub-section. The construction suggested by the learned counsel for the appellant is this: That where personal service cannot be effected or is inexpedient, substituted service may be effected in such manner as may be prescribed by rules of Court, or, if there are no rules of Court applicable to the particular case, as may be ordered by the Court. Their Lordships do not think that that construction is the right one. It seems to them much better to read the words of the Act simply, without endeavouring to put any strained construction upon them. The natural meaning of the words appears to their Lordships to be that where personal service cannot be effected, or is inexpedient, then substituted service may be effected, either in such manner as may be prescribed by the rules of Court, or in any special case, where particular circumstances exist, as may be ordered by the Court. In this case the evidence that personal service was inexpedient was overwhelming. There was the evidence of the two doctors, Dr. Manning, who is described as a gentleman of great experience in such cases, and Dr. Dick, who was in regular attendance on Mr. McLaughlin, and of Mrs. McLaughlin herself, and this evidence goes to shew that the appellant's state of mind was such that the personal service of the petition was extremely likely to aggravate his malady. One of his strongest delusions was that he was being hypnotised by his wife, for whom he had apparently conceived a perfectly unreasonable dislike, though Mrs. McLaughlin had shewn him all the care and attention which it was possible to bestow upon him. In those circumstances one can easily understand how personal service of his wife's petition to have him declared of unsound mind and to have his person and estate placed under control might irritate him to such an extent as to increase his unhappy malady or retard his recovery. At any rate, whether that was sufficient reason

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or not, the Court thought it was. It is impossible to say that there was not evidence on which the Court could come to the conclusion that personal service was inexpedient.

Then the question arises upon whom service should be made. The rules say it is to be made upon "some adult inmate at the dwelling-house." The only available adult inmates at the dwelling-house besides Mrs. McLaughlin herself were said to be the two attendants who were waiting on the appellant. If they had communicated the effect of the petition to him, it seems tolerably clear that it might have had precisely the same effect as if the petition had been served upon him by an officer of the Court. The Court therefore took the course which, as appears from the statements of the learned judges, has not been unusual in the exercise of this jurisdiction, i.e, they directed the petition to be served on the Master in Lunacy, leaving it to the latter, who is a person of experience and has the command of the services of experts in matters of this kind, to take such steps as might seem to him expedient, and to do all that was necessary for insuring that the matter of the petition was properly sifted and investigated, that it was bonâ fide and supported by the proper evidence, and that everything was done that could usefully be done for protecting the interests of the alleged lunatic. Whether that was a wise course or not, or whether the procedure is open to criticism or not, at any rate it was within the jurisdiction of the Court. It must be remembered that this particular jurisdiction is one of some peculiarity and difficulty. It exists for the benefit of the lunatic, and the guiding principle of the whole jurisdiction is what is most for the benefit of the unhappy subject of the application. It has been pointed out that this order for substituted service differs from the usual cases where substituted service is only allowed when personal service cannot be effected, whereas in this case it is allowed because personal service is inexpedient. In ordinary cases, in considering upon whom substituted service should be made, the primary consideration is as to how the matter can be best brought to the personal attention of the person in question himself. But that is not the case in lunacy. There it may be highly inexpedient that

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the matter should be brought to the alleged lunatic's personal attention. Where it is considered inexpedient that personal service should be effected, it may be, though it does not by any means follow, that in selecting the mode of substituted service regard should be had to the same considerations as apply in ordinary cases of serving a writ or other legal process. But in all cases the Court has to consider what in all the circumstances of the case is most for the benefit of the patient and for his protection. In their Lordships' opinion, therefore, the learned counsel for the appellant was not justified in saying that this proceeding was equivalent to a proceeding ex parte in the sense in which he used the term, and they think that the order made was within the jurisdiction of the Court and within the powers given to the Court by the Act of Parliament to direct service in that way. That disposes of the order of August 1, 1902.

As to the order of August 7, 1902—the order by which the Court declared that Mr. McLaughlin was of unsound mind and appointed a committee—very little remains to be said on it, when the objections to the order of August 1 have been disposed of. One objection to it is that it was made ex parte; but that objection has already been dealt with. The next objection is that there was no personal examination of the alleged lunatic. Sect. 110 of the Lunacy Act provides for a personal examination of the alleged lunatic, either by the Court or by a jury, according to whichever way the trial is conducted; but it is provided that "if it appears to the Court to be unnecessary or inexpedient that such person should be examined by the Court or the jury, the Court may in lieu of the examination aforesaid direct the master personally to examine the said person and report on such examination, or may dispense with any examination whatever." The order of August 7 states that the Court "in pursuance of the powers vested in it by s. 110" of the Act did "dispense with any examination of John McLaughlin." There, again, it may have been wise, or unwise, to exercise the jurisdiction vested in the Court, but what has to be shewn is that the Court exceeded its powers. Their Lordships cannot say that the

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Court has done so. The Court had jurisdiction to say whether in the circumstances it would or would not dispense with any examination whatever. Their Lordships are of opinion that the jurisdiction to dispense with the examination of the alleged lunatic is one which should be exercised with great caution, but it is not within their province on this appeal to say whether the Court acted wisely or unwisely; the only question for them is whether the Court acted within the powers entrusted to it. Counsel for the appellant suggested that there was no evidence upon which the Court could come to the conclusion it came to; but the affidavits of Dr. Manning, Dr. Dick, and Mrs. McLaughlin describing the appellant's state of mind—though primarily directed to the question whether personal service could be dispensed with—were good evidence on which the Court might, if it thought fit, also determine the question whether personal examination should be dispensed with.

The subsequent proceedings may be shortly stated. The appellant, having learned of the order that had been made, applied on September 15, 1902, to rescind the previous orders, which he had a perfect right to do, either on the technical ground that they had not been made in accordance with the powers of the Court, or on the merits, i.e., that the Court had come to a wrong conclusion when it declared him to be of unsound mind. The appellant apparently disputed the correctness of the order of August 7, 1902, both on the technical ground referred to and on the merits.

That application was adjourned, and on October 9 the appellant gave an amended notice of motion and the matter came on for hearing before the Chief Judge in Equity. The affidavits which had been made were read, the persons who made them were cross-examined at great length, and other oral evidence was given as to the state of the appellant's mind on August 7, and subsequently up to the date of the hearing of the motion. The hearing lasted seven days, and ultimately, on November 18, 1902, the Chief Judge in Equity gave his judgment. After a very careful review of the evidence he came to the conclusion that Mr. McLaughlin was not only of unsound mind at the date when the order was made, but that

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he had not satisfied the Court that he was then of sound mind, and he accordingly dismissed the motion. A second motion was then made for the same purpose and was heard by the Chief Judge in Equity on March 10, 1903, without any objection that the question had been already decided. His Honour then said that he did not see his way to set aside the previous orders, but having regard to affidavits which had since been filed he was satisfied that Mr. McLaughlin was then of sound mind, and accordingly he ordered what was in effect a supersedeas.

There was an appeal from that judgment, so far as it refused to set aside the earlier orders of August 1 and 7, 1902. Mr. McLaughlin's reason for seeking to set aside the orders is very candidly given by him in the short discussion after the judgment of the learned judge. "The reason," he says, "why I sought to have the order set aside was to prevent this case from constituting a precedent and to prevent non-service of proceedings in future." This shews a very creditable zeal for the public interest; but, assuming that the appellant was in fact of unsound mind on August 7, there are no sufficient materials before their Lordships to shew that the orders complained of had resulted in any injury to him. However, he appealed, and the matter was reconsidered by three learned judges in the Full Court, who delivered very full opinions on the question whether the orders of August 1 and 7 were within the powers of the Court, and were proper orders to be made at the time they were made, and they all came to the same conclusion as the Chief Judge.

Their Lordships agree in substance with the reasons given by those learned judges, and need not, therefore, repeat them. They will accordingly humbly advise His Majesty that this appeal ought to be dismissed.

Their Lordships will only add that they feel quite as strongly, as it was properly urged upon them by counsel for the appellant, that the interest of persons alleged to be of unsound mind and of all His Majesty's subjects ought to be jealously protected against any attempts of designing people, or of people acting innocently but mistakenly, to place either

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their persons or their property under restraint; but in this case their Lordships do not think that the powers of the Court were in any way exceeded.

Solicitors for appellant: *Young, Jones & Co.*