1986 December 1

[A. LOIZOU, MALACHTOS, STYLIANIDES, JJ.]

PHILIPPOS PHILIPPOU,

Appellant-Respondent,

v.

MARIA PHILIPPOU, ALIAS MAROULLA PHILIPPOU, FOR HERSELF AND HER THREE INFANT CHILDREN—ELENA, PANAYIOTA AND CHRISTOS PHILIPPOU,

Respondent-Applicant.

(Civil Appeal No. 6821).

Jurisdiction—Appearance with sole object of contesting jurisdiction or protesting against invalid service—Does not amount to submission to the jurisdiction—If, however, a litigant fights the case, not only against the jurisdiction, but also on the merits, he must be taken to have submitted to the jurisdiction.

Jurisdiction—Inferior Courts—Their jurisdiction should be traced in the statute establishing them—Duty to examine point that goes to the jurisdiction—Order issued upon ex-parte application for substituted service of maintenance application—Respondent domiciled and resident abroad—Respondent filed opposition protesting against the jurisdiction and the validity of the service—Trial Judge's duty to examine such issues—In doing so he does not act as an Appellate Court from his own order.

Maintenance—Section 40 of the Courts of Justice Law 14/60—Proceedings thereunder commence in practice by originating summons—Practice approved—Civil Procedure Rules with regard to applications by summons and actions commenced by writ applicable mutatis mutandis.

Jurisdiction—Service of writ—The foundation of the jurisdiction—Service within the jurisdiction regulated by Ord. 5, of the Civil Procedure Rules, whereas service out of the jurisdiction is regulated by Ord. 6—Service out of the

jurisdiction is not allowed as a matter of right, but in the discretion of the Judge as a privilege—Order 6 is an extension of the jurisdiction—Substituted service—Leave for, on a person out of the jurisdiction, upon ex-parte application based on Order 5, r. 9—Such a service is a nullity,

Judgments and Orders—Orders made ex parte—May be varied —The Civil Procedure Rules, Ord. 48, r. 8(4).

On 3.4.84 the respondent filed in the D. C. Larnaca an application against her husband, that is the appellant, for maintenance for herself and the three infant children of the marriage. On the same day she filed an ex parte application based on Ord. 5, r. 9 of the Civil Procedure Rules for leave of the Court for substituted service of the maintenance application on her husband by double registered post. In the affidavit in support of the ex-parte application it is stated that her husband resides in Australia and does not intend to return to Cyprus.

The leave for substituted service was given. Eventually the appellant filed an opposition to the main application supported by an affidavit sworn by his counsel in which it is stated that he is domiciled and permanently resident in Australia, that the Courts of Cyprus have no jurisdiction to try the case, that he was not duly served with the application and that, without submitting to the jurisdiction, he reserves his right to defend this or any other application.

With the consent of the parties the trial Judge held argument in respect of the legal points raised by the opposition. Counsel for the respondent husband submitted that under Ord. 6 the application could not be served in Australia, that Ord. 5, r. 9 was not applicable and that, consequently, the service was invalid.

The trial Judge held that he could not entertain such a submission as he could not act as an Appellate Court of his own decisions.

Hence the present appeal.

Held, allowing the appeal: (1) It cannot be said that one submits to jurisdiction, if one appears with the sole

object of protesting against an invalid service and against the jurisdiction. But if a litigant fights the case, not only on the jurisdiction, but also on the merits, he must be taken to have submitted to the jurisdiction, because he cannot be allowed, at one and the same time, to say that he will accept the decision, if favourable to him and will not submit to it, if it is unfavourable. In this case it is obvious that the appellant did not submit to the jurisdiction.

(2) Any order made ex-parte may be set aside or varied by the Court or Judge on such terms as may seem just (Ord. 48, r. 8(4)). The cases provided for by Ord. 16, r. 9 and 0.10, r. 7, are instances of the general principle embodied into Ord. 48, r. 8(4).

(3) The jurisdiction of an inferior Court should be traced in the Statute establishing it. Trial and decision by such a Court on a matter in which it has no jurisdiction is a nullity. It is, always, the duty of such a Court to examine a point that goes to its jurisdiction. It follows that in this case the trial Judge misdirected himself as to the law.

(4) There are no specific rules regulating the procedure in respect of applications under s. 40 of the Courts of Justice Law, but having regard to the provisions of this section and the Civil Procedure Rules the practice was followed—and this Court approves it—to commence maintenance proceedings by originating summons. The provisions of the Civil Procedure Rules with regard to applications by summons and actions commenced by writ are applicable mutatis mutandis.

(5) When a writ cannot be legally served on a defendant, the Court can exercise no jurisdiction over him. Service is the foundation of the jurisdiction. It follows that that service would normally and naturally be service within the jurisdiction. But there is an exception and that is service out of the jurisdiction, which is not allowed as a matter of right, but is granted in the discretion of the Judge as a privilege.

(6) Service within the jurisdiction is regulated by Ord. 5, whereas service out of the jurisdiction by Ord. 6 of

the Civil Procedure Rules, which is cast in identical terms as the old English 0.11(1).

(7) The ex-parte application filed in this case was not based on Ord. 6, but on Ord. 5, r.9. A Judge has no power to issue orders which the party has never sought in his application. The question is whether, in view of the fact that no leave for service out of the jurisdiction was sought, substituted service could be allowed. Substituted service abroad is governed by Ord. 6, r. 9.

(8) Order 6 does not involve a mere matter of procedure, but an extension of the jurisdiction. Substituted service within the jurisdiction cannot be made if, at the time of the issue of the writ, there could not be at law a good personal service of the writ because the defendant is not within the jurisdiction *(Porter* v. *Freudenberg* [1915] 1 K. B. 857 at 887-888). And as it was held in *Myerson* v. *Martin* [1979] 3 All E. R. 667, if at that time the plaintiff was aware of such a fact either he could issue the writ within the jurisdiction and wait for the defendant to return to be served personally or, if his claim came within R.S.C. 0.11, r. 1, apply for leave to serve the writ out of the jurisdiction. Since the defendant was not in England when the writ was issued the Court had no jurisdiction to order substituted service. (A passage from Lord Denning's judgment at p. 671 was cited with approval and adopted).

(9) In the light of the above it follows that the service of the maintenance application by substituted service in virtue of an order issued under Ord. 5, r. 9 was not a mere irregularity, but a nullity.

Appeal allowed with costs.

Cases referred to:

Tallack v. *Tallack* [1927] P. 211;

In re Dulles' Settlement (No. 2)—Dulles v. *Vidler* [1951] 1 CH. D. 842;

S.A. Consortium v. *Sun and Sand* [1978] 2 All E.R. 339;

Williams and Glyn's Bank Plc. v. *Astro Dinamico Cia* [1984] 1 All E.R. 760;

R. v. *Dennis* [1924] 1 K. B. 867;

Simpson and Another v. *Crowle and Others* [1921] 3 K. B. 243;

Johnson v. *Taylor Bros. and Company Ltd.* [1920] A.C. 144;

Iordanou v. *Aniftos* 24 C.L.R. 97;

Porter v. *Freudenberg* [1915] 1 K. B. 857;

Myerson v. *Martin* [1979] 3 All E.R. 667;

In re Pirtchard (deceased) [1963] 1 All E. R. 873;

Spyropoulos v. *Trans-Avia Holland N. V. Amsterdam* (1979) 1 C.L.R. 421;

Re Hji-Soteriou and Others (1986) 1 C.L.R. 429.

Appeal.

Appeal by respondent against the ruling of the District Court of Larnaca (Eliades, D. J.) dated the 16th October, 1984 (Appl. No. 25/84) dismissing the submission of Counsel for respondent to the effect that service out of jurisdiction ought not to have been allowed.

Chr. Clerides, for the appellant.

A. HjiPanayiotou, for the respondent.

Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: The applicant, Maria Philippou, and the respondent are husband and wife. Their marriage was celebrated according to the rites and ceremonies of the Greek Orthodox Church at Larnaca on 24.4.77. Soon after their marriage they emigrated to Australia. The couple sometime in 1980 returned to Cyprus but the respondent in October, 1982, left again Cyprus for Australia where he resides. They have three offsprings from this marriage, Elena, Panayiota and Christos.

On 3.4.84 the wife for herself and for the three infant

children took out a summons at the District Court of Larnaca whereby she prays for an order ordering the respondent to pay £500.- per month for the maintenance of the applicant and the three minor children or make such periodical payments as the Court may deem fit.

The application is based on the Courts of Justice Law, 1960 (No. 14 of 1960), Section 40(3), Laws No. 9/62 and 12/65 and the Rules of Court, 0.48, r. 3, and Article 111 of the Constitution.

On the same day an ex-parte application was filed whereby the applicant sought "leave of the Court for substituted service on the respondent of the application by double registered letter at the undermentioned address". This ex-parte application was based on the Civil Procedure Rules, 0.5, r. 9.

In the affidavit in support of this application, sworn by the applicant, it is stated that the respondent is permanently residing in Australia and does not intend to return to Cyprus.

This application was dealt with by a District Judge who in a cyclostyled form issued the following order:-

> "Court: On the material before me the application is granted. Leave is hereby given to seal and serve the copy of the application out of the jurisdiction as per application.
>
> Such service to be effected by double registered letter and by posting on the Court Notice Board for 20 days.
>
> The respondent will be at liberty to enter an opposition within 30 days of such service.
>
> Application fixed for hearing...".

The material part of the drawn up order issued by the registry on 5.4.84 reads:-

> «ΕΞ ΠΑΡΤΕ: Αιτησις υπό Αιτητρίας ήμερ. 3.4.84
>
> Τη αιτήσει της δ. Σκούρου δια κ. Α. Χ'' Παναγιώτου εκ Λευκωσίας, δικηγόρου δι' Αιτήτριαν, δια

της οποίας εξαιτείται παρά του Δικαστηρίου τούτου άδειαν όπως η επίδοσις της αιτήσεως εν τη ως άνω αιτήσει, διενεργηθή δια διπλοασφαλισμένης επιστολής προς τον Καθ' ου η Αίτησις, όστις διαμένει εις Αυστραλία, εκτός της δικαιοδοσίας του Δικαστηρίου τούτου·

ΤΟ ΔΙΚΑΣΤΗΡΙΟΝ ΤΟΥΤΟ, αναγνόν την ένορκον ομολογίαν την κατατεθείσαν υπό ή εκ μέρους της Αιτητρίας ΔΙΑ ΤΟΥ ΠΑΡΟΝΤΟΣ ΔΙΑΤΑΤΤΕΙ όπως η επίδοσις της αιτήσεως εν τη ως άνω αιτήσει θα θεωρηθή ως δεόντως γενομένη επί του Καθ' ου η Αίτησις δια της αποστολής πιστού άντιγράφου ταύτης μετά πιστού άντιγράφου του παρόντος διατάγματος δια διπλοασφαλισμένης επιστολής, εις την ως άνω αναφερομένην διεύθυνσιν και

(β) δια της αναρτήσεως παρομοίων αντιγράφων επί του Πίνακος Ανακοινώσεων του Δικαστηρίου τούτου επί 20 ημέρας.

ΚΑΙ ΤΟ ΔΙΚΑΣΤΗΡΙΟΝ ΤΟΥΤΟ ΔΙΑ ΤΟΥ ΠΑΡΟΝΤΟΣ ΠΕΡΑΙΤΕΡΩ ΔΙΑΤΑΤΤΕΙ όπως ο Καθ' ου η Αίτησις δύναται να καταχωρήση ένστασιν εντός 30 ημερών από της επιδόσεως της αιτήσεως. Εάν ο Καθ' ου η Αίτησις παραλείψη να καταχωρήση ένστασιν ή να εμφανισθή ενώπιον του Δικαστηρίου την 6.6.84 ημέραν ακροάσεως της αιτήσεως, τότε οιαδήποτε περαιτέρω ειδοποίησις θα διενεργήται δια της αναρτήσεως αντιγράφου επί του πίνακος ανακοινώσεων».

("Ex-Parte: Applicant's application dated 3.4.84. Upon the application of Miss Skourou, appearing for Mr. A. HjiPanayiotou from Nicosia, counsel for the applicant, whereby she applied for leave of this Court that the service of the application of applicant be effected by double registered post on the respondent, who resides in Australia, out of the jurisdiction of this Court.

THIS COURT, having read the affidavit filed by or on behalf of the applicant DOTH HEREBY ORDER that service of the application in the above

application be deemed to have been properly effected on the respondent by forwarding to him of a true copy of the application together with a true copy of this order by double registered post in the address hereinabove referred to and

(b) by affixing similar copies on the Court's Notice Board for a period of 20 days.

AND THIS COURT DOTH HEREBY FURTHER ORDER that the respondent may file opposition within 30 days from service upon him of the application. If he fails to file an opposition or to appear before the Court on 6.6.84, when the application is fixed for hearing, then any further notice shall be made by affixing a copy thereof on the Court's Notice Board").

Copy of the summons and the affidavit in support thereof and of the aforesaid drawn up order were sent to the respondent in Australia by double registered post.

He retained advocate in Cyprus who notified his intention to oppose the application. The notice of opposition was accompanied by a short affidavit sworn by the advocate in which it is stated that his client, the respondent, informed him and he truly and verily believes that he is domiciled and permanently resident in Australia, outside the jurisdiction of the Cyprus Courts; that the Courts of Cyprus have no jurisdiction to try the case and the respondent does not submit to jurisdiction; that the respondent was not duly served as no service can, in view of the respondent's domicile and residence, be effected outside the jurisdiction, and without prejudice to the above, without submitting to jurisdiction, the respondent reserved the right, if need be, to defend this or any other application.

The application came up for hearing before the same Judge who issued the order of 3.4.84 for the substituted service. On the suggestion of counsel for the respondent and with the consent of counsel for the applicant, the Court heard argument on the legal points raised by the opposition. Counsel for the respondent submitted that under 0.6 this summons could not be served in Australia; Order 5, r.9, was not applicable and the service by double

registered post in this case was invalid; as there was no valid service, the case could not proceed, and further the District Court of Larnaca had no jurisdiction. The trial Judge in a short ruling said that in his view he could not entertain such a submission that service out of the jurisdiction ought not to be allowed under 0.6, r.1(c), in view of the fact that the person sought to be served was not domiciled or ordinarily resident in Cyprus, as he could not act as an Appellate Court of his own decisions. The proper forum for the determination of such a complaint would be another Court when the present proceedings would be completed and he dismissed the submission.

By this appeal the appellant-respondent complains that the trial Court wrongly did not determine the questions raised before him, saying that he could not do so as he is not an Appellate Court of his own ruling; that in a mere application for substituted service based on 0.5. r.9, no order for service abroad would be issued; that the purported service of the maintenance application is null and void and of no effect being contrary to the provisions of 0.6, r.1, of the Civil Procedure Rules; that no leave for service under 0.6 could be given as there was no application before the Court, and furthermore the case does not fall within the ambit of r.4 of 0.6. Another ground raised is that the Court misdirected itself with regard to the provisions of s.40(1) of the Courts of Justice Law.

It is obvious that the respondent did not submit to the jurisdiction by the appearance of his counsel.

When a person only appears with the sole object of protesting against an invalid service and against the jurisdiction, we do not think that he can be said to submit to the jurisdiction—(*Tallack* v. *Tallack*, [1927] P. 211, 222).

In the present case counsel appeared and protested against the jurisdiction and he challenged the validity of the service. He made it plain that he did not fight the case on the merits. If a party, a litigant, fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the

jurisdiction, because he is then inviting the Court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable—(*In re Dulles' Settlement (No. 2)—Dulles* v. *Vidler* [1951] 1 Ch.D. 842; *S. A. Consortium* v. *Sun & Sand.* [1978] 2 All E.R. 339; *Williams & Glyn's Bank Plc.* v. *Astro Dinamico Cia,* [1984] 1 All E.R. 760).

In an ex-parte application the party against whom the order is sought is absent. Any order made ex-parte may be set aside or varied by the Court or Judge on such terms as may seem just—(Order 48(8)(4)). Among the applications that may be made ex-parte are applications for leave to serve out of Cyprus (0.6, r.4), leave for substituted service (0.5, r.9) and leave to issue and serve a third party notice (0.10, r.1).

Orders given in ex-parte applications, however, may be set aside by the Court that issued them, the proper forum being the Court that dealt with the ex-parte application and not the Appellate Court.

Order 16. r. 9, which provides that the defendant may take out a summons to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorizing such service, and 0.10, r. 7, which provides for the discharge of a third party are instances of the general principle and the general practice permeating our rules of procedure which finds expression into 0.48(8) (4) to which we have earlier referred.

The jurisdiction of the inferior Courts in this country must be traced in the statute establishing them. Trial and decision by an inferior Court on a matter on which it has no jurisdiction is a nullity. The question of jurisdiction is one for the Court, and it is our plain duty to decide whether there has been an absence of jurisdiction if satisfied that it is so. It is always the duty of the Court to take notice of a point which goes to the jurisdiction of the Court of trial—(*R.* v. *Dennis,* [1924] 1 K.B. 867). *Simpson and Another* v. *Crowle & Others,* [1921] 3 K. B. 243).

The trial Court misdirected itself as to the law, its

duty and its powers, and denied to exercise its competence for the determination of fundamental questions raised by counsel before it. To pronounce a decision on them it would not be acting as an Appellate Court of itself but it would be exercising its own function and performing its own duty.

Having said this, we have either to send the case back to the trial Court or determine ourselves the issues raised. As no question of evidence or credibility arises, we decided to deal with the objections taken by counsel before the trial Court.

Reference was made both before the trial Court and in these proceedings to s. 40 of the Courts of Justice Law that empowers a District Court to make order for maintenance in certain cases.

This provision was introduced for the first time by Section 44 of the Courts of Justice Law, 1953 (No. 40 of 1953).

Matters of maintenance for wife and children between members of the Turkish community were governed by s. 34 of the Turkish Family Law, as amended by s. 5 of Law No. 63/54, and the Turkish Family Courts were empowered to issue such maintenance orders for the wife and the infant children of the marriage. The District Courts were empowered by s. 44 of Law No. 40/53 to make maintenance orders for the wife and children in respect of Greek Orthodox whose matrimonial causes were within the jurisdiction of the Ecclesiastical Tribunal of the Greek Orthodox Church.

The provisions of s. 44 of the Courts of Justice Law, 1953, Cap. 8, which expired four months after Independence, were trasplanted in s. 40 of the Courts of Justice Law, 1960 (No. 14 of 1960). As, however, this matter was within the competence of the Greek Communal Chamber, the Supreme Constitutional Court declared s. 40(1) of the Courts of Justice Law, 1960 (No. 14 of 1960) unconstitutional. The Greek Communal Chamber passed Law No. 9/62 establishing Courts for the exercise of such same power. The Greek Communal Chamber ceased to exist on 31.3.65 and by the Transfer of the Exercise of

the Functions of the Greek Communal Chamber Law and the Ministry of Education Law, 1965 (No. 12 of 1965), s. 11, the powers and jurisdiction of the Greek Communal Courts established under the Greek Communal Courts Law, 1962 (No. 9 of 1962) of the Greek Communal Chamber were transferred and are exercised as from that date by the District Courts within their territorial jurisdiction, according to the Courts of Justice Law.

Section 40 of the Courts of Justice Law provides that the District Court makes a maintenance order on the application of the wife. No specific rules were made for this specific jurisdiction but having regard to the wording of the section and the provisions of the Civil Procedure Rules as practice was followed—and we agree and approve it—for the commencement of proceedings by originating summons; the provisions of the Civil Procedure Rules with regard to applications by summons and actions commenced by writ are applicable mutatis mutandis.

The Court can exercise jurisdiction only when the writ or summons is served on the defendant within the jurisdiction or by the "assumed" jurisdiction which gave the Courts a discretionary circumscribed power to summon absent defendants whether Cypriots or foreign. The service of the writ or summons was something equivalent thereto. The summons is essential as the foundation of the Court's jurisdiction. When a writ cannot legally be served upon a defendant, the Court can exercise no jurisdiction over him. Jurisdiction, according to the English Law and the system of law obtaining in this country, is based on the act of personal service. It is far otherwise in other systems where service is in no sense a foundation of jurisdiction, but merely a sine qua non before effective action is allowed. Now service being the foundation of jurisdiction, it follows that that service naturally and normally would be service within the jurisdiction. But there is an exception to this normal rule, and that is service out of the jurisdiction. This, however, is not allowed as a right but is granted in the discretion of the Judge as a privilege, and the rule in question here prescribes the limits within which that discretion should be exercised—(See *Johnson* v. *Taylor Bros. and Company Ltd.*, [1920] A. C. 144).

Service within the jurisdiction is governed by 0.5 of the Rules. Service out of the jurisdiction is provided for in 0.6 which is cast in identical terms as the old English 0.11(1). This Order confers upon the Court a new power whereby it is enabled to exercise jurisdiction in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for. This is not service of a writ as a right; it may only be "allowed"; it is discretionary. The controlling words of r. 1 are "service .... may be allowed by the Court or a Judge", and then follow categories (a) - (h).

In the case under consideration the applicant filed an ex-parte application based on 0.5, r. 9. It was not an application based on 0.6. It was an application for leave for substituted service by double registered post.

Order 48, r. 2(1), provides that every application to the Court shall state the nature of the order or directions sought and refer to the specific section of the Law or to the specific Rules of Court upon which it is founded.

There could be no misconception of what the applicant in that ex-parte application was seeking. The application was founded on r. 9 of 0.5 and the order sought was for substituted service. This was filed on the same day as the summons whereby proceedings were commenced. The respondent was permanently resident in Australia to the knowledge of the applicant herself.

A Judge has no power to issue orders which the party has never sought in his application. He has to confine himself to the relief sought and he cannot take up any matter which in his mind would properly suit the case of a litigant, according to the Rules or the Law.

The same principle was enunciated with regard to trial of cases, that a Court or Judge should confine himself to the issues as crystallized at the closing of the pleadings of the party and not take up any matter which is raised by evidence of any witness—(See, inter alia, *Iordanou* v. *Aniftos,* 24 C.L.R. 97, 106).

As no leave for service abroad was sought, could substituted service be allowed? The procedure for substituted

service abroad is governed by r. 9 of 0.6 that corresponds to the old English 0.11 (8) (4). Order 6 does not involve a mere matter of procedure but an extension of jurisdiction. The Law as to when substituted service will be allowed was summed up by Lord Reading in *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, 887-888. The first rule propounded by Lord Reading is that an order for substituted service of a writ of summons within the jurisdiction cannot be made in any case in which, at the time of the issue of the writ, there could not be at law a good personal service of the writ because the defendant is not within the jurisdiction.

In the recent case of *Myerson* v. *Martin*, [1979] 3 All E.R. 667, it was held that if the defendant was outside the jurisdiction at the time the writ was issued and the plaintiff was aware of the fact either the plaintiff could issue the writ for service within the jurisdiction and wait for the defendant to return to be served personally (and in such a case substituted service could not be ordered), or, if his claim came within R.S.C. 0.11, r.1, apply for leave to serve the writ out of the jurisdiction. Since the defendant had not been in England when the plaintiff had issued the writ the Court had no jurisdiction to order substituted service.

Lord Denning at page 671 said:-

> "If the defendant was in fact *outside* the jurisdiction at the time the writ was issued, and the plaintiff knows it, the plaintiff can take his choice and issue a writ for service *within* the jurisdiction, but in that case he has to wait his opportunity and hope that the defendant will return to England and be served personally.
>
> Otherwise, if the defendant was in fact outside the jurisdiction when the writ was issued, and is likely to remain outside, the proper course for the plaintiff is to apply for leave to serve out of the jurisdiction, in which case he can only get it if the case comes within R.S.C. Ord. 11.
>
> In the present case Mr. Martin was *outside* the jurisdiction at the time the writ was issued. There cannot therefore be substituted service. The only

course for the plaintiff is to try to serve him personally when he comes here. Or, alternatively, apply for leave to issue a writ for service out of the jurisdiction, and get leave if he brings the case within R.S.C. Ord. 11".

(See, also, Dicey and Morris on the Conflict of Laws, 10th Edition, pages 181-184, and page 196).

We fully agree and adopt this statement of the Law which is in accord with out Rules of Court.

In the present case the applicant well knew that the respondent was outside the jurisdiction at the time the summons was taken out but she did not make use of 0.6.

The service of the summons by substituted service, as done in the present case, by order issued under r. 9, 0.5, was not a mere irregularity but a nullity.

On the distinction between "nullity" and "irregularity" see, inter alia, *In re Pritchard (deceased)*, [1963] 1 All E.R. 873; *Spyropoulos* v. *Trans-Avia Holland N.V. Amsterdam*, (1979) 1 C.L.R. 421; *Re Julia S. Hji-Soteriou and Others, of Limassol*, Civil Application No. 34/85, unreported).*

The service of the summons will be set aside.

It was further submitted that the case for the applicant does not fall within any of the categories (a) - (h) of r. 1 of 0.6 of the Civil Procedure Law that give discretion to a Court to allow service out of the jurisdiction and particularly so as the respondent is neither domiciled nor ordinarily resident in the Republic. We are of the view that this issue is premature.

We need not also deal with the matter of the extent of the jurisdiction of a District Court under s. 40 for making maintenance orders against a defendant abroad.

In the result this appeal is allowed. The service of the summons on the respondent by substituted service is set aside.

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* Now reported (1986) 1 C.L.R. 429.

With regard to costs, not without some hesitation, having regard to the nature of the claim, we make no order as to costs.

Appeal allowed with no order as to costs.