KABLE NO 2: ORDERS OF A SUPERIOR COURT 1, FALSE IMPRISONMENT 0

STEVEN C CHURCHES*

> Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. 'It is possible,' says the gatekeeper, 'but not now.' At the moment the gate to the law stands open, as always, and the gatekeeper walks to the side, so the man bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: 'If it tempts you so much, try it in spite of my prohibition. But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other. I can't endure even one glimpse of the third.'[1]

The proceedings brought by Mr Kable in respect of his imprisonment in 1995 under a statute determined in 1996 to be constitutionally invalid recently concluded in the High Court, where his claim in false imprisonment was dismissed 7–0. The Court of Appeal below had found in his favour 5–0. The driving factor in the High Court's reasoning was that the orders for imprisonment by Levine J in the NSW Supreme Court had been orders of a superior court, and such orders may only be unravelled on a basis of voidability, not nullity. That is to say, they may be treated as non-operative from the time of the decision of underlying lack of legal power, but actions taken under such orders remain of legal force until the moment of invalidation of the jurisdictional power in the court. Thus the imprisonment for six months prior to the decision of the High Court in 1996 remained legally valid, so that there was legal justification that defeated the claim for false imprisonment.

This article queries the reasoning of the judgments that found orders made on the basis of an unconstitutional grant of jurisdiction still to be orders of a superior court that remained of full force. The heart of this analysis involves the comparison of orders of English superior courts, originally creatures of the prerogative holding generally unlimited jurisdictions and devoid of written constitutional inhibition, with the orders of Australian and US superior courts, set up under statutes and functioning in a written constitutional environment. Reliance in this area by Australian courts on English precedents is imperilled by the fundamentally different foundations of the two countries' superior court systems.

---

* Barrister, South Australia; School of Law, University of South Australia.

1 Franz Kafka, *Before the Law* (Ian Johnston trans, 2007–2013) Franz Kafka Online <http://www.kafka-online.info/before-the-law.html> [trans of: *Vor dem Gesetz* (first published 1915)].

I BACKGROUND TO *NEW SOUTH WALES v KABLE* ('*KABLE NO 2*')[2]

Modern mass democracy is matched with mass media information, and the message to the populace, in turn fed back into the ballot box, is the need for security. Pressure has been mounting over a long period for persons to be detained on the basis of being classified as a threat to the community, a process quite removed from the classic model of imprisonment following conviction by a validly constituted court, for a crime known at the time of the commission of the facts constituting the alleged offence.

The political lack of interest in liberty, as opposed to posturing before the public, has become steadily more evident over the quarter of a century since Deane J (dissenting) referred to the withholding of parole from an habitual paedophile by the South Australian Cabinet, absent natural justice, noting the circumstances of the 'prisoner Mr O'Shea … where his "at pleasure" and non-punitive incarceration is now being continued, against expert and specialist advice, as a result of a discretionary decision made by a political body.'[3]

The same year Deane J, emphasising the exclusive curial right to remove liberty and the lack of executive power in that regard, had said in a case involving the proposed delivery by the Commonwealth government of an absconded American serviceman, resident in Australia, to the US authorities: 'The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action.'[4]

The next step in the search for community protection was to provide for imprisoning those deemed dangerous, not just through their periods of potential parole, but for periods beyond sentence set by a trial judge, or indeed, disconnected from any prison sentence on foot. Since the common law tradition generally resists detention by any order other than that of a court,[5] the Victorian Parliament enacted the *Community Protection Act 1990* (Vic) (the '*Act*'), pursuant to which a designated government minister could apply to the Supreme Court for the imprisonment of Garry Ian David (who was identified by name as the sole focus of the *Act*), the determination to be on the balance of probabilities as to the likelihood of Mr David committing serious crime or the need for community protection from Mr David.

---

2 (2013) 298 ALR 144.

3 *South Australia v O'Shea* (1987) 163 CLR 378, 414.

4 *Re Bolton Ex parte Beane* (1987) 162 CLR 514, 528.

5 Allowing in Australia for administrative detention for refugee applicants: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. Further, there is a possibility that such detention could be indefinite (ie, for the duration of life): *Al Kateb v Godwin* (2004) 219 CLR 562.

This legislation received piercing analysis at the time,[6] but was not challenged as to its constitutional validity.[7] Nonetheless, the two competing principles had now intersected. On the one hand, freedom was removable only by court order following a criminal trial, and on the other hand, the community called for pre-emptive protection from those deemed violent. The result was State legislation that squared the circle without addressing the inherent antinomy, by giving a superior court powers never previously vested in a common law court: the power to imprison for reasons other than conviction following a trial for a known offence.

The Victorian precedent was waiting for the NSW Government to take it to that State's Parliament when the troubling matter of Gregory Wayne Kable attracted public attention. Mr Kable had killed his wife, but had pleaded guilty to manslaughter on the ground of diminished responsibility. While in prison he wrote seriously threatening letters to various people outlining what he would do to them on his release. The nature of the resulting legislation, the *Community Protection Act 1994* (NSW) ('*CP Act'*) (like the Victorian precedent, person specific, aimed at Mr Kable as the named object of the statutory powers) and the action taken under it may be seen in the first three paragraphs under the heading 'Procedural History' in the recent joint judgment of the High Court in *Kable No 2*:

> The [*CP Act*] provided for 'the preventive detention (by order of the Supreme Court [of New South Wales] made on the application of the Director of Public Prosecutions) of Gregory Wayne Kable' [section 3(1)]. On 23 February 1995, on the application of the Director of Public Prosecutions, Levine J made an order pursuant to s 9 of the CP Act that Mr Kable be detained in custody for a period of 6 months.
>
> Mr Kable appealed against this order to the Court of Appeal but his appeal was dismissed.[8]
>
> By special leave, Mr Kable appealed to this court. After the grant of special leave, but before the appeal to this court was heard, the 6 month period fixed by the order of Levine J expired and Mr Kable was released from detention. In September 1996, this Court held[9] that the CP Act was invalid. This court allowed Mr Kable's appeal, set aside the order which the Court of Appeal had made, and, in its place, ordered that the appeal to that Court be allowed with costs, the order of Levine J be set aside and, in its place, order that the application of the Director of Public Prosecutions be dismissed with costs. It will be convenient to refer to this decision as *Kable No 1*.[10]

---

6 See *Kable v DPP (NSW)* (1996) 189 CLR 51, 123 (McHugh J), quoting David Wood, 'A One Man Dangerous Offenders Statute – The Community Protection Act 1990 (Vic)' (1990) 17 *Melbourne University Law Review* 497, 502.

7 See *A-G (Vic) v David* [1992] 2 VR 46, which did not touch on any constitutional issues.

8 *Kable v DPP* (1995) 36 NSWLR 374.

9 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable No 1*').

10 (2013) 298 ALR 144, 144–5, [2]–[4] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); Justice Gageler wrote a separate and concurring judgment: at 155–64, [45]–[78].

At stake had been the principle that courts capable of bearing federal jurisdiction (which include state courts, including supreme courts) could not be invested by legislation with functions incompatible with the exercise of federal judicial power. The proceedings prescribed by the *CP Act* (exclusively against Mr Kable) did not resemble the functions associated with federal judicial power. They involved not a trial for a known offence, but the making of an estimate by a court of a likelihood of future offending, and that estimate based in part on material inadmissible as evidence. The *CP Act* made the NSW Supreme Court an instrument of a legislative plan, brainchild of the executive, to imprison Mr Kable by a process far removed from ordinary judicial process.

A Mr Kable's Subsequent Claim in Tort against the State of New South Wales

Mr Kable later brought an action for damages against the State arising from the conduct of its officers in bringing proceedings against him and in detaining him under the (now invalidated) *CP Act*, which action was unsuccessful before a single judge of the Supreme Court of NSW.[11] Mr Kable then appealed to the Court of Appeal, which sat a five judge bench.[12] The Court of Appeal unanimously reversed the court below, thus finding in favour of Mr Kable's claim that he had been falsely imprisoned.

The State then appealed to the High Court, which found unanimously in its favour.[13] The heart of the decision was that the orders made by Levine J under the *CP Act* in February 1995 for the imprisonment of Mr Kable were orders of a superior court judge, and as such remained valid until such time as any fault in jurisdiction had been determined. In short, such orders were voidable, but not void. Since the determination of the invalidity of the *CP Act* did not occur until after Mr Kable had been released at the termination of the six month imprisonment order made by Levine J, it followed that the imprisonment could not serve as the basis of a claim in tort. Although Justice Levine's order rested on power given to him by an *Act* later declared to be constitutionally invalid, the reasoning of the High Court in *Kable No 2* was that it was nonetheless an order of a superior court judge, and as such, capable of being voidable only on

---

It should be noted that prior to the proceedings before Levine J in 1995, instigated by the Director of Public Prosecutions, Mr Kable had brought proceedings of his own volition to the Supreme Court of NSW unsuccessfully challenging the constitutional validity of the *CP Act*: see *R v Kable* (1994) 75 A Crim R 428. The argument before Spender AJ did not touch on the ultimately successful argument regarding the *CP Act* as destructive of the integrity of a state court capable of carrying federal jurisdiction. As will become apparent, if Mr Kable had appealed this preliminary decision, he might have been better off in the long run, rather than, as it transpired, appealing the decision of Levine J which dealt with both the Director of Public Prosecution's application under the *CP Act* to have Mr Kable imprisoned, as well as an argument on constitutional validity.

11 *Kable v New South Wales* (2010) 203 A Crim R 66 (Hoeben J).

12 *Kable v New South Wales* (2012) 293 ALR 719 (Allsop P, Basten, Campbell and Meagher JJA and McClellan CJ at CL) ('*Kable No 2 CA*').

13 *Kable No 2* (2013) 298 ALR 144.

determination of invalidity. Until the moment of such determination, the order was, and always would be, good.

II THE KEY ISSUES: (1) THE STATUS OF SUPERIOR COURT ORDERS AND (2) THE NATURE OF A SUPERIOR COURT ORDER BASED IN SUBSEQUENTLY DETERMINED INVALID LAW

The reasoning of the two judgments in *Kable No 2* raises issues about the nature of superior court orders, as contrasted with the orders of inferior courts. That dichotomy leads in the instant case to enquiry also as to the nature of the jurisdiction exercised by Levine J in making his order imprisoning Mr Kable. In the Court of Appeal Basten JA (the remainder of the bench concurring) had determined that Levine J had valid federal jurisdiction to sit to determine the constitutional validity of the *CP Act*, but that his orders made under the (invalid) *CP Act* were an invalid exercise of jurisdiction.[14] Such a finding allowed for the bifurcation of Justice Levine's order, so that it could stand so far as it represented a valid exercise of federal jurisdiction, but that critically it failed and was not a valid order of a superior court judge, in so far as it purported to exercise jurisdiction under the constitutionally invalid *CP Act*.

The joint judgment in *Kable No 2* said of the above proposition from the Court of Appeal:

> [T]he effect which is given to the order made beyond jurisdiction comes not from the law which purported to confer the relevant jurisdiction but from the status or nature of the court making the order (as a superior court of record). The effect which is given to the order is for only so long as it remains in force. Once set aside on appeal, the order is spent.
>
> There is then no occasion to attempt to divide the exercise of jurisdiction by Levine J in the manner considered by Basten JA. The division suggested [footnote omitted] was between the (valid) exercise of jurisdiction conferred by s 39(2) of the Judiciary Act 1903 (Cth) to hear and determine the question about the validity of the CP Act (as a question arising under the Constitution or involving its interpretation) and the (invalid) exercise of jurisdiction to decide whether to make an order under the CP Act. There being no occasion to consider this division, it is neither necessary nor desirable to examine whether the proceedings conducted by Levine J constituted the hearing and determination of one or more than one 'matter', or what may have been the boundaries of the relevant matter or matters.[15]

A The Status of the Orders of Superior Courts

1 What Is a Superior Court?

Rubinstein commenced his analysis of the issue as follows: '[a] superior court has, by definition, general jurisdiction while an inferior court is one which

14 *Kable No 2 CA* (2012) 293 ALR 719, 757 [151].

15 (2013) 298 ALR 144, 153 [36]–[37].

is limited by law with regard to either the area, the persons or the subject-matter over which it has jurisdiction.'[16]

From this and what followed, it may be inferred that the distinction developed in England where the Royal Courts of Justice at Westminster (that is, prior to their being amalgamated by the *Judicature Act 1873*, 36 & 37 Vict, c 66 and *Judicature Act 1875*, 38 & 39 Vict, c 77 and physically moving down to the present court building on The Strand) were creatures of the prerogative and had limits to jurisdiction only so far as common law tradition allowed. On the other hand, inferior courts were those set up under statute, whose jurisdictional limits were on display in such statutes.

The issue of jurisdictional limits leads to the question of the forum in which such limits might be tested. In pre-*Judicature Act* England the Royal Courts heard argument as to jurisdictional excess by inferior courts, but inevitably, a 'superior court has authority conclusively to determine the existence of its own jurisdiction.'[17]

This raises issues of analogy for Australian courts, as all the colonial supreme courts, the direct forebears of the present state supreme courts, were erected by statute or Letters Patent giving them the powers of the Royal Courts at Westminster, that is to say, they were set up as courts of unlimited jurisdiction. But the inflation in status of these courts at the point of Federation (vested with chapter III federal jurisdiction) laid a landmine for the future. Unlike the English Royal Courts which had neither statutory limits to their jurisdictions, nor constitutional constraints against which their exercises of jurisdiction might be tested, Australian state supreme courts were throughout the 20th century made creatures of state legislation, and legislation subsequent to the foundation statute for each court, adding to jurisdiction, carried the inherent quality of possible constitutional invalidity (although this was not apparent until *Kable No 1*). The question would then arise as to the status of decisions taken by such courts under statutes later determined to be invalid.

2 *Is There a Distinction between Superior and Inferior Court Orders That Goes to Nullity for the Latter and Not the Former in the Event of Jurisdictional Challenge? The English Experience*

The first early modern authority on the subject of error in assuming jurisdiction as opposed to error of law within jurisdiction is *The Case of the Marshalsea*[18] which was cited by Dixon J in *Parisienne Basket Shoes Pty Ltd v Whyte* (a case concerning an improper assumption of jurisdiction by an inferior court) for the following proposition:

> [T]he clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the

16 Amnon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Clarendon Press, 1965) 11.

17 *R v Swansson* (2007) 69 NSWLR 406, 418 [88] (McClellan CJ at CL), citing *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369.

18 (1612) 10 Co Rep 68, 76a–76b; 77 ER 1027, 1038–41.

> conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari, or appeal. But, if there be want of jurisdiction, then the matter is coram non judice [before one not a judge]. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable.[19]

Coke's report of *The Case of the Marshalsea* in the Court of Common Pleas was concerned with the activities of an inferior court, the Court of the Marshalsea, but in dicta the Court of Common Pleas referred to a 1482 Year Book decision for the proposition that 'if the Court has not power and authority, then their proceeding is *coram non judice*: as if the Court of Common Pleas holds plea in an appeal of death, robbery or any other appeal, and the defendant is attainted, it is *coram non judice*.'[20]

It may be inferred that while the concept of an appeal had a different meaning in the seventeenth century from the modern era, the matters referred to were beyond the accepted, traditional common law limits of the jurisdiction of Common Pleas. Chief Justice Coke and his bench (he reported unanimity)[21] were of the view that the exercise of judicial power beyond accepted jurisdiction, even for a superior court, resulted in *coram non judice*: the court was not acting as a court at all. The result of acting *coram non judice* was that in respect of suit in tort against 'the officer or minister of the Court who executes the precept or process of the Court … actions will lie against them without any regard of the precept or process'.[22]

From the above it may be inferred that at an earlier period there was no bar to contemplating an order of a superior court as void, a nullity from the moment of promulgation, if the issuing court was outside its accepted jurisdiction. But, as the Note in the 1977 *Yale Law Journal* put the matter, 'there seems to be no case in which the judgment of one of the superior courts was held to be void'.[23] The speculative dicta of *The Case of the Marshalsea* was one thing – specific case example acceptance by the Royal Courts that they could be challenged for exceeding jurisdiction to the point of orders being determined as a nullity was another. The Yale Law Journal Note continued on to say: '[t]he English voidness doctrine was used exclusively [by the superior ie Royal Courts at Westminster] to subject the local and ecclesiastical courts to royal supervision.'[24]

The self-protective view of the Royal Courts for their exercises of jurisdiction may be early seen in the decision of King's Bench in *Prigg v Adams*.[25] A statute giving exclusive jurisdiction in matters involving 40 shillings

---

19 (1938) 59 CLR 369, 389.

20 *The Case of the Marshalsea* (1612) 10 Co Rep 68, 76b; 77 ER 1027, 1040, citing *Bowser v Collins* YB 22 Ed IV 33b.

21 *The Case of the Marshalsea* (1612) 10 Co Rep 68, 76a; 77 ER 1027, 1042.

22 (1612) 10 Co Rep 68, 76a; (1612) 77 ER 1027, 1038.

23 Note, 'Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments' (1977) 87 *Yale Law Journal* 164, 166.

24 Ibid. For an illustration of the same sense of looming authority over inferior courts by superior (common law) courts presuming their perfected jurisdiction, see: Rubinstein, above n 16, 11–12, 175.

25 (1693) Carthew 274; 90 ER 762.

or less to a local court had been ignored, with suit in debt for a sum less than 40 shillings proceeding in Common Pleas. This amounted to a complete lack of jurisdiction in the light of the statutory command, but the King's Bench did not find the order of Common Pleas void, but merely voidable. As the *Yale Law Journal* Note observed, the reasoning rested on the acceptance of the usual complete jurisdiction of Common Pleas, from which the statute had, inferentially, taken a rebate.[26] The finding of mere voidability left the order of Common Pleas subject only to attack by motion to vacate or writ of error (but not certiorari; a writ for review by King's Bench that was only emerging in modern form in the later 17th century, and would not allow review of superior courts).

The procedurally different results reflecting the distinction between void and voidable did not reflect an explicit distinction as to the fate of orders successfully challenged with regard to jurisdiction: the orders of superior and inferior courts were not divided by a sheep-and-goat-proof wall. Rather, the special status of superior courts as regarded the jurisdictions within which they worked rested on presumption. Superior courts did not have to flag their jurisdiction in their orders (it was, generally speaking, at large), but the presumption of acting within jurisdiction could be challenged, which would be possible when a superior court made orders in one of the few areas where such courts were known to be restricted from acting. As Parke B pointed out for the Exchequer Chamber in *Gosset v Howard*,[27] noting that justices in inferior courts needed to display their statutory authority on their orders:

> Not so the process of Superior Courts acting by the authority of the common law. In the argument of the case of *Peacock v Bell*[28] … the rule as to pleading is well expressed thus: 'The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged: … *In like manner it is presumed*, with respect to such writs as are actually issued by Superior Courts, that they are duly issued, and in a case in which they have jurisdiction, unless the contrary appears on the face of them; as it would, for instance, if a writ of capias for a criminal matter issued from the Common Pleas, or a writ in a real action (before the abolition of such remedies) from the King's Bench, or a real action, not in the Crown's case, in the Exchequer: in all which cases the want of jurisdiction would appear. But writs issued by a Superior Court, not appearing to be out of the scope of their jurisdiction, are valid, and of themselves, without any further allegation, a protection to all officers and others in their aid acting under them.[29]

The inference from the last sentence in the above quotation is that superior court orders are valid until challenged, rather than possibly void if later successfully invalidated. The high Victorian era cases to this effect which still

---

26 Note, 'Filling the Void', above n 23, 166. In the light of modern statutory interpretive technique reasoning could proceed on the basis that the statute had not extinguished in clear terms the general jurisdiction of Common Pleas in respect of small claims.

27 (1845) 10 QB 411; 116 ER 158.

28 (1666) 1 Wms Saund 73, 74; 85 ER 84, 87–8. The argument referred to was accepted by the majority of the King's Bench.

29 (1845) 10 QB 411, 453–4; 116 ER 158, 173 (emphasis added).

appear in Australian High Court reasoning, *Scott v Bennett*[30] and *Revell v Blake,*[31] carry this sense. Martin B for the judges in *Scott v Bennett* unanimously advising the House of Lords, referred to superior court orders as 'binding … unless [they] can be altered by appeal or [writ of] error,[32] while Blackburn J made the concept explicit in *Revell v Black*, saying that a superior court judgment was binding 'until' reversed.[33]

It should be noted, however, that linguistic imprecision still lingered in the Victorian case law. As was pointed out by Romer LJ in *Hadkinson v Hadkinson*, all court orders (superior or inferior) must be obeyed 'unless and until' such orders are discharged.[34] It is not enough to know of jurisdictional defect: such defect must be brought to the court's attention in application for discharge of the orders. It follows that court orders (of superior and inferior courts) remain on foot until successfully challenged, but there is no clear early line of authority (other than the factually weak case of *Prigg v Adam*)[35] supporting the proposition that in the event of challenge to a superior court order, the order will be regarded as merely voidable from the date of discharge, and not void ab initio.

Indeed, Lord Diplock for the Privy Council in 1984 was decisive that the nomenclature of 'voidness' and 'voidable' was appropriate for contract law, but not for the fate of court orders subject to challenge.[36] His Lordship's reasoning was clearly aimed at the necessity for challenge to ultra vires court orders to be taken *ex debito justitiae* in the court that made the original order, as a result of which application, if successful, the order will be deemed irregular, but the terminology of 'voidness' and 'voidability' was to be eschewed.

It is thus apparent that up to the Victorian period English case law provided no ringing endorsement of the claim that superior court orders are merely voidable for jurisdictional defect, although an inference certainly lies in that direction from commentary concerning the protection of officers acting in pursuance of court orders.[37] Given the general jurisdictions bestowed on the superior courts in England, and the lack of a written constitution (which could serve as a defining limitation on jurisdiction), the lack of case law wrestling with this problem is entirely explicable. The English cases do not rest on the high stakes involved in *Kable No 2*; deprivation of liberty, based on an unconstitutional statute.

30 (1871–2) LR 5 HL 234.
31 (1872–3) LR 8 CP 533.
32 (1871–2) LR 5 HL 234, 245.
33 (1872–3) LR 8 CP 533, 545 (Blackburn J).
34 [1952] P 285, 288.
35 See *Prigg v Adams* (1693) Carthew 274; 90 ER 762.
36 *Isaacs v Robertson* [1985] 1 AC 97, 102–103.
37 See the close of the quote from *Gosset v Howard* (1845) 10 QB 411, above n 29.

3 Superior Court Orders, Invalidity and Imprisonment in Kable No 2 *at First Instance*

The result of reliance on the pattern of English jurisprudence, but applied to orders for imprisonment in the context of invalidity may be seen in the judgment of Hoeben J at first instance in *Kable No 2*.[38] His Honour did reflect on the tort of false imprisonment,[39] but referred to *R v Governor of Brockhill Prison; Ex parte Evans (No 2)*[40] for support for the proposition that no claim arose where a sentence of imprisonment was later overturned on appeal: the analogy was clear between successful appeal against conviction or as to sentence, and the appeal that led to the finding of invalidity of the *CP Act*. He then set out what serves as a copy book analysis of the primacy of superior court orders, valid until overtaken by appeal:

> There is a long line of authority … protecting those who execute the orders of a superior court (*Russell v East Anglian Railway Company* (1850) 42 ER 201, 207). …
>
> In *Henderson v Preston* (1888) 21 QBD 362, 366 Lord Esher said:
>
> > In the case of *Olliet v Bessy* (1682) T Jones' Rep 214 decided about two hundred years ago, it was so held, and from that day to this no action can be found in the books to have been maintained against a gaoler where he acted within the terms of the warrant.
>
> The reasons for this line of authority are obvious and well established. A gaoler is compelled to act in accordance with court orders. The implications of this were explained by Lord Denman CJ in *Andrew v Marris* [1841] 1 QB 3, 16 where he said:
>
> > There would be something very unreasonable in the law if it placed him in the position of being punishable by the court for disobedience and at that time suable by the party for obedience to the warrant.
>
> The plaintiff did not take the Court to any authority to the contrary.
>
> Australian authority at the highest level is to similar effect. Rich J, with whom Latham CJ agreed, said in *Cameron v Cole* (1944) 68 CLR 571, 590:
>
> > It is settled by the highest authority that the decision of a superior [c]ourt, even if in excess of jurisdiction, is at worst voidable, and is valid unless and until it is set aside. …

Perhaps the most definitive statement by the High Court on this issue is in *Re Macks; Ex parte Saint* (2000) 204 CLR 158 ['*Macks*']. The question arose whether orders made by the Federal Court pursuant to jurisdiction purportedly conferred by invalid legislation were nullities. Specifically, Victoria, South Australia and Western Australia argued that:

> orders made in the exercise of jurisdiction conferred by a statute which is invalid for constitutional reasons are nullities and cannot be saved by the doctrine that orders of superior courts made in excess of jurisdiction are merely voidable': 166, [48].

---

38 (2010) 203 A Crim R 66.

39 Ibid 85 [102].

40 [2001] 2 AC 19 ('*Brockhill*').

The High Court unanimously rejected that proposition.[41]

The question then narrows to whether the High Court approach in *Macks*,[42] of a superior court order being valid until overturned, despite being based in constitutionally invalid law, was soundly based, and in turn, appropriate to be applied to a claim for false imprisonment.

B The Nature of a Superior Court Order Based in Law Subsequently Determined Invalid

1 US Case Law on Lack of Jurisdiction Based in Constitutional Defect, and Its Consequences

The US, unlike England, provided exactly the conditions throughout the 19th and 20th centuries for testing issues going to the status of superior court orders that were challenged for various reasons, including constitutional invalidity, and the fate of such orders temporally: void or merely voidable? The late 19th century cases set the scene for what would become a more nuanced exploration of the issues in the 20th century, the case law emerging in a country with both a national written constitution, and a constitution for each state. It must be conceded immediately that the cases referred to below this heading deal with orders of inferior not superior courts, but the American approach, while revealing an understanding of the concepts, appeared to make little of the distinction when constitutional defect was in issue.

The American case law in this field substantially rests on the issue of purported appointments to apparent judicial office: the contest aims either at the invalidity of the appointment process, or at the more fundamental level, at the constitutional validity of the judicial office itself. The classic 19th century exposition was delivered in *Norton v Shelby County*[43] which involved the removal of an inferior court's jurisdiction by a statute later found invalid. What was the status of the (commercial) orders made by the substitute court? The argument for their validity relied on the principal weapon in all American cases in this area: the 'de facto officer' doctrine. It was argued that those sitting in the substitute court were exercising their powers as de facto judges. Justice Field for the Supreme Court, using argument closely parallel to the English theory on the validity of superior court orders, said that the 'de facto officer' doctrine was:

> [F]ounded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined.[44]

41 (2010) 203 A Crim R 66, 85–6 [103]–[108].
42 (2000) 204 CLR 158.
43 118 US 425 (1886) ('*Norton*').
44 Ibid 441.

But Field J then gave voice to a theory that made constitutional invalidity utterly destructive of any attempt to erect judicial authority on such a non-existent foundation:

> But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an 'officer' who holds no office, and a public office can exist only by force of law. … An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.[45]

In *Ex parte Nielsen*[46] the US Supreme Court was confronted with orders of a criminal nature made by a court in the territory of Utah, involving a man who had been convicted of both bigamy and adultery in separate convictions arising from the same facts, ie sexual relations with the same woman. The second conviction breached the constitutional protection against double jeopardy. Justice Bradley for the Court said:

> It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus.[47]

The factor of unconstitutionality in jurisdiction attracted the consequence of the judgment being void, and habeas corpus was brought to bear, but the use of that writ to open the cell door did not resolve the question, not dealt with in *Nielsen*, of whether the reference to the judgment being 'void' would sustain a finding that the imprisonment already undergone would support a claim in false imprisonment.

The reference to collateral attack in *Nielsen* concerns the taking of proceedings contesting the jurisdiction of a court separate from a principal claim for relief. The mischief in collateral attack may lie in allowing proceedings to, in effect, be reopened by an unsuccessful party which then attempts to impugn the jurisdictional capacity of the court that found against that party. Such a collateral attack in turn attracts adverse attention as undermining the principle of *res judicata*; that proceedings should be regarded as closed once judgment is delivered.

The response to that criticism is both general and specific to Mr Kable's situation. The principle of *res judicata* does not inhibit the appeal process, and it is only proper that the principle protect the finality of decisions of courts bearing appropriate jurisdiction, but that the appropriateness of such jurisdiction be challengeable. The mischief lies in an attack on jurisdiction *after* loss in the

45 Ibid 442. For an overview of this area and an analysis of *Norton,* see Clifford L Pannam, 'Unconstitutional Statutes and De Facto Officers' (1966) 2 *Federal Law Review* 37, 50–1.

46 131 US 176 (1889) ('*Nielsen*').

47 Ibid 182.

principal claim.[48] Needless to say, Mr Kable attacked the NSW Supreme Court's jurisdiction regarding the *CP Act* in the proceedings before Levine J, which were initiated by the Director of Public Prosecutions. Mr Kable had previously taken proceedings contesting the jurisdiction of the court,[49] but he did not appeal that result, as it was overtaken by the application from the Director of Public Prosecutions.

People v Toal saw the Californian Supreme Court find, by majority, that a court constituted under municipal regulations in defiance of the State constitution was no court at all, and the orders made by such a purported court, including convictions, could not be supported by reference to the 'de facto officer' doctrine.[50] Justice Works, for the majority, said: '[t]here cannot be a de facto judge of a court that has no existence'.[51] But again, there was no determination of the consequences for the orders on conviction in the period prior to their disallowance.

The following year the US Supreme Court relied on the other side of the de facto officer coin by finding that an unauthorised appointment of a judge in Wisconsin did not attract a finding of unconstitutionality, as the purported judge had been appointed to an existing court, so that he was exercising judicial functions in an office lawfully established 'by color of right'.[52] The reasoning was in accord with that in *Norton*: the office itself did exist at law, and exercise of power in that office could be justified under the 'de facto officer' doctrine.

The absolutism of Justice Field's approach in *Norton*, to the effect that an unconstitutional law was never capable of supporting legal power has attracted a deluge of criticism.[53] As Pannam put the matter regarding the time prior to a determination of invalidity: 'before then the statute was an apparently valid constituent of the vast array of legal provisions which each citizen refuses to

48 Even worse is what the Irish Supreme Court calls 'piggybacking', in which a successful claim for invalidation of criminal provisions by party A is deployed years later by party B to attempt to overturn a conviction which could have been challenged at trial by reference to A's successful claim: see *A v Governor of Arbour Hill Prison* [2006] 4 IR 88, reasoning adopted in *Interfarct Ltd v Liverpool City Council* [2011] QB 744, 764 [60], still allowing judicial discretion to reopen a conviction 'where substantial injustice would otherwise be done' (CA); *Cadder v HM Advocate* [2010] 1 WLR 2601 (SC).

49 See *R v Kable* (1994) 75 A Crim R 428.

50 24 Pac Rep 603 (1890) ('*Toal*'). *Toal* is a key case used by Oliver P Field, 'The Effect of Unconstitutional Statute in the Law of Public Officers Effect on Official Status' (1928) 13 *Minnesota Law Review* 439, 467–8, replicated exactly in Oliver P Field, *The Effect of an Unconstitutional Statute* (University of Minnesota Press, 1935) 103–4. *Toal* is exactly in line with the reasoning in *Norton*.

51 *Toal* 24 Pac Rep 603, 605 (1890). This reasoning was exactly paralleled in a series of Arkansas cases culminating in *Howell v Howell* 213 Ark 298 (1948), 309–10 (Griffin-Smith CJ). This formed the subject of criticism in a Note which can also be referred to for a distinction that might justify the approach of the Arkansas Supreme Court: 'the consequences are more serious when a statute creating the office and defining the performance of governmental function transcends the constitution than when a statute authorising the selection to an office whose valid functions will be performed by someone is invalid': Note, 'De Facto Officers: Effect of Divorce Decree Granted by "Chancellor" When Statute Creating Office and Making Appointment Is Unconstitutional' (1948) 1 *Vanderbilt Law Review* 651, 653 n 14 citing Field, *The Effect of an Unconstitutional Statute,* above n 50, 116. See also Pannam, above n 45, 55.

52 *Manning v Weeks* 139 US 504, 506 (1891) (Gray J).

53 Pannam, above n 45, 50–1.

obey at his peril. … [T]here is … only one effective answer to the statement of Field J – "It is not true"'.[54]

The logical complexity of this issue attracted subtlety in the judgment of Hughes CJ for the Supreme Court in *Chicot County Drainage District v Baxter State Bank,*[55] a commercial case in which the Chief Justice qualified the approach in *Norton*:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects – with respect to particular relations, individual and corporate, and particular conduct, private and official. *Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.* These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[56]

It should be immediately noted that Hughes CJ did not turn the reasoning in *Norton* on its head. An all-inclusive theory of nullity could not be supported, but the Chief Justice was concerned as to factors that would allow for nullity or not on a case by case basis. That left the theory seriously unhinged from the certainty afforded by Justice Field's absolutism in *Norton*.

Furthermore, it should be noted that the reasoning in *Chicot* was concerned with the timing of a challenge as to validity of relevant legislation. Statements denying the possibility of collateral challenge need to be seen in the light of the failure by a party to challenge validity at the earliest opportunity, rather than keeping a constitutional challenge as spare ammunition in case of loss in the principal claim (in *Chicot* a claim as to bonds). Thus Hughes CJ said:

> Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application.[57]

The first portion of this quotation, down to the word 'invalid', was employed by Gageler J in *Kable No 2* as support for the assertion that the United States Supreme Court has ruled that superior court orders cannot be challenged collaterally.[58] But with respect, the quote from *Chicot* above does not go to that matter. Blocking collateral challenge is a different matter and has a different basis from the more fundamental issue of whether a superior court's orders can be treated as nullities. The material quoted from *Chicot* above is supportive of the

54 Ibid 54, quoting Field, above n 50, 91.
55 308 US 371 (1940) ('*Chicot*').
56 Ibid 374 (emphasis added).
57 Ibid 377.
58 (2013) 298 ALR 144, 159 [61].

judicial discretion to which Hughes CJ alluded above, and was not associated with the material on collateral attacks.

That the issue of collateral attack should not deflect a superior court from dealing with the more fundamental matter of alleged nullity of judicial orders (its own, or those of a subordinate court) is reflected in *Glidden Co v Zdanok*[59] in which Harlan J, for the Supreme Court, explained the rationale for the collateral attack rule, but said that such limitation on the curial armoury 'does not obtain, of course, when the alleged defect of authority operates also as a limitation on this Court's appellate jurisdiction.'[60] Justice Harlan continued:

> A fortiori is this so when the challenge is based upon non-frivolous constitutional grounds. … The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. … It should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of res judicata, that there be an end to litigation. At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and that is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.[61]

It may be noted that *Norton* and *Chicot* both involved questions as to the legal existence of inferior state courts, and the orders made by those courts in commercial litigation, attacked as to their validity under State constitutional provisions. *Glidden* was quite different, involving as it did the question of whether judges in specialist courts set up by Congress and specified to be article III courts, were judges with full article III protection, especially if they had been appointed to the courts in the period prior to congressional upgrading which followed after the Supreme Court had ruled that such courts, absent detail added by Congress, were not article III courts. The distinction as to the weight of the constitutional issues at stake needs to be made in the light of Justice Harlan's reference above to the acceptability of challenge as to validity, even when it was raised by way of collateral attack, where such challenge was raised 'upon nonfrivolous constitutional grounds.'[62]

2 The Position in the High Court of Australia Prior to Kable No 2 *Regarding Superior Court Orders Based on an Invalid Law*

The best (and only) summation of the state of High Court jurisprudence in this matter at the turn of the 21st century may be found in the judgment of Kirby J in *Residual Assco Group Ltd v Spalvins.*[63] The other six members of the Court said in joint reasons that the issue of nullity arising from a finding of invalidity did not emerge in that case.[64] Justice Kirby ultimately agreed with the joint judgment, but explored the issue at length, which process in itself indicates the

59 370 US 530 (1962) ('*Glidden*').
60 Ibid 535.
61 Ibid 536.
62 *Glidden* 370 US 530, 536 (1962)
63 (2000) 202 CLR 629, 653 ff ('*Residual Assco*').
64 Ibid 637 [6].

variables that might go to applying judicial discretion as to nullifying an existing judicial order.

Justice Kirby commenced with reference to the absolutist theory of invalidity,[65] citing both *Norton*[66] and Latham CJ in *South Australia v The Commonwealth*.[67] He then observed that McHugh J (a participant in the joint judgment in *Residual Assco*) had earlier been of the view that the orders of superior courts could not be declared void even if 'based on an unconstitutional statute.'[68] But Kirby J observed that in *Re Wakim; Ex parte McNally*[69] (eleven years and a higher court later) McHugh J 'expressed views apparently favourable to absolute nullification ab initio'.[70] Justice Kirby then quoted McHugh J in *Re Wakim*: 'The [previously made] orders [based in an incorrect interpretation of the Constitution] have no constitutional effect. No doctrine of *res judicata* or issue estoppel can prevail against the Constitution.'[71]

Justice Kirby explained that this reasoning rested on the ultimate authority of the Constitution, against which common law doctrines such as *res judicata* or issue estoppel could not prevail. His Honour then explored two considerations that supported the McHugh J nullity view: first, federal courts in Australia depend for their jurisdiction on jurisdictional facts that rest ultimately on the Constitution, thus differing to an important extent from the English model of superior courts of general jurisdiction;[72] and secondly, even in the face of arguments that invalidation of court orders from inception would create chaotically unworkable conditions (the policy underlying the 'de facto officer' rule), the need for:

> [E]ffectiveness could not be sustained where the statute in question was found to constitute a breach of a fundamental limitation on the exercise of federal legislative power or of a prohibition on such exercise established by the Constitution. Thus Sir Owen Dixon, in propounding a role for the de facto officers doctrine in the context of Australian constitutional law, did so on the footing that, like the doctrine of the voidable nature of the orders of superior courts, the de facto officers doctrine 'operate[s] to curb the drastic logical implications of the traditional view that an unconstitutional statute is a complete nullity'. Yet assuming this to be possible 'there may be situations in which public inconvenience and the frustration of legitimate reliance' on an apparent but unconstitutional law 'must give way to the retroactive invalidation of official acts in order to vindicate a constitutional boundary, or to guarantee a constitutional right'.[73]

---

65 Ibid 653 [58]–[59].

66 118 US 425, 442 (1886).

67 (1942) 65 CLR 373, 408.

68 (2000) 202 CLR 629, 654 [61], quoting *Peters v A-G (NSW)* (1988) 16 NSWLR 24, 40 (McHugh JA).

69 (1999) 198 CLR 511 ('*Re Wakim*').

70 (2000) 202 CLR 629, 654 [61].

71 (1999) 198 CLR 511, 565.

72 (2000) 202 CLR 629, 654–5 [63].

73 Ibid 655 [64] (citations removed). The reference to Sir Owen Dixon may most easily be traced to Sir Owen Dixon, 'De Facto Officers' in Woinarski (ed), *Jesting Pilate: and Other Papers and Addresses by Sir Owen Dixon* (Lawbook, 2nd ed, 1965) 229, 231. It is about the story of the NSW judge who had allegedly remained on the bench beyond the statutory retirement age. For the quotations, see Pannam, above n 45, 38, 61–2.

Justice Kirby reasoned from the inherent requirement of superior federal courts to determine their own jurisdiction, even to the extent of self-determining that a court did not have jurisdiction, to a conclusion that a collateral attack on validity of orders was not permissible, and that by further analogy, the orders of such courts, because of their self-determining jurisdiction under the Constitution, could not be treated as nullities.[74]

Residual Assco was grounded in the invalidity finding in *Re Wakim* which had involved the majority of the High Court not quashing a winding up order found to lack constitutional underpinning. Of this Kirby J said: '[t]he Court took this position ostensibly to protect the rights and interests acquired by a liquidator and other third parties under the order. Such a decision cannot be reconciled with the doctrine of absolute nullification.'[75]

But neither the reasoning in *Re Wakim* concerning rights as between a liquidator and third parties, nor that of Kirby J in *Residual Assco*, concerning the validity of purported South Australian legislation providing for the State Supreme Court to deal with orders of federal superior courts, a matter which affected the dispute between the plaintiff company and its former directors and auditor, speaks to a doctrine in which nullification may not be the result of some constitutional invalidity, on some occasions.

Prior to *Kable No 2*, there were only two other reflections in the High Court on this matter; the first contained in the glancing blow from Gummow J in *Macks* to the effect that respecting the decision in *Chicot*[76] on *res judicata* where constitutional validity was at stake, '[t]his Court has yet to express conclusions on the subject'.[77] And in *Forge v ASIC* Kirby J said, relying on the American Supreme Court decision in *Glidden*:

> In the United States of America, the Supreme Court has held that the de facto officers doctrine is inapplicable where the relevant appointment is invalid on 'nonfrivolous constitutional grounds'. This unedifying phrase is indication enough of the uncertain foundation of the doctrine in that country.[78]

Presumably Kirby J found the phrase 'unedifying' because it called into play a large amplitude of judicial discretion. But as his Honour said in *Residual Assco*: '[i]n most constitutional puzzles of this kind the answer is not incontestable. It must be found by the exercise of judgment.'[79]

74 See especially *Residual Assco* (2000) 202 CLR 629, 659–60 [75]–[76].
75 Ibid 660 [78].
76 308 US 371 (1940).
77 *Macks* (2000) 204 CLR 158, 238 [224].
78 (2006) 228 CLR 45, 115 [174].
79 (2000) 202 CLR 629, 663 [85].

III THE REASONING IN *KABLE NO 2* REGARDING INVALIDATION OF SUPERIOR COURT ORDERS

The chasm between the approach of the Court of Appeal[80] and the High Court lay in differing views over the status of the orders made by Levine J under the later invalidated *CP Act* in 1995. The Court of Appeal had circumvented the problem of superior court orders not being subject to nullification by finding that 'the Supreme Court was not exercising judicial power or authority and was not acting, institutionally, as a superior court'.[81] In other words, when Levine J made his orders, he did not do so in the capacity of a superior court judge, but rather he 'was acting, effectively, in an executive function (beyond that which is permissibly ancillary to the exercise of judicial power), as an instrument of the Executive'.[82] This was the heart of the matter: at the time that Levine J made his orders he was most certainly a Supreme Court judge, but was he clothed with judicial authority in the process of making the orders imprisoning Mr Kable?

A The Joint Judgment in *Kable No 2*: Why Levine J Was Making 'Superior Court Orders'

The High Court joint judgment pronounced the approach of the Court of Appeal, quoted above, to be wrong:

> The majority in *Kable No 1* held that the *CP Act* was invalid because it required the Supreme Court to exercise judicial power and act institutionally as a court, but to perform a task that was inconsistent with the maintenance (which chapter III of the Constitution requires) of the Supreme Court's institutional integrity.[83]

The reasoning that followed in the joint judgment ultimately rested on this single point, that Levine J had not been reduced by the result and reasoning of *Kable No 1* to an administrative functionary, but rather, he was at all relevant times a Supreme Court judge who, when making the orders under the *CP Act*, was merely performing in a manner inconsistent with the Supreme Court's institutional integrity. On the reasoning of the Court of Appeal, Justice Levine's orders under the CP Act were not classifiable as judicial, and so they received no protection from the doctrine of superior court orders being only voidable. On the other hand, the High Court approach left Justice Levine's orders as those of a judge acting as a judge, albeit inconsistently with the necessary institutional integrity to sustain the status of his Court as a chapter III court.

B The Paradox Involved

This is the heart of the paradox: that the orders of a judge acting in a manner intrinsically destructive of his court's status as a chapter III court (such destruction acting to classify the court as a 'non-court' until the offending

80 *Kable No 2 CA* (2012) 293 ALR 719.
81 (2012) 293 ALR 719, 722 [3] (Allsop P).
82 Ibid.
83 *Kable No 2* (2013) 298 ALR 144, 148 [17].

jurisdiction was excised) could still receive status as court orders. Since it has never been suggested other than that the *CP Act's* invalidity was inherent at the moment of its assent,[84] the Supreme Court of NSW was protected against the possibility that it had been from the time of the *CP Act*'s commencement until its finding of invalidation (a period of nearly two years), a 'non-court' for the purposes of chapter III,[85] But the cost of such protection was that the Supreme Court notionally never had jurisdictional capacity under the *CP Act*.

C The Justifications for Avoiding the Paradox

Deflecting the above reasoning were justifications in the joint judgment in *Kable No 2* such as the following:

> [I]n *Kable No 1* this Court ordered that, in place of the order made by the Court of Appeal, the appeal to that court was allowed and the order of Levine J was set aside, as distinct from quashed, or declared invalid. That is, the order of Levine J was treated in this court's orders in a manner consistent with it having been valid until set aside.[86]

That was asserted without reference to the fact that the question of the temporal status of Justice Levine's orders (were they void ab initio, or merely voidable from the date of determination of constitutional invalidity of the *CP Act*?) was not in contention in argument, nor had been the subject of analysis in the judgments in *Kable No 1*. The joint judgment in *Kable No 2* had already quoted Gaudron J in *Kable No 1* to the effect that:

> [T]he power given by the *CP Act* 'is not a power that is properly characterised as a judicial function, notwithstanding that it is purportedly conferred on a court and its exercise is conditioned in terms usually associated with the judicial process' and that 'except to the extent that the *[CP] Act* attempts to dress them up as legal proceedings … they do not in any way partake of the nature of legal proceedings'.[87]

No reference was made in *Kable No 2* to McHugh J in *Kable No 1* saying:

> [T]he constitutional validity of the [*CP Act*] cannot depend on how the judges of the Supreme Court discharge the duty that the *Act* imposes upon them. The *Act* was either valid or invalid when it was given the Royal Assent. Nothing that the judges of the Supreme Court did after its enactment could change its status as a valid or invalid piece of legislation.[88]

The joint judgment in *Kable No 2* then explored the void/voidability distinction.[89] The irrelevance of this legal dichotomy was explained in terms of the lack of 'sharply defined'[90] borders. The joint judgment observed that argument for Mr Kable did not admit of complication regarding not only who

84 See *Kable No 1* (1996) 189 CLR 51, 123–4 (McHugh J).

85 The issue of a chapter III (State) court losing chapter III status in the face of function bestowed on it was dealt with in a joint judgment: *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501, 543–4 [152]–[154].

86 (2013) 298 ALR 144, 149 [19].

87 Ibid 148 [16], quoting *Kable No 1* (1996) 189 CLR 51, 106, 107 (Gaudron J).

88 (1996) 189 CLR 51, 123–4 (McHugh J).

89 (2013) 298 ALR 144, 149–50 [20]–[23].

90 *Kable No 2* (2013) 298 ALR 144, [21].

may complain about the want of power, but that what remedy may be available was also a relevant issue.[91] One may observe at that juncture that the very arguments as to imprecision in the tools for discerning void from voidable might go to an argument that the application of the law on that division requires judicial discretion, taking account of all the facts in a matter, rather than a determination to find an absolute answer with a one size fits all approach.

The joint judgment then determined that the order made by Levine J was a judicial order.[92] Referring to the pseudo-judicial proceedings provided for under the *CP Act* (determined to be invalid in *Kable No 1*) the joint judgment said:

> The order made by Levine J was the result of an adjudication determining the rights of Mr Kable and the order both authorised and required his detention for a fixed term. The order was made following proceedings which were conducted inter partes. Subject to some exceptions, the rules of evidence applied. … The order was enforced as a court order. Mr Kable could and did appeal against the order. All of these features of the proceedings and the order that was made disposing of the proceedings point to the order being made by a judge of the Supreme Court in his judicial capacity. … The order made by Levine J was a judicial order.[93]

Having determined that orders made by a judge vested with purported powers later determined invalid were nonetheless 'judicial orders', the joint judgment proceeded to the next logical step, which was that the orders were those of a superior court of record.[94] The distinction between the law on English superior courts and those in Australia was recognised, as was the distinction based in written constitutional limits on curial jurisdiction. Then the joint judgment asserted that the presumption that superior courts were acting within their jurisdiction 'is best understood as a statement about the effect that is to be given to its orders unless or until they are set aside.'[95]

The joint judgment could then rest four square on the doctrine that orders of superior courts are valid until set aside 'even if the orders are made in excess of jurisdiction (whether on constitutional grounds or for reasons of some statutory limitation on jurisdiction).'[96] The doctrine of voidness rather than nullity was

---

91 Ibid 149 [21].

92 Ibid 150–1 [24]–[27].

93 Ibid 151 [27].

94 Ibid 151–4 [28]–[37].

95 Ibid 152 [29]–[31]. The voidability doctrine of superior court orders, resting in *Cameron v Cole* (1944) 68 CLR 571, 590, was utilised just days after *Kable No 2* was handed down in *DPP (Vic) v Toulmin* [2013] VSCA 145, which required a most complicated set of sentencing issues to be addressed in the light of sentencing not having been undertaken on previously determined judicial standards.

96 *Kable No 2* (2013) 298 ALR 144, 152 [32]. Justice Gageler relied at an analogous point in his judgment: at 157 [53], on Dixon J in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 106, for the proposition that a conviction determined under a regulation prior to the regulation being disallowed 'continues in force' because its operation does not depend on the disallowed regulation but rather on the authority belonging to a judgment of a competent court. But the analogy is, with respect, strained at the point that Dixon J determined that the regulation was of legal force at the time of the conviction, which cannot be said for the *CP Act* which was always invalid: see *Kable No 1* (1996) 189 CLR 51, 123–4 (McHugh J). The conviction in *Dignan* did not rest on a foundation of orders made by a court acting unconstitutionally as was the case with Levine J.

said to 'lie in the nature of judicial power'.[97] *Macks*[98] was then deployed at length to justify the validity of superior court orders until they were successfully appealed or reviewed, leading to a destruction of the 'logical conundrum'[99] advanced by Basten JA in the Court of Appeal. This was identified 'as being that the law on which the effect of the judicial order depended gave it "an effect extending beyond the constitutional limits of that jurisdiction"'.[100]

The critical importance of the status of superior court orders was now crystalline: even if the jurisdiction provided by statute to a superior court fell away through constitutional invalidity, the status of any orders made antecedent to the finding of invalidity were made good by the fact that they emanated from a superior court.

D The Final 'Fundamental Consideration' in the Joint Judgment and in the Judgment of Gageler J

The joint judgment asserted:

> There must come a point in any developed legal system where decisions made in the exercise of judicial power are given effect despite the particular decision later being set aside or reversed. … One way in which [that point] is marked, in Australian law, is by treating the orders of a superior court of record as valid until set aside.[101]

If this were not so, superior court orders would have no more than provisional effect until all avenues of appeal or review had run out. The consequence would then be in this case that:

> [I]f the detention order made by Levine J was not effective until set aside, those apparently bound by the order were obliged to disobey it, lest they be held responsible for false imprisonment. On Mr Kable's argument, the order was without legal effect and should not have been obeyed. The decision to disobey the order would have required both the individual gaoler and the Executive Government of New South Wales to predict whether this Court would accept what were then novel constitutional arguments. More fundamentally, as the legal philosopher Hans Kelsen wrote, '[a] status where everybody is authorized to declare every norm, that is to say, everything which presents itself as a norm, as nul, is almost a status of anarchy'.[102]

This reasoning is consistent with the argument historically underpinning the voidability approach to superior court orders: the adverse impact that a nullity finding would have on those, particularly court officers required to give effect to

97 *Kable No 2* (2013) 298 ALR 144, 153 [33].

98 See especially *Macks* (2000) 204 CLR 158, 238 [224], going to the limits of the matter analysed in that case.

99 *Kable No 2* (2013) 298 ALR 144, [35] citing *Kable No 2 CA* (2012) 293 ALR 719, 755 [145], 756 [149] (Basten JA).

100 (2013) 298 ALR 144, 153 [36], citing *Kable No 2 CA* (2012) 293 ALR 719, 755 [145] (Basten JA). For the material immediately following this quote, see above n 15. The analogous point was made in Justice Gageler's judgment: at 158–60 [57]–[61], ultimately relying on the US Supreme Court decision in *Stoll v Gottlieb* 305 US 165, 171–2 (1938), a case that went off on forbidding collateral attack on the orders of a court.

101 *Kable No 2* (2013) 298 ALR 144, 154 [38].

102 Ibid 154 [40] (citation removed).

court orders, who acted on the presumed validity of such orders.[103] The short answer to the concern for court officers and gaolers is that modern statutory protection has eased the potential risk in tort for such officers if they act in good faith, as of course they would be if acting on superior court orders, irrespective of whether such orders were later invalidated.[104] The fact that false imprisonment is a tort of strict liability that does not allow a defence of good faith action does not undermine the statutory defence.[105]

The Kelsen reference can only be described as a 'draconian' argument: Mr Kable was alone in his attack on the validity of the *CP Act*, and later his suit for false imprisonment. To the extent that the entire community is 'authorised' to seek review of legislative validity (but hardly to 'declare every norm … as nul [sic]'[106]), that is the consequence of having a written constitution which provides for judicial review. 'Draconian' is a state of mind that can be deployed to suppress an argument,[107] but which with equal subjectivity may inflate another.

The Kelsen approach elevates the concern as to collateral attack as an avenue for subverting *res judicata* to a level of absolutism, which is quite inappropriate in a case where Mr Kable had addressed the issue of constitutional validity from the outset.[108]

Justice Gageler's final despatch of Mr Kable's submissions was to observe that the proceedings under the *CP Act*, beginning with Levine J, continuing through the Court of Appeal and ending in the High Court all had to be conducted on the basis that the nature of the power exercised by the appellate courts was no different from the power exercised by Levine J in making his orders.[109] From that it followed:

> What the High Court did in *Kable No 1* is therefore consistent with the jurisdiction to make a preventive detention order, purportedly conferred on the Supreme Court by the *CP Act*, being judicial in character, albeit having features which made the conferral of that jurisdiction incompatible with chapter III of the Constitution.[110]

One response to that assertion might be that on another view the appellate role of the High Court in *Kable No 1* was secured in the legitimate application of federal jurisdiction by Levine J (he was asked to find the *CP Act* invalid, which

---

103 See, eg, *Gosset v Howard* (1845) 10 QB 411, 453–4; 116 ER 158, 173 (Parke B).

104 See, eg, s 46 of the *Prisons Act 1952* (NSW) (at the time of Justice Levine's orders) and now the *Crimes (Administration of Sentences) Act 1999* (NSW) s 263 protecting officers involved in imprisoning while acting in good faith.

105 See *State of Victoria v Horvath* (2002) 6 VR 326, 346 [52]. Justice Gageler neatly finessed this approach (*Kable No 2* (2013) 298 ALR 144, 161 [64]–[65]) by referring to the link in the *CP Act* to protection under the *Prisons Act 1952* (NSW), observing that as the entire *CP Act* had been found invalid, this protection was lost also, but arguably the definition of 'prisoner' in the *Prisons Act*, para (b), would have covered the incarceration of Mr Kable on the orders of Levine J, particularly as the protection in section 46 required a plaintiff to make out malice or lack of 'reasonable and probable cause' on the part of the imprisoning officer.

106 *Kable No 2* (2013) 298 ALR 144, 154 [40].

107 See, eg, *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501, 525–6 [71], 527 [77].

108 See *R v Kable* (1994) 75 A Crim R 428.

109 *Kable No 2* (2013) 298 ALR 144, 162 [73].

110 Ibid 162 [74].

involved an exercise of federal jurisdiction) so that the role of the High Court had nothing to do with the 'jurisdiction to make a preventative detention order' other than to determine that the *CP Act*, the basis of such orders, was invalid. That is to say, the High Court was not concerned directly with the making of the detention order.

IV COULD THE HIGH COURT HAVE REASONED TO A DIFFERENT CONCLUSION?

There are a number of issues that serve as possible points of departure from the reasoning in *Kable No 2*. First, the primal importance of freedom in the common law, recognised by the tort of false imprisonment; secondly, the nature of superior court orders and the 'rule' that they can only be voidable, not void; thirdly, the determination that Justice Levine's orders carried the status of superior court orders, which issue in turn calls for examination of the doctrines surrounding the recognition of actions based in constitutionally invalid instruments; and fourthly, whether the ironclad approach to these issues by the High Court was susceptible to a measure of judicial discretion, particularly in the light of the actual claim being made by Mr Kable, for false imprisonment.

A The Elephant in the Drawing Room, Missing in the Court Room: False Imprisonment as a Tort of Strict Liability

The common law has an indisputable care for personal liberty, as expressed in judicial utterances over a very long period, from Fortescue CJ in the 15th century[111] and Sir Edward Coke in the 17th,[112] to Blackstone,[113] and the dissenting speech of Lord Shaw in *The King (at the prosecution of Arthur Zadig) v Halliday*,[114] itself a forerunner of Lord Atkin's dissent in *Liversidge v Anderson*.[115] The law expresses its concern for personal liberty by the high bar it sets on any purported justification for detaining or imprisoning an individual, and the severe consequences that follow from any infraction of tort law's doctrine of strict liability for false imprisonment.

To quote Lord Hobhouse in *Brockhill*[116] (the leading recent British case on the importance of false imprisonment), quoted by Basten JA in *Kable No 2 CA*:

> Imprisonment involves the infringement of a legally protected right and therefore must be justified. If it cannot be lawfully justified, it is no defence for the

111 Sir John Fortescue, *The Governance of England* (Clarendon Press, revised ed, 1885) 102 n 3.

112 Norval Morris, 'Prison in Evolution' in Tadeusz Grygier, Howard Jones, John C Spencer (eds), *Criminology in Transition: Essays in Honour of Hermann Mannheim* (Tavistock, 1965) 267, 270–1, citing Coke in his last parliament in 1628.

113 'Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals': William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) vol 1, 130.

114 [1917] AC 260, 290–3.

115 [1942] AC 206, 244–7.

116 [2001] 2 AC 19, 42.

> defendant to say that he believed that he could justify it. In contrast with the tort of misfeasance in public office, bad faith is not an ingredient of the tort; it is not a defence for the defendant to say that he acted in good faith …[117]

This principle is a subset of the major principle enunciated by Lord Atkin when he said in *Eshugbayi Eleko v Officer Administering the Government of Nigeria* (a habeas corpus case) that 'no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice'.[118]

Most recently, in litigation involving detention at the hands of the Executive, Lord Collins JSC noted in *R (Lumba) [aka Congo] v Secretary of State for the Home Department*:

> Fundamental rights are in play. Chapter 39 of *Magna Carta* (1215) (9 Hen 3) said that 'no free man shall be seized, or imprisoned … except … by the law of the land' and the *Statute of Westminster* (1354) (28 Edw 3, c 3) provided that 'no man of what state or condition he be, shall be … imprisoned … without being brought in answer by due process of the law'. That the liberty of the subject is a fundamental constitutional principle hardly needs the great authority of Sir Thomas Bingham MR … to support it, but it is worth recalling what he said in his book [Sir Thomas Bingham, *The Rule of Law* (Allen Lane, 2010) 10] … about the fundamental provisions of Magna Carta: 'These are words which should be inscribed on the stationery of the … Home Office.'[119]

But in the High Court's reasoning in *Kable No 2* the issue of false imprisonment fell away, and was mentioned in the joint judgment only by reference to the history of the litigation, and in the judgment of Gageler J not at all. The exchanges between bar and Bench in argument in *Kable No 2*[120] leave no doubt as to the Bench's focus on the doctrine of superior court order voidability: the New South Wales Solicitor General was not even prepared to argue *Brockhill*,[121] and it appeared nowhere in the judgments.

B Superior Court Orders

The history of superior court orders in England shows a steady crescendo of acceptance from the Victorian period that such orders remain on foot until overturned on appeal or for jurisdictional defect. This acceptance has been adopted by the High Court in Australia, even as it addresses the differences between English and Australian conditions.[122] Nonetheless, it is noticeable that none of the English cases deal with the high stakes issues involved in *Kable No 2*, and that some of the references to the carrying power of court orders, such as in *Victorian Stevedoring & General Contracting Co Pty Ltd and Makes v*

117 (2012) 293 ALR 719, 750 [120].
118 [1931] AC 662, 670.
119 [2012] 1 AC 245, 315 [219].
120 Transcript of Proceedings, *New South Wales v Kable* [2013] HCATrans 71 (9 April 2013) 2890 ff (P W Bates, French CJ and Hayne and Keane JJ).
121 Ibid 925 ff (M G Sexton SC and French CJ).
122 See *Residual Assco* (2000) 202 CLR 629, 654–5 [63]–[64], 659–60 [75]–[76]; text prior to n 95 above.

Dignan,[123] do not survive close scrutiny. It is notable that *Dignan* did not involve an order of a superior court. The dicta taken from Justice Dixon's judgment has later been applied, as so much in this field, to rather more specific legal issues.

C The Possible Effect of the Determination of Invalidity in *Kable No 1*

Even if it is allowed that superior court orders remain valid until overturned, the question remains as to whether the orders made by Levine J fitted that description. The American 'de facto officer' doctrine is based in a sensible view to practicality: the exercise of judicial power under colour of office will be treated in retrospect as valid,[124] but not so where the office itself is constitutionally invalid.[125] The reasoning on that limitation on the 'de facto officer' rule is that otherwise constitutional inhibitions could be swept aside. Inadvertently improper appointment to office is one thing; unconstitutional creation of office is another.

The undermining of the nullity rule by Supreme Court cases such as *Chicot*[126] and *Stoll v Gottlieb*[127] did not work a complete reversal of that rule. *Chicot* plainly looked to a determination to be made on individual facts as to the status of actions performed prior to invalidation of the statutory basis. *Glidden*[128] supports the acceptance of collateral attack on orders (and by parity of reasoning, their nullification) made in an unconstitutional court where the basis for the constitutional challenge was as serious ('non-frivolous') as the determination of whether the relevant courts were and had been acting as US article III courts, or, one might add, whether an Australian chapter III court had retained its integrity in receiving an alien jurisdiction.

The analysis by Kirby J in *Residual Assco*[129] does not necessitate an acceptance of universal non-nullification, any more than American courts continued to accept *Norton*'s absolute nullification doctrine.[130] As Pannam explored nearly 50 years ago, well before *Kable No 1* had arrived, the 'de facto officer' doctrine, making good actions performed under colour of law, might have to 'give way to the retroactive invalidation of official acts in order to vindicate a constitutional boundary, or to guarantee a constitutional right'.[131]

---

123 (1931) 46 CLR 73 ('*Dignan*'). See above n 98 and accompanying text.

124 For an example of acceptance of de facto judicial performance at Supreme Court level where the office existed but the mode of appointment was defective, see *In re Aldridge* (1897) 15 NZLR 361.

125 See Field, *The Effect of an Unconstitutional Statute*, above n 50 and accompanying text.

126 308 US 371 (1940).

127 305 US 165 (1938).

128 370 US 530 (1962).

129 See text at n 63 ff above.

130 See text at n 43 ff above.

131 *Residual Assco* (2000) 202 CLR 629, 655 [64] (Kirby J), quoting Pannam, above n 45, 38, 61–2. See text at n 70 above. For evidence of a similar sentiment regarding the consequence of power based in constitutional transgression, see also Field, *The Effect of an Unconstitutional Statute*, above n 50.

D Was There Room for Introducing Some Judicial Discretion in *Kable No 2*?

The above analysis suggests that in the situation of serious constitutional infringement underlying the actions taken by a superior court, an absolutist approach may not be appropriate. There are a number of factors that go to an appropriateness of judicial discretion.

First, Mr Kable was not a volunteer to the proceedings. Even as regards his tilt at invalidity before Spender AJ,[132] he was confronted by an exercise of State power, and that was all the more so when the Director of Public Prosecutions applied for his incarceration to Levine J. The tone of disapprobation of collateral attacks on jurisdiction falls, inevitably, on those who are volunteers to the litigation.

Secondly, there is a flavour throughout the judgments in *Kable No 2* that Mr Kable must fail as his original resistance to the Director of Public Prosecutions' application was bound up with his challenge as to the validity of the *CP Act*, and that the odour of collateral attack might have dissipated if the litigation had been severed. Such a view punishes Mr Kable for not pursuing an appeal against the ruling of Spender AJ, at a time when the Director of Public Prosecutions was making his original application. The obvious path was to contest validity in the same proceedings as those commenced by the Director of Public Prosecutions. A counsel of perfection to the contrary is quite inappropriate.

Thirdly, the constitutional invalidity of the *CP Act* was of critical importance, and on the analysis above that factor undermines the reliance on the mere voidness of superior court orders.[133]

Fourthly, and in specific addition to the point above, the claim was in false imprisonment, which should direct a court to the greatest concern for any deprivation of liberty not soundly based in law, although it must be conceded that the Australian High Court has, in the course of the 21st century, shown scant interest in false imprisonment cases, as illustrated by *Ruddock v Taylor*[134] and *Haskins v Commonwealth*[135] in which neither *Brockhill* nor its reasoning received a mention, other than in a dissent in *Ruddock*.[136] *Ruddock* rested on the good faith of the Commonwealth officers detaining Mr Taylor for over 300 days in the absence of lawful authority, while *Haskins*, involving incarceration by a military court later found to be unconstitutional, saw the following reason in the joint judgment:

132 *R v Kable* (1994) 75 A Crim R 428.
133 See text above at nn 124-131.
134 (2005) 222 CLR 612 ('*Ruddock*').
135 (2011) 244 CLR 22.
136 (2005) 222 CLR 612, 657–8 [166] (Kirby J).

> To permit the plaintiff to maintain an action against those who executed that punishment (whether service police or the officer in charge of the Corrective Establishment) would be destructive of discipline. Obedience to lawful command is at the heart of a disciplined and effective defence force.[137]

And fifthly, buttressing practical factors three and four above, there was no issue at stake of court officers being at personal risk of tort liability. The days of magnificent Diceyan Crown isolation from the fray of tort litigation, with the full weight of the law falling on the hapless and unprotected heads of officers involved, are long gone, although courts still like to reason as though such personal liability is a reality. In Mr Kable's instance, the liability of his gaolers would fall on the Crown in right of New South Wales pursuant to section 10 of the *Law Reform (Vicarious Liability) Act 1983* (NSW).[138]

V CONCLUSION

The judgments in *Kable No 2* induce the disorientation inspired by an M C Escher graphic: something as critical as a wielding of jurisdiction unconstitutionally does not lead down stairs to the exit from the court procedure, but rather, seeming to start in that direction, it then merges into a set of stairs leading back into the heart of the judicial process determined 17 years earlier to be unconstitutional. Justice Levine's judgment has now become a Klein bottle, having no inside and outside, goodside or badside, with which one might grapple as to validity. It has only one surface, and there is nothing to grip regarding the earlier finding of unconstitutionality.[139]

137 (2011) 244 CLR 22, 47 [67] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

138 See *Kable No 2 CA* (2012) 293 ALR 719, [49]–[57] (Allsop P, Campbell and Meagher JJA, and McClellan CJ at CL agreeing).

139 The Klein bottle is a closed non-orientable surface of Euler characteristic that has no inside or outside: C T J Dodson and Phillip E Parker, *A User's Guide to Algebraic Topology* (Kluwer Academic Publishers, 1997) 125, It was originally described by Felix Klein: David Hilbert and Stephan Cohn-Vossen, *Geometry and the Imagination* (Chelsea Publications, 1999) 308. It can be physically realised only in four dimensions, since it must pass through itself without the presence of a hole.