[HIGH COURT OF AUSTRALIA.]

McLAUGHLIN . . . . . APPELLANT;

AND

FOSBERY AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *June* 16, 17, 20, 30. *Aug.* 25. *Sep.* 7.

Griffith, C.J., Barton and O'Connor, JJ.

Lunacy Act (*No.* 45 *of* 1898), *secs.* 16, 172—*Powers of committee of the person of a lunatic—Order signed by committee for reception of lunatic into a licensed house under sec.* 16—*Forcible removal of lunatic—Action for trespass and false imprisonment—Stay of proceedings under sec.* 172—*Acts done for the purpose of carrying out provisions of the Lunacy Act—Practice—Appeals from State Courts—Commonwealth Judiciary Act*, 1903, *sec.* 37—*Such judgment as ought to have been given in the first instance—Amendment—Formal defect or irregularity—Title of proceedings—Frivolous or vexatious action—Stay of proceedings at common law.*

The powers of a committee of the person of a lunatic, appointed uuder sec. 102 of the *Lunacy Act*, 1898, which substitutes a proceeding by declaration for the old proceeding *de lunatico inquirendo*, are not conferred by the Act, but are dependent upon the common law, and acts done by the committee, or by the authority of the committee, are not necessarily acts done for the purpose of carrying out the provisions of the Act, within the meaning of sec. 172.

The committee of the person of a lunatic signed an order under sec. 16 authorizing the reception of the lunatic into a licensed house. For the purpose of removing the lunatic there, certain members of the police force, at the request and by the direction of the committee, and, in her presence, and having the order in their possession, entered the lunatic's house, and took him to the licensed house. The lunatic subsequently obtained an order from the Court declaring that he had recovered his sanity, and, seven months after the making of the order, brought an action against the Inspector-General of Police, and the officers who had removed him, claiming damages for trespass and false imprisonment. On the application of the defendants in the action, the Chief Judge in Equity, sitting as the Judge in Lunacy under the Act, made an order staying all proceedings in the action under sec. 172 (3), and that order was subsequently affirmed by the Full Court.

The High Court, on appeal, found that, on the appellant's own version of the facts, if the action had gone to trial, no jury could reasonably have come to any other conclusion than that the respondents honestly believed that the committee, in so directing them, was acting in the execution of the authority vested in her by

law, and that they honestly and reasonably believed that the amount of force which they used was necessary to effect the safe removal of the appellant.

Held, that the acts complained of were not done for the purpose of carrying out the provisions of the Act, and that therefore the respondents were not protected by sec. 172.

But *held* (*per Griffith*, C.J., and *Barton*, J., *O'Connor*, J., *dissentiente*), that the Supreme Court, in the exercise of its inherent jurisdiction to stay vexatious actions, ought to have stayed proceedings in the action, if application had been made to it for that purpose in its common law jurisdiction, and that therefore the order appealed from, so far as it directed a stay of proceedings, was substantially right;

That the entitling of the proceedings in the lunacy jurisdiction of the Supreme Court was a formal defect or irregularity which the Full Court, sitting as a Court of Appeal under the *Equity Act* 1901, and exercising the powers of amendment conferred by secs. 70 and 84 of that Act, could have cured by amendment, without causing any injustice to the appellant;

And that the High Court, sitting as a final Court of Appeal, should disregard formal defects and irregularities in the proceedings, and, instead of allowing the appeal, should exercise the power conferred by sec. 37 of the *Judiciary Act*, and make all such amendments as the Full Court could and ought to have made.

Rule laid down by the Judicial Committee of the Privy Council in *Orphans Board* v. *Kraegelius*, 9 Moo. P.C., 441, at p. 447, as to dealing with points of mere form on appeal, adopted.

Distinction between different jurisdictions of the Supreme Court considered.

Per O'Connor, J.—The High Court in dealing with appeals from judgments of the Supreme Courts of the States, should be guided by the laws of practice and procedure which bind the Courts whose judgments are appealed from, in accordance with the rule laid down by Lord *Penzance* in *Cowan* v. *Duke of Buccleuch*, 2 App. Cas., 344 at p. 354; and, inasmuch as the Supreme Court, sitting in its Lunacy jurisdiction, on appeal from an order made in that jurisdiction, could not, without absolutely disregarding its established practice and procedure, have amended the proceedings in such a way as to convert them into proceedings at common law, the appeal should be allowed.

Order of the Supreme Court (1904), 4 S.R. (N.S.W.), 74, varied, and affirmed as varied.

APPEAL from a decision of the Supreme Court of New South Wales.

The following statement of the facts and proceedings is taken from the judgment of *Griffith*, C.J.:—

On 7th August, 1902, the learned Chief Judge in Equity made an order declaring the appellant to be of unsound mind and incapable of managing his affairs, and by the same order appointed

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his wife to be the committee of his person. On 17th September in the same year, Mrs. McLaughlin, as such committee, signed an order addressed to Dr. Vause, the superintendent of a private hospital for the insane, directing him to receive the appellant into his hospital. This order, with an office copy of the order of 7th August annexed to it, was on the same day delivered to the respondents, other than the respondent Fosbery, who are members of the police force, and had been directed by that respondent (who was then Inspector-General of police), to attend at the office of the committee's solicitors to receive it, and thereupon to convey the appellant to Dr. Vause's private hospital, which they proceeded to do. According to the appellant's version of the facts it appears that the respondents Fullerton and Ward came to his house in the evening and said to him, "We have come from Dr. Vause, he wishes to see you at his hospital." Appellant replied, "I do not believe you; show me a letter from Dr. Vause; how dare he send anyone to me on such an errand?" Respondent Fullerton then said, "We're the police; we have orders to bring you out there, and if you do not come quietly we shall put mufflers on you, and bring you by force." Appellant protested with some vehemence of language, whereupon Fullerton said, "Are you going to come quietly, or shall we have to put the mufflers on you?" Appellant replied, "I certainly am not going quietly, it would be an act of lunacy were I, being a solicitor, to leave my house willingly under such circumstances, and proceed to a private lunatic asylum. You must remove me by force if you are determined to do so, and take the consequences." The mufflers were then put on, and appellant was removed to a closed carriage and taken to the private hospital, the mufflers being removed on the way, after the appellant's son, who accompanied him, had requested their removal, and after appellant had given his assurance that he did not intend to try to leap out of the carriage. It appears that the committee was present at the time of the apprehension.

The appellant remained in confinement in the hospital for some time. On 10th March, 1903, the Court made a superseding order, declaring that the appellant had recovered his sanity and was capable of managing his affairs. The action, which was for damages for the apprehension and confinement of the appellant

under the circumstances just stated, and for the trespass to his house where he was apprehended, was not brought until 29th October, 1903, more than seven months after the making of the superseding order. The summons for a stay of proceedings required the appellant to attend before the Chief Judge in Equity, on the hearing of a summary application under sec. 172 of the *Lunacy Act* of 1898 (*a*), to stay proceedings in the action, (described as brought in the Court in its common law jurisdiction), on the grounds—(1) that the matters complained of in the action were done or commanded to be done by the defendants therein for the purpose of carrying out the provisions of the said Act, and that they acted in good faith and with reasonable care; and (2) that the action was not commenced within three months next after the alleged cause of action, or within three months next after the making of a superseding order, or next after the discharge of the plaintiff in the action, as in the section required, and upon the grounds stated in specified affidavits.

The application was granted by the Chief Judge in Equity, who made an order staying all proceedings in the action, with costs against the appellant (3rd December, 1903).

Against this order the appellant appealed to the Full Court, and on 22nd February, 1904, the appeal was dismissed with costs; *Ex parte Fosbery*, (1904) 4 S.R. (N.S.W.), 74.

Lamb and *Watt* for the appellant.

(*a*) Sec. 172 of the *Lunacy Act*, 1898, is as follows:—

172. (1) No suit or action shall lie against any person for or on account of any act, matter, or thing done or commanded to be done by him, or purporting to be done for the purpose of carrying out the provisions of this Act, if that person has acted in good faith and with reasonable care.

(2) No such suit or action as aforesaid shall be commenced but within three months after the alleged cause of action, or, in the case of a suit or action by a person who has been an insane person or patient, but within three months next after the making of a superseding order, or next after the discharge of the patient.

Proceedings in such suit or action as aforesaid may, on summary application to the Court be stayed upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care, or that the said proceedings have been commenced after the expiration of the three months aforesaid.

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Lamb. The Judge in Lunacy was wrong in making an order staying proceedings absolutely. There were disputed questions of fact, which went to the root of the action. The only materials before the Judge were the conflicting affidavits of the respective parties. There was evidence that the plaintiff was not violent, and that excessive force had been used by the defendants in removing him, and there was also evidence the other way. The issues of fact so raised should have been allowed to go to a jury. The defendants could have pleaded that they did what was complained of under the authority of the Act, and that no more force than necessary was used, and the plaintiff could have joined issue and new-assigned for excess. The question for the jury would then be whether the defendants had acted in such a way as to bring themselves within the protection of sec. 172 (1).

Sub-sec. (3) does not contemplate an absolute stay of proceedings, but a conditional one. The Court might, for instance, have granted a stay until the plaintiff should find security, but had no power under the section to make it absolute. An absolute stay would not be granted at common law unless the evidence before the Court showed beyond question that the action was an abuse of the process of the Court, and that there was no reasonable ground for making the allegations contained in the declaration; *Cocker* v. *Tempest*, 7 M. & W., 502.

[GRIFFITH, C.J., referred to *Higgins* v. *Woodhall*, 6 Times Rep., p. 1; and *Lawrance* v. *Ld. Norreys*, 15 App. Cas., 210, at p. 219.]

The provision in sub-sec. (2), limiting the time within which an action may be brought, only applies where the acts complained of are done or purport to be done for the purpose of carrying out the provisions of the Act. The trespasses complained of in the declaration do not come within that provision. The defendants claimed that they were acting under an order made by the committee of the person of the lunatic. The Court had refused to make an order committing the lunatic to a hospital, and no order had been made under the Act giving the committee the custody of the lunatic. The only power by which the committee could make an order affecting the liberty of the lunatic, if she could make one at all, must have been one which she possessed at common law. However extensive that power may be, it is not conferred by

the Act. Consequently the committee could not have justified under the Act, nor could those acting under the committee's authority, unless, as in secs. 16 and 171, they were expressly empowered to do so. Their justification would be at common law, and might have been so pleaded, and the limitations in sub-sec. (2) would not apply. Sec. 102 is the only one in the Act that deals with the appointment of the committee of the person and it is silent as to his powers. The powers of the committee depend upon old Statutes and the common law, and are derived from the King through the Court, which, by the Charter of Justice, was entrusted with those powers over the persons and estates of lunatics which the King had conferred upon the Lord Chancellor. There is no section which gives protection to the committee in the exercise of his powers. Sec. 16 presupposes those powers, but does not give them; *Ex parte Cranmer*, 12 Vesey, 445; *Re Flanagan*, 2 Jo. & Lat., 343. It protects superintendents of houses for the reception of lunatics, so long as they are acting under an order of the Court or of the committee, but it has no reference to the taking or carrying away of the lunatic. It is doubtful whether, even at common law, the committee has power to take away the lunatic by force without an order of the Court giving him the custody of the person; *Phillips' Law of Lunacy*, (1858 ed.), p. 278; *Pope on Lunacy*, 2nd ed., 108, 110, dealing with sec. 12 of 53 Vict. c. 5.

[BARTON, J., referred to *Pitt Lewis on The Insane under the Law* (1895), p. 91.]

The Court, in making an order, exercises powers given by the Charter of Justice, independently of the *Lunacy Act*; *In re W.M.*, (1903) 3 S.R. (N.S.W.), 552, at p. 565. The defendants, if they had acted under an order of the Court, could have justified under it, and would not have been liable to an action unless they used unnecessary force. The order under which the defendants claimed to have been acting was addressed to the superintendent of the hospital, and authorized him to receive the lunatic into the hospital, but it gave no authority to the defendants to carry him there. If the committee had not the power to take and convey, still less had the defendants; *Addison on Torts*, 6th ed., p. 150, citing *Griffin* v. *Coleman*, 4 H. & N., 265.

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[O'CONNOR, J.—On that point, *Fletcher* v. *Fletcher*, 28 L.J., Q.B., 134; 1 E. & E., 420, would apply.]

If the legislature had intended that persons in the position of the defendants, when interfering with the lunatic's liberty, should have the protection of secs. 171 and 172, it would have given it by express words, as was done in the *Justices Act*, 1902, and the *Crimes Act*, 1900; *Maxwell on Interpretration of Statutes*, 3rd ed., p. 325, citing *Griffith* v. *Taylor*, 2 C.P.D., 194. The protection given by the Act must be construed strictly as extending only to those persons who are expressly mentioned, and to things done under the Act; *Fletcher* v. *Fletcher* (*supra*); *Thomas* v. *Saunders*, 5 B. & Ad., 462; *Elliott* v. *Allen*, 1 C.B., 18; *R.* v. *Pinder*; *In re Greenwood*, 24 L.J., Q.B., 148.

The fact that the committee was appointed under the Act does not give him the right to take advantage of the limitations as to the time of bringing actions in sec. 172 (2); *Shatwell* v. *Hall*, 12 L.J., Ex., 74; 10 M. & W., 523. *Callinan* v. *Railway Commissioners of New South Wales*, (1901) 1 S.R. (N.S.W.), 89, which was relied upon by the respondent in the Court below, is not in point. In that case the defendants were doing something under the *Railway Act*, and an action was brought against them for doing it negligently. If sub-sec. (2) is construed as extending to all actions, in the same way as the provisions as to notice in the *Railway Act*, sub-sec. (1) must receive an equally extended construction, and there would be no right of action at all, even for excess.

The word "Court" in sec. 172 (3) means the Court in which the action is brought. The defendants should have gone to the Supreme Court in its common law jurisdiction to obtain a stay of proceedings.

[GRIFFITH, C.J.—If sec. 172 (3) gives nothing more than the ordinary power of the Supreme Court to stay its own proceedings, there is no necessity for it at all. We should like to hear you on that point.]

The section provides that the action must be brought before the expiration of three months, and that if the defendants have acted with reasonable care and good faith in carrying out the provisions of the Act no action will lie. These are statutory

requirements, and therefore could not have been taken advantage of as grounds for staying proceedings at common law.

Watt followed. The common law power of the committee of the person over the lunatic is limited, and he must obtain an order of the Court giving him custody of the person in order to be protected in forcibly removing him; *Lunacy Rules* (N.S.W.), 1900, rr. 44 *et seq.*; *Pitt Lewis on Lunacy*, p. 91; *Addison on Torts*, 6th ed., p. 162; *Prodgers* v. *Phrazier*, 1 Vern., 9; 2 Ch. Ca., 70; *In re McDermott*, 3 Dr. & War., 480. Even if the committee has power over the person of the lunatic, the Act gives no protection to him or those acting under his authority, except when carrying out the provisions of the Act; *Carpue* v. *London and Brighton Railway Co.*, 5 Q.B., 747; *Palmer* v. *Grand Junction Railway Co.*, 8 L.J., Ex., 129; 4 M. & W., 749; *Mercer* v. *Gooch*, 15 L.T., 219; *Doust* v. *Slater*, 38 L.J., Q.B., 159; 10 B. & S., 400.

Sir Julian Salomons, K.C. (with him, *C. B. Stephens*), for the respondents. The Judge in Lunacy had power to make the order. The word "Court" in sec. 172 means "Supreme Court, in its lunacy jurisdiction." The power given by that section is in addition to the inherent power of the Supreme Court to stay its own proceedings. Absolute discretion is vested in the Judge in Lunacy. It is immaterial that the plaintiff could have replied excess or new-assigned to the defendant's pleas of justification. If that were to bar the exercise of the Court's discretion, its jurisdiction might be ousted in every case. If the Court exercises its discretion wrongly, or makes a wrong order, the Court of appeal will reverse it, not because it was made without jurisdiction, but because it was wrong. The Judge was satisfied on the evidence that the defendants had acted *bonâ fide*, with reasonable care, and without unnecessary violence. If he was not clearly wrong, this Court, on grounds of public policy, will not go into the question of merits, merely because the plaintiff says that, if allowed to go to a jury, he could prove excess, or malice; *Munster* v. *Lamb*, 11 Q.B.D., 588, at pp. 591, 607. If the action had gone to trial, the plaintiff must have been nonsuited. The Judge would have been wrong if he had refused to stay

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proceedings; *Castro* v. *Murray*, L.R. 10 Ex., 213; *Dawkins* v. *Prince Edmond of Saxe-Weimar*, 1 Q.B.D., 499.

[GRIFFITH, C.J.—In the latter case the Court stayed proceedings because they held that, even if everything that the plaintiff alleged was true, no action would lie.]

Even if the Judge could not stay proceedings absolutely under sec. 172, the Supreme Court had power at common law to do so at its discretion. The *Lunacy Act* might be disregarded altogether, and the application reheard by this Court on this appeal. On the evidence before it the Court would be justified in granting a stay of proceedings now. Apart from the Act altogether, the plaintiff could never obtain a verdict in the circumstances of this case. There was no evidence of violence having been used by the defendants.

[GRIFFITH, C.J.—We cannot see any evidence of violence to go to a jury.]

The defendants were absolutely protected when acting under the order of the committee, just as they would have been in acting under an order made by the Judge. The committee had power to make the order, although the Court had made no order expressly giving her the custody of the lunatic; *Wood Renton on Lunacy*, (1896 ed.), pp. 345, 692. In *Fletcher* v. *Fletcher* (*supra*), no order had been made by a duly appointed committee, and the defendant sought to justify under a section which protected persons of certain classes, to which he did not belong. If his plea had alleged that plaintiff was in fact a lunatic, it would have been a good defence at common law. It was held bad because it did not contain that allegation.

The limitation of the time for bringing the action to three months, sec. 172 (2), applies. The provision is analogous to sections in other Acts providing that notice of action should be given. All the cases on that point are in the respondents' favor. The acts complained of by the plaintiff were done under the Act, within the meaning of sec. 172. The committee is appointed under the Act (sec. 102), and though, when appointed, he has powers which are defined by the common law, he would never have been entitled to exercise them but for the appointment under the Act.

[GRIFFITH, C.J.—It may be that at common law the committee has power to put the lunatic under restraint, wherever he pleases, in case of necessity. By the Act he is authorized to place the lunatic in a licensed house. Is not that only naming a place in regard to which the committee may exercise his common law and other powers ?]

The appointment necessarily implies the giving of the power to take and convey the lunatic, and therefore the exercise of that power is a thing done under the Act. In this case the order was directed to the keeper of a house licensed under the Act. Secs. 16 and 171 provide that the committee's order shall be sufficient authority and justification for the reception of the lunatic into the house. The reception is therefore a thing done under the Act, and the reception implies the taking and conveying of the lunatic to the house. The intention of the legislature to include the taking and conveying in the authority to receive is shown by the language of Schedule III. of the Act, read in connection with sec. 6, which gives power to justices to order the removal of an insane person, to be received into a licensed house.

The lunatic is wholly under the charge of the committee. Even if the committee had no power to authorize the defendants to carry away the lunatic, she had power to make the order in question, which was directed to the keeper of a licensed house, and authorized him to receive the lunatic. Under the Act that order was necessary. If the defendants were mistaken in thinking that the order gave them power to convey the plaintiff to the house, they nevertheless purported to be carrying out the provisions of the Act in acting upon the order, and therefore were protected under sec. 172.

Lamb in reply. This Court will not dismiss the appeal on the ground that the Supreme Court might have stayed proceedings at common law, if it had been asked to do so. If such an application had been made, the appellant would have been able to meet it. Different considerations would have arisen, and other affidavits could have been filed, if necessary. This Court should not consider what might have happened if a different ground had been taken in the first instance. There was nothing to lead the

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appellant to suppose that the respondent relied on anything but sec. 172. The ordinary course at common law is to go to the Court in which the proceedings are pending. It is improbable that the Supreme Court would have stayed proceedings when there was such conflicting evidence before it.

The police were not acting in any public capacity in removing the appellant. They were merely assisting the committee, and are in no stronger position than civilians would be, if doing the same thing. If they made a mistake in supposing that the committee could legally authorize them to do what they did, they are not protected; *Griffith* v. *Taylor*, 2 C.P.D., 194, at p. 201.

The provision for appointment in sec. 102 does not imply that the committee's powers are thereby conferred. It merely establishes a new method of procedure in substitution for the old form of inquiry, *de lunatico inquirendo*.

Cur. adv. vult.

On 30th June the Court expressed a wish, before delivering judgment, to hear argument by one counsel on each side, on the question whether, if the order of the Chief Judge in Equity was wrongly made under the *Lunacy Act*, it could and ought to have been made by the Supreme Court in its common law jurisdiction.

On 25th August, on the matter being again called, *Griffith*, C.J., referred counsel to the cases: *Re Davidson*, 20 L.J., Ch., 644; *In re Pearson*, 5 Ch. D., 982; *In re Currie*, 10 Ch. D., 93; *Metropolitan Bank* v. *Pooley*, 10 App. Cas., 210; *Lawrance* v. *Lord Norreys*, 15 App. Cas., 210; and the argument was further adjourned to 7th Sept., 1904.

7th September.

Sir Julian Salomons, K.C., for the respondents. If the Court should be of opinion that the action ought to have been stayed at common law, they should not allow the appeal merely because the original application was made in the wrong form. The proceedings could have been amended by the Full Court, and dealt with as a common law application. He referred to *Metropolitan Bank* v. *Pooley* (*supra*); *Haggard* v. *Pelicier Frères*, (1892) A.C., 61; *Chatterton* v. *Secretary of State for India*, (1895) 2 Q.B., 189; *Willis* v. *Earl Beauchamp*, 11 P.D., 59; *In re Currie* (*supra*).

Lamb, for the appellant. The objection to the amendment suggested was not a mere technicality, but one of substance. It would be altogether contrary to the practice of the Supreme Court to make such an amendment. Proceedings in the Lunacy jurisdiction cannot be converted, by amendment, into proceedings at common law. The appellant was not prepared to meet the contention that the action was frivolous and vexatious, at the hearing in the Court below. It was sufficient for him to answer the application, as one made under sec. 172 of the Act. On that application the appellant should have succeeded as a matter of law, and consequently there was no necessity to go exhaustively into the facts in connection with the actual seizure and removal. If the Judge in the first instance would have been right in dismissing the application on the point of law, the Court of appeal cannot say that he ought to have made an order granting it. [He cited *In re Otto's Kopje Diamond Mines Ltd.*, (1893) 1 Ch., 618; *Hipgrave* v. *Case*, 28 Ch. D., 356; *Raleigh* v. *Goschen*, (1898) 1 Ch., 73; *Cropper* v. *Smith*, 26 Ch. D., 700; *L. C. & D. Railway Co.* v. *S. E. Railway Co.*, 40 Ch. D., 100; *Garden Gully Quartz Mining Co.* v. *McLister*, 1 App. Cas., 39; *Mittens* v. *Forman*, 58 L.J.Q.B., 40; *Attorney-General of Duchy of Lancaster* v. *L. & N. W. Railway Co.*, (1892) 3 Ch., 274.]

Even if the Court holds that it can now make an order staying proceedings, and dismiss the appeal, the appellant should not be compelled to pay the costs, because they have been caused by the respondent's mistake; *Snow, Burney and Stringer, Ann. Prac.*, (1894) p. 352.

[GRIFFITH, C.J., referred to *Board of Orphans* v. *Kraegelius*, 9 Moo. P.C., 441.]

Cur. adv. vult.

The following judgments were read:—

9th September.

GRIFFITH, C.J. This is an appeal from a decision of the Full Court, described as sitting in its Lunacy jurisdiction, affirming an order of *A. H. Simpson*, J., the Chief Judge in Equity, staying proceedings in an action for assault and false imprisonment and trespass to a house, brought by the appellant against the respondents in the Supreme Court. The events which led up to the

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order may be shortly stated as follows: [the learned Chief Justice stated the facts of the case, and continued]:—

The term "Court," as defined by sec. 3 of the Act, means the Supreme Court in its Lunacy jurisdiction. And, although the title of the Act is "An Act to consolidate the law respecting the insane," and the Act purports to be a consolidation Act only, we think there is nothing in the context of sec. 172 to exclude this interpretation, notwithstanding that the effect is, in this respect, to alter the previous law, under which an application to stay was required to be made to the Court in which the action was pending.

At the hearing of the summons it was objected for the appellant that his apprehension and conveyance to a private hospital for the insane were not acts done for the purpose of carrying out any of the provisions of the *Lunacy Act* within the meaning of the section, although his reception there might be such an act; that the defendants' justification, if any, for the apprehension must be at common law, and that the section had, therefore, no application to the case so far as regards the apprehension. The argument for the respondents was based on sec. 16 of the Act, which provides that when a person has been found insane by any proceedings in the Court, an order signed by a Judge, or by the committee appointed by the Court, and having thereto annexed an office copy of the order appointing such committee, shall be sufficient authority for the reception of such person into a hospital for the insane, or licensed house (*i.e.*, private hospital for the insane), without any further order or medical certificate. It was contended that since the reception of the appellant into Dr. Vause's hospital was authorized by the Act, his apprehension for the purpose of conveying him there was an act done for the purpose of carrying out the provisions of the Act, viz., the provisions authorizing his reception. This view commended itself to the learned Chief Judge and to the Full Court on appeal. The learned Judge of first instance said in the course of his judgment:—"Sec. 16 does not in terms provide for taking an insane person to a hospital or a licensed house, but such power is, in my opinion, necessarily implied from the provisions which authorize his reception into such institution and his detention there and his recapture if he escapes." On the same point, *Pring*, J., said:—"We must not

suppose that the legislature, in authorizing an action of that kind, would do so without giving the necessary authority for carrying it into execution." I pause for a moment to remark that, while it is clear that sec. 16 recognizes the existence of some authority vested in the committee of the person of a lunatic as to the disposition of his person, the recognition of an existing authority is not the same thing as the creation of a new authority by implication; and that, in the interpretation of a Statute affecting personal liberty, supposition as to the intention of the legislature has no place. The function of the Court is limited to interpreting and giving effect to its will as expressed in the Statute.

The question for determination under sec. 172 is not whether the committee had authority to deprive the lunatic of his liberty, but whether such deprivation is an act done for the purpose of carrying out the provisions of the Act. The distinction is important, inasmuch as the limitation of three months is absolute, in cases to which the section applies, and it does not necessarily follow that acts done by a committee under his common law powers are done for that purpose.

The application to stay was made before plea, so that the respondents were not called upon to state their defence with legal precision. It will, however, we think, facilitate a clear understanding of the real point in issue if the defence is stated in the form of a plea. So stated, it would run to the following effect:— "The defendants say that before the time &c. the plaintiff had been duly declared by this Court in its lunacy jurisdiction to be of unsound mind and incapable of managing his affairs, and one A. A. McLaughlin had been duly appointed to be the committee of his person; and the said A. A. McLaughlin had as such committee signed an order whereby she directed that the plaintiff should be received into a house duly licensed for the reception of insane patients: And thereupon the defendants [at the request and by the direction of the said A. A. McLaughlin and in her presence] and having with them the said order and an office copy &c., took the plaintiff into custody and conveyed him to the said licensed house, using no more force than was necessary in that behalf, which are the alleged trespasses." I have placed in brackets the words "at the request and by the direction &c." It will be seen

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that, if the view taken by the Supreme Court of sec. 16 is the correct one, the plea would be good without these words, for (as was rightly said by *Pring*, J.), if an act is done in pursuance of authority conferred by a Statute, it needs no further justification than the Statute. If, on the other hand, the plea without these words would be a bad plea, it is plain that the justification for the respondent's acts must be found in the authority of the committee. We proceed to consider the matter from the point of view of a plea omitting these words, and will afterwards consider whether acts done by or by authority of the committee of the person are, by reason merely that they are so done, acts done for the purpose of carrying out the provisions of the Act within the meaning of sec. 172. Before referring to the decided cases, which appear to us to be conclusive on both points, it will be convenient to refer to the several sections of the Act bearing on the matter. The Act is divided into Parts. Part I. deals with the proceedings by which persons of unsound mind may be placed under restraint, and contains careful provisions for the protection of the liberty of persons suspected of insanity, as well as for the protection of the public against them. Sec. 4 authorizes a justice, upon information on oath that a person deemed (*i.e.* supposed) to be insane is without sufficient means of support, or is wandering at large, or has been discovered under circumstances that denote a purpose of committing some offence, to issue an order under his hand requiring a constable to apprehend such person and bring him before two justices. It also authorizes a constable without order to apprehend a person found under similar circumstances. Sec. 5 imposes certain duties upon constables and justices with respect to persons supposed to be insane and not properly treated. Sec. 6 prescribes the duties of the justices before whom a person is brought under the previous provisions, and authorizes them, if satisfied of the insanity and of the existence of some one of several enumerated conditions, by order under their hands in a prescribed form and accompanied by prescribed particulars, "to direct him to be received into some hospital for the insane or licensed house to be named in the order," and goes on to say that the person in question "shall be forthwith conveyed to," and upon production of the order and particulars and of two medical certificates (which

must have been before the justices), "shall be received into, and detained in, such hospital or licensed house accordingly." In urgent cases the justices may act provisionally upon one certificate only. Sec. 7 allows persons brought before justices under the Act to be remanded to a reception house or private hospital. Sec. 9 provides that "any person may be received and detained as a patient in a hospital for the insane or a licensed house on the authority of a request under the hand of some person" in the prescribed form duly attached, and accompanied by a statement of particulars and two medical certificates, as to which detailed directions are given (secs. 9, 10, 11, 12, 13), all having for their apparent object the prevention of any undue interference with personal liberty. It is important to observe that section 9 contains no provision as to the apprehension or removal of the supposed lunatic. Sec. 14 limits the duration of a justice's order for reception to 21 days after the date of the latest of the medical certificates. Sec. 15 provides for the amendment of errors in orders, requests, medical certificates or other documents. Sec. 16, already quoted, provides that an order signed by a Judge or by the committee appointed by the Court with an office copy of the order appointing him annexed "shall be sufficient authority for the reception of such person into any hospital for the insane or licensed house without any further order or any such medical certificate as hereinbefore mentioned." This section, like sec. 9, contains no provisions as to the apprehension of the patient or his removal to a hospital or licensed house. Sec. 17 makes it a misdemeanour to receive any person into a hospital for the insane, reception house, or licensed house, or other appointed place, "without such order statement and medical certificate or other proper authority as in such cases is required under the provisions of this Act." Sec. 18 authorizes the retaking of escaped patients, and their conveyance, reception and detention in the place from which they have escaped.

Part II. deals with hospitals for the insane. Part III. deals with licensed houses for the reception of the insane, and contains elaborate provisions against abuse of the powers of restraint of liberty conferred on the keepers. Part IV. (secs. 52-58) deals with reception houses for the temporary treatment of the insane.

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Sec. 56 provides that any justice may by order under his hand direct the temporary reception into a reception house of a person for whose reception into a hospital for the insane or licensed house the necessary authority is in existence.

It will be seen that the only express provisions with regard to the apprehension and forcible removal of persons supposed to be insane are those contained in secs. 4, 5 and 6. Secs. 9 and 16 are addressed to a different branch of the subject, namely the conditions on which patients may be admitted to places approved and appointed for their detention, but are silent as to the conditions under which they may be forcibly apprehended and removed. They are both framed on the same lines, and afford protection to the superintendent of the hospital or licensed house; but, in our opinion, they do not of themselves afford any protection to a person who takes advantage of them for the purpose of procuring the detention of a supposed lunatic, any more than a warrant authorizing the keeper of a prison to receive and detain a named person would afford any authority to a stranger to apprehend that person and convey him to the prison. *Fletcher* v. *Fletcher* (1 E. &. E., 420; 28 L.J., Q.B., 134), was a case in which the defendant had taken advantage of the provisions of the Act 8 & 9 Vict. c. 100, sec. 46, with respect to the plaintiff, who was his nephew. That sec. was to the same effect as sec. 9 of the Act now under consideration, and provided that no person should be received into a licensed house without an order under the hand of some person in the prescribed form, nor without two medical certificates. The plaintiff having brought an action for assault and false imprisonment, the defendant pleaded that two medical certificates had been duly given under the Statute, and that he honestly believed that they were true, and that the plaintiff was of unsound mind, and unfit to be at large, and that it was necessary that he should be confined. The Act contained an express provision (sec. 99) protecting the keepers of licensed houses who acted on the faith of an order and certificates. The plea was held bad. *Wightman*, J., said, (as reported in the *Law Journal*):—"The plea has been framed as if it had been thought that the enactment extended protection to the person, other than the medical man, who orders the taking up of his relative or friend as a lunatic, but

on the contrary it enumerates those who are to be protected, viz., the medical man, the keeper of the asylum and servants, leaving out the person signing the order to arrest." This case would be exactly in point if an action were brought by a plaintiff against a person who, having signed a request under sec. 9, had followed it up by procuring his apprehension and confinement. The principle of the case is equally applicable to sec. 16, which, therefore, in our opinion, affords of itself no protection either to the committee of the person who signs an order under it, or to persons who act on the authority of such an order. Their protection, if any, must be sought in the common law. In this connection it is interesting to compare sec. 35 of the English *Lunacy Act*, 1890, which expressly provides that a reception order shall be sufficient authority for taking the lunatic and conveying him to the place mentioned in the order. The term "reception order" includes an order signed by the committee of the person (sec. 12), and also what is called an "urgency order," which is the English equivalent of the request mentioned in sec. 8 of the New South Wales Act.

The suggested plea would, therefore, be bad without the words enclosed in brackets. Would it be good if the words are included? There is singularly little to be found in the books as to the authority of the committee of the person of a lunatic to dispose of his liberty. The form of order now in use in England is—"We do commit and grant the custody of the person, regulation and government, of the said A.B. to" the committee. And the condition of the bond prescribed to be given by the committee is that he "shall carefully provide for the person of the said A.B. and for his safety . . . and shall in all things demean himself as the careful and faithful grantee and committee of the person of the said A.B." The committee is not in the position of the keeper of a prison, nor does the lunatic necessarily reside with him, but he is responsible for the lunatic's comfort.

It is said that he may settle and change at pleasure the lunatic's residence, which may be either with himself or with some other suitable person for whom he is responsible; *Wood Renton on Lunacy*, 341, 345. Sec. 16 of the Act now under consideration assumes that he may select a licensed house as the place of enforced

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residence. It is plain, therefore, that the committee of the person has at common law some power of control over the liberty of the lunatic. It is not material for the present purpose to consider in detail the limits and conditions within which that power may be exercised. In practice they are determined by the Judge or other judicial officer exercising the powers of the Court, and as a matter of expediency it is certainly desirable that any proposed restraint of liberty should have judicial sanction before it is used. For the purpose of determining the liability of the respondents in this action it is sufficient to say that the committee, when appointed, has an authority vested in him to cause the removal of the lunatic from one place of residence to another if circumstances justify such action. And we think that any persons called upon to assist him in effecting such removal are entitled to protection from liability, on a principle analogous to that which protects persons called upon to assist an officer of police in the execution of a warrant. There may perhaps be circumstances which would disentitle them to claim such protection, but if they honestly believe that the committee is merely calling for their assistance in the exercise of his legal authority they are not liable. The suggested plea would, therefore, in our judgment, be a good defence to the action.

It does not, however, follow that the acts of the respondents were acts done for the purposes of carrying out any of the provisions of the Act. The only section of the Act, other than sec. 16, in which the committee of the person is mentioned, is sec. 102, which provides that, when it is proved to the satisfaction of the Court that a person is of unsound mind and incapable of managing his affairs, the Court may make a declaration to that effect, and may direct a reference to the Master and make all proper orders as to the property, debts, and maintenance of the lunatic, and may, if necessary, appoint a committee of his estate, "and also when desirable a committee of his person." This section is contained in Part VII. of the Act, which is headed "Proceedings for declaring persons insane or incapable and for the appointment of committees of their estates, &c.," and deals with matters of procedure and practice. The proceeding by declaration is substituted for the old proceeding by inquisition, the provision as to

the appointment of a committee of the person being added as an incidental consequence of the declaration. The Act is silent as to the powers of the committee when appointed, which must, therefore, whether the power of appointment is regarded as conferred by the Constitution of the Supreme Court or by sec. 102, be found in and governed by the common law relating to committees. Can then an act done by the authority of the committee be considered as an act done in pursuance of the Statute? The rules applicable for answering this question are well settled. In *Edge* v. *Parker*, 8 B. & C., 697, the question was whether the entry of assignees in bankruptcy into the plaintiff's premises to seize goods the property of the bankrupt was an act done in pursuance of the *Bankruptcy Act*, 6 Geo. IV. c. 16, under which they were appointed. Actions "for anything done in pursuance of the Act" were required to be brought within three months after the act committed, and the action had been commenced after that period. *Bayley*, J., delivering the considered judgment of the Court of King's Bench, said—"The right construction of the clause appears to be this: If the assignee does an act directed by the Statute, but does it erroneously, he is protected; but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the Statute, that is not done in pursuance of the Statute, and he is responsible for it." The same point had been previously decided by the Court of Common Pleas in *Carruthers* v. *Payne*, 5 Bing., 270. In *Shatwell* v. *Hall* (10 M. & W., 523), a local Act of Parliament, which authorized the appointment of constables, had provided that no plaintiff should recover in any action against any person for anything done in pursuance of the Act without twenty-one days' notice of action having been given. The action was brought without the prescribed notice against two constables appointed under the Act for something which had been done by them as constables, but not in the execution of any power conferred by the Act itself. Lord *Abinger*, C.B., delivering the considered judgment of the Court of Exchequer, said (p. 526):—"Now the action is not brought for anything done by them directly in execution of any of the *powers* of the local Act of Parliament; but it was said that it was brought against them for something which they did, and could only do, by the authority of

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the Act. It is true they were appointed constables by virtue of the Act of Parliament, which gives them all the authority of constables; but the act they did was not in pursuance of the Act of Parliament at all, and they were not entitled to notice, in respect thereof, any more than any other constable would be."

On the authority of these cases, we are bound to hold that acts done by the committee, or by the authority of the committee, are not necessarily acts done for the purposes of carrying out the provisions of the Statute within the meaning of sec. 172. It is quite immaterial that the respondents may have thought themselves to be so acting. For the test in such cases is not whether the defendant thought that there was a law and that he was acting in pursuance of it, but whether he honestly believed in the existence of a state of facts which, if it had existed, would have afforded a justification under some law; *Roberts* v. *Orchard*, 2 H. & C., 769; 33 L.J., Ex., 65. In *Cook* v. *Leonard*, (6 B. & C., 351), *Bayley*, J., stated the rule thus: "These cases fall within the general rule applicable to this subject, viz., that, when an Act of Parliament requires notice before action brought in respect of anything done in pursuance or in execution of its provisions, these latter words are not confined to acts done strictly in pursuance of the Act of Parliament, but extend to all acts done *bonâ fide* which may reasonably be supposed to be done in pursuance of the Act. But when there is no colour for supposing that the act done is authorized, then notice of action is not necessary."

If the intention of the committee, at the moment of directing the apprehension, to take advantage of the provisions of sec. 16 were to be held to constitute the act of apprehension an act done for the purposes of carrying out the provisions of the Statute, singular consequences would follow. The protection of sec. 172 would or would not attach according to the state of mind of the committee, which might vary from time to time. A forcible detention, if confinement in a licensed house were not then contemplated, would not be within the section. If, however, during the detention the committee thought it desirable to direct such a confinement, the character of the detention would thereupon be changed, as it might be again changed if, before the lunatic's arrival at the place of confinement, the committee should no longer think it necessary

to confine him. A construction which would make the quality of the act of apprehension vary according to the secret and perhaps fluctuating intention of the committee is so improbable that we do not think we ought to adopt it.

On the other hand it is contended that, conceding that the apprehension and detention of a lunatic by the committee of his person cannot be regarded as matters falling within the term "provisions of the Act," yet one of such provisions is the creation of places in which he may be detained when so apprehended, that when the committee has determined to take advantage of that provision, the apprehension of the lunatic and his conveyance to the private hospital, against his will if need be, are necessary incidents of giving effect to such determination, and that the apprehension and conveyance, being acts done for the purpose of taking advantage of a permissory provision of the Act, are consequently acts done for the purpose of carrying out that provision. In this view the persons concerned in the apprehension and conveyance after the order for reception has been signed would come within the protection of sec. 172. We are quite unable to accept this view, having regard to the authorities already referred to, and having regard also to the absence from the *Lunacy Act* of positive provisions such as those contained in the English Statute, and to the language of sec. 172 itself, which does not seem apt to cover such an act as the apprehension of a lunatic committed to the charge of a Committee.

So far the Court is unanimous. In what I have further to say I am expressing the opinion of my brother *Barton* and myself.

Assuming that the provisions of sec. 172 of the *Lunacy Act* were inapplicable (as we have decided), it was contended for the respondents that upon the facts disclosed in the affidavits the action is one which ought to be stayed by the Court in the exercise of its inherent jurisdiction to stay vexatious actions. The case of *Metropolitan Bank* v. *Pooley*, 10 Ap. Cas., 210, was cited, in which the House of Lords, on appeal from a decision of the Court of Appeal reversing an order of the Queen's Bench Division, stayed proceedings on this ground, on a point of law which had not been taken in the Courts below.

On the other hand it was contended that the High Court must

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allow the appeal on the ground that the application was made to the Chief Judge in Equity in the exercise of the jurisdiction conferred by the *Lunacy Act*, and that the appeal to the Full Court must be taken (as it is in form expressed to be), to have been heard in the same jurisdiction, and that an order expressed to be made in one jurisdiction of the Court cannot be supported as an order made in another jurisdiction, although it might properly have been made in the latter. In our judgment this argument is founded upon a misconception of the word "jurisdiction" as used in the Acts relating to the Supreme Court. The Supreme Court of New South Wales is one Court, having under its original constitution all the powers which the Courts of Chancery and the Common Law and Ecclesiastical Courts had in England. Every Judge of the Court has the powers and authority of a Judge of the Court, and his powers are not in fact or in law impaired if he erroneously attributes the source of any particular power to the wrong Statute. Otherwise the result might follow that a Judge exercising a power actually vested in him by one Statute would be liable to an action for acting without jurisdiction, if by a mistake in the title of the proceedings it appeared that his authority was derived from another Statute. In any view of the matter, the Full Court sits as the Supreme Court of New South Wales, and, when so sitting, has all the powers of that Court conferred upon it by the Statutes conferring its jurisdiction, taken collectively. If by the Statute law of New South Wales it were positively enacted that an order of the Full Court within its jurisdiction under one Statute should be invalid if it purported to be made under another Statute, this Court could only obey the law as so enacted, whatever surprise one might feel at the existence of such a law. But, in the absence of such an enactment we think that this Court in dealing with appeals from the Supreme Court of a State should be guided by the doctrine expressed in the case of *The Board of Orphans* v. *Kraegelius*, 9 Moo. P.C., 441, at p. 447. "Now it is a wholesome province of this Court to disregard points of mere form raised upon an appeal when they do not in any manner affect the substance of the subject in controversy, and have not in any respect a tendency to mislead or prejudice the defendant in any way." The objection taken in that case was to the form of the action.

All powers of the Supreme Court of New South Wales are derived from Statute, and, in one sense, there are as many jurisdictions as there are Statutes conferring jurisdiction. But in another, and the truer sense, the jurisdiction of the Court, *quâ* Court, is single, and an order of the Court made within its jurisdiction, in the sense that it is made by virtue of the authority vested in the Court by law, cannot be impeached merely because the formal documents describe it as made under a Statute different from that which actually confers the authority. If, as was formerly the case in England, but was never the case in New South Wales, the general judicial power of the State were distributed among several different Courts, an order of one Court not within its province could not be supported by showing that it could have been made by another Court. But this argument is not applicable to a single Court in which all the judicial power of the State is vested.

We proceed to apply these principles to the present case. The application was made to the learned Judge of first instance upon an application purporting to be made to him as a Judge in Equity under the jurisdiction conferred by the *Lunacy Act*. If he had taken the same view of the law as we do, he would have refused to make the order asked for in the exercise of that jurisdiction. If he had then been asked to make an order to the same effect under the general jurisdiction which he had as a Judge of the Supreme Court, and for that purpose to allow an amendment of the proceedings, he would probably have refused to do so. Nor could any objection have been taken to such refusal? Not, however, because he had no power to entertain the matter in the exercise of his common law jurisdiction, but because, according to to the course of the Court, it was more convenient that such an application should be made to another Judge. When the case came before the Full Court a similar application might have been made to them. That it could have been made and granted, the cases of *Re Pearson*, L.R., 5 Ch., 982, and *Re Currie*, L.R., 10 Ch., 93, afford complete authority. In those cases the Lords Justices of Appeal did not merely exercise their jurisdiction under a different Statute, but exercised a jurisdiction conferred upon them as members of an entirely different tribunal from that in which

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the original application was made. But they took it for granted that, having vested in them personally the jurisdiction to make the order asked for, they could by amendment of the proceedings transfer those proceedings, not merely to a different branch of the same jurisdiction, but to an entirely different jurisdiction also vested in them. If the application had been made to the Full Court, it might or might not have been granted. It is not necessary to consider whether if it had been refused an appeal could have been brought to this Court from their refusal. Such an application was not, in fact, made, but they made an order which, in our view of the law, although it could not be made under the Statute brought under their notice, could have been made under their general powers and jurisdiction if the evidence warranted such an order. How, then, ought we to deal with the case? The appeal to the Full Court was brought under the *Equity Act* (No. 24 of 1901), by which it is provided that all appeals shall be by way of rehearing (sec. 82), and that the Full Court shall have all the powers of amendment of the Judge (sec. 84 (1)), and have power to make any order which ought to have been made (sec. 84 (4)). The same Act provides that no proceeding shall be invalidated by any formal defect, nor by any irregularity, unless the Court is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of the Court (sec. 70).

In our opinion the entitling of the proceedings in this matter "In Lunacy" was a defect or irregularity, and the Full Court would have been, if not bound to amend it, at any rate, justified in disregarding it, and in making any order that the materials before them warranted. The only question, then, is whether the amendment could be made without doing substantial injustice. If upon an application for amendment the Court ought to have allowed an adjournment for the purpose of adducing additional evidence on the part of the appellant, or if it appears that any additional relevant evidence could be adduced by him, it is clear that such an amendment ought not to have been allowed, and, consequently, that we ought not to deal with the case on the footing of its having been made. We proceed to consider the matter from this point of view. It is important to bear in mind

that the procedure, by summons or motion upon affidavit, is common to both branches of the jurisdiction. One of the grounds stated in the summons was that the defendants, in apprehending the plaintiff, acted in good faith and with reasonable care. In support of this ground the evidence was addressed to showing that the plaintiff's conduct had necessitated the use of a certain amount of force, and that no more had been used than was necessary. In answer, the plaintiff adduced evidence as to the amount of force used, with the object of showing that it was excessive. It was assumed on both sides that the words "in good faith and with reasonable care" raised the question of excessive force. The plaintiff's attention was therefore drawn to the matter, and he cannot complain that he is called upon to answer a new case, which would, of course, be unjust. There is, substantially, no conflict of evidence, but we accept the plaintiff's version of the facts. [His Honor then gave the plaintiff's version of the facts in connection with his apprehension, as reported above, and proceeded.]

Whether an action could or could not be maintained against the committee herself, there cannot be any doubt, upon these facts, that if the present action came before a jury the defendants would be entitled to succeed. The question for the jury would be whether the defendants, when they apprehended the plaintiff, and conveyed him to the private hospital by direction of the committee, honestly believed that the committee, in so directing them, was acting in the execution of the authority vested in her by law to determine the place of residence of the plaintiff. To this question only one answer is possible. It was suggested that the plaintiff would be entitled to allege excessive violence by way of new assignment. If this were done, the jury would be directed that if the defendants honestly and reasonably believed, upon the facts before them, that the amount of force which they used was necessary to enable them to effect the safe removal of the plaintiff, they would be entitled to a verdict. And upon the plaintiff's own version of the facts, as just stated, we think that a jury could not, upon such a direction, reasonably find in his favour. The action is, therefore, a hopeless one. And, as said by *North*, J., in *Barrett* v. *Day*, 43 Ch. D., 435, at p. 449, the prosecution of an

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action is vexatious when it is clear that no relief can be granted at the trial. It was suggested that the defendants might have exceeded some hypothetical instructions given to them by the committee as to not using force. But we think that the selection of officers of the police to carry out the directions of the committee of itself imports a direction to use such force as might be reasonably necessary. If we were to allow this appeal, the result would be that the respondents could immediately renew the application to the Supreme Court or a Judge, upon affidavits in identical terms, but with the heading "In Lunacy" omitted; and upon the same materials the Court would be bound to make the same order. We cannot but think that such a circuity to bring about the same result would be a scandal in the administration of justice, and that this Court, in lending itself to it, would be departing from the rule which would, undoubtedly, have prevented the Judicial Committee from recommending the allowance of an appeal in a similar case. We are, therefore, of opinion that the order of the Full Court, so far as it directed a stay of proceedings, was substantially right, and that the objections to it are mere formal defects or irregularities which ought to be disregarded by this Court, sitting as a Court of final appeal. This Court can make such an order as ought to have been made by the Full Court. We think that, the appeal being a rehearing, the Court should have treated the matter as an application to stay proceedings upon the grounds disclosed in the affidavits, and that they should have directed the proceedings to be amended by omitting the heading "In Lunacy," and have made a substantive order that that proceedings in the action be stayed. And, as the appeal to the Full Court was occasioned by the erroneous procedure of the defendants, the costs of both applications should have been allowed to the plaintiff instead of to the defendants.

O'CONNOR, J. The jurisdiction of the Court in Lunacy is by the *Lunacy Act* of 1898 vested in the Chief Judge in Equity, or the Judge sitting in Equity for him. From that Court the Act gives an appeal to the Supreme Court. By sec. 172 special power is given to the Court in Lunacy on summary application to stay any action or suit under the circumstances there stated. After

the issue of the writ in this action and before pleading, the defendants made an application under this section to the Chief Judge in Equity as the Court in Lunacy for a stay of proceedings in the action. The Chief Judge, holding that the facts stated were within the section, made an order staying the action. From that order the plaintiff appealed to the Supreme Court in its Lunacy Jurisdiction, and that Court, sitting as a Court of appeal in Equity exercising lunacy jurisdiction, dismissed the appeal—the only question then considered being the applicability of sec. 172 to the facts. From that dismissal the plaintiff appealed to this Court on the same grounds as those taken by him on the original application, and as those taken by him on the application before the Supreme Court. Upon the argument the question submitted for our consideration was whether, upon the facts, the defendants came within the protection of sec. 172, so as to give the Court in Lunacy jurisdiction to stay the action. As to that part of the case I entirely concur in the views expressed by the *Chief Justice*. For the reasons given by him, to which I can usefully add nothing, I am of opinion that the defendants do not come within the protection of the section, and that the Chief Judge in Equity had no jurisdiction to make the order. As the defendants had failed to establish the basis on which alone the order in the Court below could rest, the ordinary consequence would be the upholding of the appeal. But, at the end of the argument, and in consequence, no doubt, of questions put to counsel by the Court, the contention was raised that, even if the order could not be sustained under sec. 172, the defendants were still entitled to have it upheld on the ground that the Supreme Court, in the exercise of its common law jurisdiction, could, on the facts, have stayed the action as being vexatious, and an abuse of its process. I regret to say that I have the misfortune to differ from my learned colleagues in their view of this contention. It may be conceded that the plaintiff's own affidavit discloses a state of facts which would justify the Supreme Court, in its common law jurisdiction, staying the action as vexatious, and an abuse of its process. It may also be conceded that this Court has the power, to be exercised on fitting occasions, of upholding a decision upon grounds not taken in the Court below. That power ought to be

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exercised only when the Court is satisfied that the party against whom the new ground is taken suffers no injustice or prejudice thereby. But even if the Court satisfies itself on that score there still remains this necessary condition—that the new ground is one which the Court below could and ought in accordance with the law regulating its procedure and practice have given effect to. In hearing these appeals from State Courts, this Court has no original jurisdiction. It can do no more than pronounce its judgment upon proceedings as they come before it, and, if it exercises the power under sec. 37 of the *Judiciary Act* of setting those proceedings right, it can do so only in accordance with the laws which bind the Court below. In other words, this Court must deal with the rights of parties before it, not in accordance with its view of what the law of procedure in the State Court ought to be, but in accordance with what it is. This principle has always been well recognized in the House of Lords, and is put in these words by Lord *Penzance* in *Cowan* v. *Duke of Buccleuch*, 2 App. Cas., at p. 354. Speaking of a course of procedure permissible before the Scotch Court, from which the appeal came, but alleged to be inconvenient and confusing in dealing with the rights of the parties, he says:—"A great deal has been said in argument about the convenience or the inconvenience of adopting this or that course, but after all I apprehend that the question before your Lordships to-day is not whether it is most convenient that this or that procedure should be adopted, but whether as a matter of fact the procedure in the present case is or is not consistent with the existing practice of the Court in Scotland." Applying these principles to the case before us, the first question that arises is this:—Could the Supreme Court, sitting as it was in its lunacy jurisdiction, dealing with an order made in that jurisdiction, hold the order to be good because in its common law jurisdiction it would on the facts before it have made a similar order. It is perfectly clear that the Supreme Court could not have held the order valid on that ground. No case has been cited to us showing that such a course has ever been followed in the Supreme Court, and I can say of my own knowledge, from a long experience of the practice of that Court, that such a course would be absolutely contrary to the practice of the Court. It is said there is only the one Supreme Court invested

with both common law and Equity powers, and that it is always open to the Court to apply any of its powers to facts that come before it. It is true that there is only one Supreme Court invested with all these powers, but ever since the establishment of the Court under the Charter of Justice its powers in Equity and its powers at common law have been exercised by separate divisions of the Court—separate not only in name and form, but administering in many respects different systems of jurisprudence. In many Statutes of this State the distinction is recognized. Take as an example, sec. 252 of the *Companies Act*, under which the rights of an applicant may vary considerably according as his application is made in the common law or in the Equity jurisdiction of the Court. It may or may not be convenient or necessary to have this separation of jurisdictions. That is not a matter for us to consider. The separation of jurisdictions exists, not as a mere matter of form or of headings, but as a substantial separation of different systems of jurisprudence, and so long as it does exist the Supreme Court could not, and would not, apply in the exercise of the one jurisdiction the principles of the other. Whether the Supreme Court, under the Statutes which constitute it and apportion its jurisdictions, could or could not legally take the course suggested, becomes, under the circumstances, a merely academic question. It may be that there is nothing in the Statutes which would prevent that course being taken if the Supreme Court thought fit to make so radical a change in its procedure. But where the separation of jurisdictions has from the establishment of the Supreme Court been strictly followed, where separate systems of pleadings and procedure have been founded on this separation—systems themselves regulated in many particulars by Statutes—where under the body of practice so constituted the rights of suitors have been invariably presented and investigated, and where such body of practice violates in no respect the Statutes establishing the Court, it may well be said that the practice of the Court is the law of the Court—a law which, in accordance with the principles I have already referred to, this Court on appeal is bound to have regard to. Some English cases were cited to us in argument, of which *In re Currie*, (10 Ch. D., at p. 93), is an example, in which applications made in Lunacy were in Court amended by being

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intituled also in Chancery. These cases do not touch the position with which I am dealing. It is evident that the change of jurisdiction, which, as far as I see, was in none of the cases opposed, was made in accordance with the recognized practice of the Court. It is true that a Court of appeal such as this will disregard mere matters of form. A passage in the judgment of *Knight-Bruce*, L.J., in the *Board of Orphans* v. *Kraegelius*, 9 Moo. P.C. Reports, p. 447, was referred to by my learned colleague the *Chief Justice* in support of the defendant's contention, but, when the matters of procedure spoken of in that judgment are looked at, it is plain that they were merely matters of form. This appears from a passage of the same judgment just preceding that cited. "The first objection was as to the form of the action. It was said it was misconceived. The Court below was the best judge of its forms and rules upon such a point, assuming it not to be frivolous; but whether frivolous or not both parties and the Court below considered it unworthy of attention." That judgment would in no way justify such a disregard of the practice of the Court below as is suggested in this case.

For these reasons I am of opinion that, as the Supreme Court sitting in Lunacy could not, without absolutely disregarding its established practice and procedure, have supported the order in question on the common law ground, this Court ought not to support it on that ground. But it is said there is a way out of the difficulty. Sec. 37 of the *Judiciary Act* empowers this Court to "give such judgment as ought to have been given in the first instance," and it is argued that in the exercise of this power we should direct the proceedings to be so amended as to change the matter pending in the Supreme Court from a proceeding in lunacy to a proceeding at common law, and that we should then make the order staying proceedings, which the Supreme Court, in its common law jurisdiction, would have made if the application had been originally initiated in that jurisdiction. The same question there arises: Could the Supreme Court, without absolutely disregarding its well-established procedure, have made such an amendment—an amendment which would change an application in one jurisdiction into an application in another jurisdiction? Assuming that the Supreme Court had power under the Statutes

authorizing amendments, to make such an alteration, which I very much doubt, I am clearly of opinion that it would be contrary to the practice of the Court to make such an amendment. So long as the divisions of the jurisdiction of the Court exist in the sense I have already explained, it would be inconsistent with the whole framework of its procedure to allow a party who has chosen to seek the aid of the Court by proceedings in one jurisdiction, to obtain it in another jurisdiction by an amendment of the same proceedings. Under the circumstances, the Supreme Court might, if the question had been raised there, have allowed the application in lunacy to lapse or be dismissed, and a new application to be made in the common law jurisdiction. That, however, was not done, and this Court can only deal with the proceeding now before it, that is the application originally made to the Supreme Court in its lunacy jurisdiction, and heard by it on appeal in the same jurisdiction. Bearing in mind the principle which I have already explained, that this Court in its appellate jurisdiction is bound to give effect to the established practice and procedure of the Court below, I find it impossible to come to the conclusion that we should direct an amendment which the Supreme Court itself could not make without departing from its well established practice and procedure. It is no doubt the duty of this Court to do substantial justice and disregard mere matters of form if they stand in the way. But on the other hand it is necessary to pay due regard to the substantial requirements of practice and procedure in the State Courts, if we would avoid bringing about even a greater evil than circuity of proceedings, that is uncertainty as to the procedure which is to regulate the enforcement or defence of their rights, when suitors from the State Courts come before this Court on appeal. For these reasons I am of opinion that the Appeal should be sustained.

Order of Supreme Court varied by reciting that it was made upon the rehearing, by way of appeal, of an application made to the Chief Judge in Equity in the exercise of the jurisdiction conferred upon him by the Lunacy Act for a stay

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of proceedings in the action, by omitting the description of the Full Court as sitting as the Full Court in Lunacy, and by directing that all the proceedings be amended by omitting the words "In Lunacy" in the title, with all necessary consequential amendments, and, instead of directing that the appeal be dismissed, ordering that all proceedings in the action be stayed, and by directing that respondents pay the costs of proceedings before the Chief Judge in Equity and Full Court, and omitting direction that plaintiff pay those costs. Order so varied affirmed. No costs of the appeal.

Solicitor, for appellant, *W. Morgan.*

Solicitor, for respondent, *The Crown Solicitor of New South Wales.*

[HIGH COURT OF AUSTRALIA.]

LOW . . . . . APPELLANT;

AND

BONARIUS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY. *September* 8, 9.

Griffith, C.J., Barton and O'Connor, JJ.

Early Closing Act (N.S.W.), No. 38 of 1899, secs. 6, 7, 20, 21—Early Closing (Amendment) Act, No. 81 of 1900, sec. 5—Closing time for shops—Shop in which more than one business is carried on—Closed to the admission of the public for purposes of trade—Question of fact.

The *Early Closing Act* provides that a shop, in which the mixed business of a fancy goods seller and news agent is carried on, must be closed on Wednesdays at one o'clock p.m., the hour fixed for the closing of shops in which fancy goods only are sold.