[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . . APPELLANT;
DEFENDANT,

AND

BAUME . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 4, 5, 10.

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

Practice—Discovery of documents—Action by subject against Commonwealth—Jurisdiction of Supreme Court to order discovery against Commonwealth—Common Law Procedure Act (*N.S.W.*), (*No.* 21 *of* 1899), *sec.* 102*—*Judiciary Act*, 1903 (*No.* 6 *of* 1903), *sec.* 64.

Sec. 64 of the *Judiciary Act* 1903, provides that in suits to which the Commonwealth is a party the rights of parties shall as nearly as possible be the same as in a suit between subject and subject.

Sec. 102 of the *Common Law Procedure Act* (*N.S.W.*), (No. 21 of 1899) provides that on the application of either party to an action the Court or a Judge may order that "the party against whom the application is made, or if such party is a body corporate, some officer to be named of such body corporate," shall answer on affidavit as to documents in his possession relating to the matters in dispute.

(*) Sec. 102 of the *Common Law Procedure Act* (N.S.W.), (No. 21 of 1899), is as follows:—

102 (1) Upon the application of either party to any action or other proceeding, upon an affidavit by such party or his attorney of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession of the opposite party, the Court or a Judge may order that—

(*a*) the party against whom such application is made; or

(*b*) if such party is a body corporate, some officer to be named of such body corporate,

shall answer on affidavit stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody such documents or any of them are in, and whether he or they objects or object to the production of such as are in his or their possession or power, and if so upon what grounds.

(2) Upon such affidavit being made the Court or Judge may make such further order thereon as shall be just.

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Held, that the Supreme Court of New South Wales has no jurisdiction, in an action brought in that Court by an individual against the Commonwealth, to make an order for discovery of documents against the defendant.

Decision of *A. H. Simpson* J. (22 N.S.W. W.N., 5) reversed.

APPEAL from a decision of *A. H. Simpson* J. in Chambers (1).

The plaintiff brought an action at common law in the Supreme Court of New South Wales, under sec. 56 of the *Judiciary Act* 1903, against the Commonwealth, to recover compensation for the wrongful detention by the Customs authorities of certain goods imported by the plaintiff. Before setting down the case for trial, the plaintiff formally requested the defendant to consent to an order for discovery of documents under sec. 102 of the *Common Law Procedure Act* (N.S.W.) (No. 21 of 1899). The defendant's solicitors replied stating that the defendant would not consent to an order, but that they were prepared to allow the plaintiff to have inspection of all documents in the custody of the defendant's officers, which it was fair that the plaintiff should see, for the purposes of his action. The plaintiff thereupon applied to a Judge in Chambers, by summons, for an order for discovery under sec. 102 of the *Common Law Procedure Act* (N.S.W.) (No. 21 of 1899).

A. H. Simpson J., who heard the summons, made an order that the Comptroller-General of Customs, or some other proper officer of the Commonwealth should within twenty-one days answer on affidavit stating what documents the defendant had in its possession or power relating to the matters in dispute in the action, and what he knew as to the custody they were in, and whether he objected on behalf of the defendant, and, if so, on what grounds, following the words of sec. 102. The defendant was ordered to pay the costs (1).

From this decision the defendant now appealed.

Garland for the appellant. The Commonwealth must be treated by a Court of law as the Crown, and therefore its prerogative cannot be curtailed without its express consent. Secs. 56 and 64 of the *Judiciary Act* 1903 involve a submission by

(1) 22 N.S.W. W.N., 5.

the Commonwealth to the jurisdiction of the Supreme Courts of the States, but the submission is not absolute; the jurisdiction of the Supreme Courts can only be exercised subject to the restrictions existing in each State, by common law and by Statute: *Chartered Bank of India, &c.* v. *Rich* (1). In New South Wales the rights of suitors against the Crown are regulated by the *Claims Against Government Act* (No. 30 of 1897). Sec. 4 of that Act corresponds to sec. 64 of the *Judiciary Act* 1903, and is in almost identical words. It has been decided in New South Wales that discovery on oath cannot be ordered against the Crown under the *Common Law Procedure Act*: *Wilson* v. *Minister for Works* (2); *Anderson* v. *Stuart* (3); *Bank of New South Wales* v. *Dibbs* (4); although under the *Claims Against Government Act* provision is made for the appointment of a nominal defendant in actions against the Government. It has been doubted whether any sections of the *Common Law Procedure Act* apply to the Crown: *Evans* v. *O'Connor* (5). The case of *Ricketson* v. *Smith* (6), decided only that in a suit in Equity the Judge had power to order discovery against the Government, and has no application to the *Common Law Procedure Act*. That case was approved in *Morissey* v. *Young* (7), in which it was held that a bill for discovery in Equity would lie against the Government, in aid of a plaintiff in an action at common law. These cases are not authorities on the construction of sec. 102. Even where a nominal defendant is appointed, it is only for the purpose of using his name. His position is no worse than that of the Crown itself. The *Claims Against the Government Act* (N.S.W.) expressly provides that he shall not be answerable either in person or property, and therefore he could not be compelled to make an affidavit of discovery. No Court will make an order which it cannot enforce.

In England the rights of suitors against the Crown are regulated by the *Petition of Right Act* (23 & 24 Vict. c. 34), sec. 7 of which corresponds with sec. 4 of the New South Wales Act. The Crown in England is not bound by rules to which private suitors must conform, *e.g.*, rules of pleading: *Tobin* v. *The Queen* (8). The

(1) 4 B. & S., 73; 32 L.J.Q.B., 300.
(2) 1 N.S.W. W.N., 68.
(3) 1 N.S.W. W.N., 92.
(4) 2 N.S.W. W.N., 9.
(5) 12 N.S.W. L.R., 81.
(6) 16 N.S.W. L.R., Eq., 170.
(7) 17 N.S.W. L.R., Eq., 157.
(8) 32 L.J.C.P., 216.

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prerogative of the Crown in New South Wales is the same as in England except in so far as it has been expressly cut down by Statute: *Attorney-General* v. *McLeod* (1). In England the Crown has never been ordered to make discovery on oath: *Thomas* v. *Reg.* (2); *Tomline* v. *Reg.* (3); *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (4). Where the Crown is plaintiff the Court of Equity can refuse to grant the relief sought until the plaintiff appoints some officer to make discovery of documents: *Attorney-General* v. *Brooksbank* (5). *Prioleau* v. *United States of America and Andrew Johnson* (6), applies only to cases in which a foreign Government is a party to proceedings in English Courts, and is consistent with the case last cited. Such Governments are treated as parties, and not as in the position of the Crown, and are not allowed to make use of the procedure of the English Courts unless they comply with the rules to which subjects are amenable: *Republic of Liberia* v. *Imperial Bank* (7); *Republic of Liberia* v. *Roye* (8).

The words of sec. 102 of the *Common Law Procedure Act* (N.S.W.) 1899 are not applicable to cases in which the Commonwealth is being sued. It is not a party which can answer on oath, and it is not a corporation.

[GRIFFITH C.J. referred to *Republic of Costa Rica* v. *Erlanger* (9); and *Bank of Montreal* v. *Cameron* (10).

O'CONNOR J. referred to *Sloman* v. *Government of New Zealand* (11).]

The section cannot be read so as to include this case merely because it ought to have included it. Its meaning cannot be extended to cover the case of the Commonwealth owing to the presence of the words "as nearly as possible" in sec. 64 of the *Judiciary Act*. The Commonwealth, therefore, when sued in the Supreme Court of New South Wales at common law, is in the same position as the State Government when sued under the *Claims Against the Government Act*, and cannot be ordered to make discovery on oath.

(1) 14 N.S.W.L.R., 121.
(2) L.R., 10 Q.B., 44.
(3) 4 Ex. D., 252.
(4) (1897) 2 Q.B., 384.
(5) 1 Y. & J., 439.
(6) L.R., 2 Eq., 659.
(7) L.R., 16 Eq., 179.
(8) 1 App. Cas., 139.
(9) 3 Ch. D., 62.
(10) 2 Q.B.D., 536.
(11) 1 C.P.D., 563.

Want K.C. and *J. L. Campbell*, for the respondent. The intention of the legislature in passing sec. 64 of the *Judiciary Act* 1903 was to place the Commonwealth in the same position as a subject in suits to which the Commonwealth was a party, whether as plaintiff or defendant. Under the section it is as much amenable to the jurisdiction of the Supreme Courts when defendant as if it had invoked the jurisdiction itself. The *Petition of Right Act* (23 & 24 Vict. c. 34) dealt only with claims against the Crown, and therefore the cases involving the rights of suitors under it do not apply here. The difficulty of enforcing an order is not a matter for this Court to consider. The Court which makes the order will find means to enforce it practically, as by declining to assist the defendant until the order is complied with. The effect of the words "as nearly as possible" is to give the Supreme Court power to vary the construction of the procedure Statute in such a way as to give analogous relief, unless the difficulties in the way of enforcement of its order are insuperable. A similar difficulty in ordering discovery against an infant suing by next friend was surmounted by the English Courts in *Higginson* v. *Hull* (1).

[GRIFFITH C.J.—*Pearson* J. declined to follow that case in *Dyke* v. *Stephens* (2).]

The right to sue is valueless without incidental rights necessary to give effect to it. It had been decided in *Ricketson* v. *Smith* (3), that in New South Wales discovery could be ordered against the Crown, and therefore the word "rights" in sec. 64 of the *Judiciary Act* 1903 must be taken to mean rights as heretofore declared.

That section is a permanent submission by the Commonwealth to the jurisdiction of the Supreme Courts.

[GRIFFITH C.J.—It is a submission to whatever jurisdiction the State Court possesses. If the State Court has original and inherent jurisdiction to order discovery, then there is a submission to that; but if that Court has only a limited statutory jurisdiction to make such orders, you must show that the right claimed falls within the provisions of the Statute.]

Sec. 102 of the *Common Law Procedure Act* covers the case.

(1) 10 Ch. D., 235. (2) 30 Ch. D., 189.
(3) 16 N.S.W.L.R., Eq., 170.

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The only question therefore is whether there is machinery to enforce the right. The Court can order some competent person to make the affidavit. If the action had been brought in the High Court, there would have been no difficulty in making and enforcing the order. There is no objection on the ground of expediency, because the defendant could claim privilege for any documents which it would be against public interest to produce for inspection. Sec. 102 does not require the affidavit to be made by the defendant. It is sufficient if the answer, by whomsoever made, is on the oath of that person: *Ranger* v. *Great Western Railway Co.* (1); *Barnett* v. *Hooper* (2); *Kingsford* v. *Great Western Railway Co.* (3).

[GRIFFITH, C.J.—It is difficult to reconcile the last case with *Bank of Montreal* v. *Cameron* (4).]

The word "party" in sec. 102 of the *Common Law Procedure Act* (N.S.W.) is large enough to include the Commonwealth. By the *Interpretation Act* (N.S.W.) 1897, the word is defined as including "body politic." The right to discovery is one of the ordinary rights of litigants in the State, and therefore the Commonwealth, having submitted to the jurisdiction, is liable to have such an order made against it. The words "as nearly as possible" in sec. 64 of the *Judiciary Act* imply that the words of a State procedure Act might not literally apply to the case of the Commonwealth. The section is a direction to the Supreme Courts to give effect to their procedure Acts as far as is possible in dealing with the Commonwealth as a party, in order to place the private litigant as nearly as possible on equal terms with the Commonwealth. To that end the section should be liberally construed. The Crown may lose its prerogative by necessary implication, as well as by express words, in a Statute: *Moore* v. *Smith* (5); *Théberge* v. *Laudry* (6). The *Petition of Right Act* in England was passed for the purpose of facilitating the procedure in petitions of right, and expressly stated that it gave the subject no new remedy. Before that Act there was no question that discovery could not be ordered against the Crown. The only question in

(1) 4 DeG. & J., 74; 28 L.J., Ch., 741.
(2) 1 F. & F., 412, 467.
(3) 16 C.B.N.S., 761; 33 L.J., C.P., 307.
(4) 2 Q.B.D., 536.
(5) 1 El. & El., 597.
(6) 2 App. Cas., 102.

the cases decided on the construction of that Act was, what was the remedy? The whole extent of Royal prerogative was therefore open to the Crown. Under the Statutes of this State and of the Commonwealth the range of the prerogative is more restricted, the tendency of legislation being to treat the Governments as parties having the same or similar rights and liabilities as private suitors. The English cases therefore afford no guide in the construction of the Statutes now in question.

[GRIFFITH C.J.—Supposing there were no technical difficulty, the order should only be for the disclosure of such documents as might, consistently with the public interest, be disclosed. After the offer that was made by the defendant in this case would the Court make an order against it?]

The plaintiff is entitled to a statement upon oath of what documents are subject to privilege, not to be at the mercy of the department, and only allowed to see such documents as it pleases.

Garland in reply. The words "as nearly as possible" are taken from the Queensland Act (29 Vic. No. 23) sec. 5, of which the New South Wales Act (39 Vic. No. 38) sec. 3 (since consolidated as sec. 4 of Act No. 30 of 1897), is practically a transcript. The words in the English Act (23 & 24 Vic. c. 34) are "so far as the same may be applicable," which are substantially the same. The "rights" referred to in sec. 64 of the *Judiciary Act* must be such as are capable of being asserted against the Crown. "Party" in sec. 102 of the *Common Law Procedure Act* 1899 cannot have the wide meaning given it by the *Interpretation Act*, because the section goes on to deal expressly with the case of a corporation. In general "party" does not mean the Crown: *Maxwell on Interpretation of Statutes*, 3rd. ed., p. 191.

He referred also to *United States of America* v. *Wagner* (1); and *Curtis* v. *Mundy* (2).

[*Campbell* referred also to *Fisher* v. *Tully* (3).]

Cur. adv. vult.

(1) L.R., 2 Ch., 582.
(2) (1892) 2 Q.B., 178.
(3) 3 S.C.R. (Qd.), 194.

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GRIFFITH C.J. The question raised in this case, which is one of considerable importance, turns upon the construction of sec. 64 of the *Judiciary Act* 1903. Sec. 78 of the Constitution provides that the Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power. The judicial power extends to all matters in which the Commonwealth is a party (sec. 75). In execution of the authority conferred by sec. 78 the Parliament enacted, by sec. 56 of the *Judiciary Act* 1903, that any person making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court or in the Supreme Court of the State in which the claim arises. The plaintiff in the present case, taking advantage of this provision, has brought this action on the common law side of the Supreme Court of New South Wales. Sec. 64 of the *Judiciary Act* 1903 provides that, in any suit to which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject. The question for determination is the meaning to be given to the words "as nearly as possible." It arises in this way. The *Common Law Procedure Act* (N.S.W.), (No. 21 of 1899), provides (sec. 102) that upon the application of either party to any action or other proceeding, upon an affidavit by such party or his attorney that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, the Court or a Judge may order that (*a*) the party against whom such application is made, or (*b*) if such party is a body corporate, some officer to be named of such body corporate, "shall answer on affidavit" as to the documents in his possession &c. Mr. Justice *A. H. Simpson*, sitting in Chambers, and purporting to act under the authority of this section, made the usual order for discovery against the defendant, who now appeals from the order on the ground, substantially, of want of jurisdiction to make the order.

Some points appear free from doubt. It has always been held that a sovereign power invoking the assistance of a Court of justice as plaintiff submits itself to the jurisdiction of the

Court for the purposes of the suit, so that any order that could be made against an ordinary plaintiff may be made against it. Of this rule *Prioleau* v. *United States of America* (1) affords a good illustration. On the other hand, a Court of justice has no jurisdiction against a sovereign power which does not subject itself, or is not subjected by Statute, to its jurisdiction. There can be no doubt that sec. 56 of the *Judiciary Act* 1903 operates as a submission by the Commonwealth to the jurisdiction of the High Court or a State Court in cases falling within the section. But in every case the question must arise, what is the jurisdiction of the particular Court whose aid is invoked. If the Supreme Court of New South Wales has a general discretionary power to order the parties to suits to make discovery by any means which it thinks fit to direct, *cadit quæstio*. But it is clear that this is not so. Courts of common law never had any such general discretionary power, and such powers as they have were conferred by Statute. The Court of Chancery, on the other hand, had jurisdiction to grant discovery for various purposes, but subject to settled rules of practice. In the present case we are dealing with an action at common law. The plaintiff must therefore show that the Supreme Court has jurisdiction under the Statute of 1899 to order discovery against the Commonwealth. Again, it is not open to doubt that the Commonwealth as mentioned in the *Judiciary Act* 1903 means the body politic called by that name, which is not a corporation or body corporate in the sense in which those words are used in sec. 102 of the Act No. 21 of 1899, but stands for the Crown as representing the whole community, and that it is entitled to the same privileges and rights as the Crown, except so far as it has surrendered them by virtue of the Act: See *Roberts* v. *Ahern* (2).

The case for the plaintiff is put in two ways. First it is said that the words "may order that the party shall answer on affidavit" include a power to order a party to answer on the affidavit of some other person than himself. And for this the case of *Ranger* v. *Great Western Railway Co.* (3) is cited. In that case it was held that a Statute which provided that the Court might make an

(1) L.R. 2 Eq., 659.
(2) 1 C.L.R., 406.
(3) 4 DeG. & J., 74; 28 L.J. Ch., 741.

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order "for the production by any defendant on oath" authorized the Court to order production by a defendant company on the oath of its officer. If this is the meaning of the words "may order that the party shall answer on affidavit," as used in sec. 102, the plaintiff is entitled to succeed. But the section goes on to make specific provision for the case of bodies corporate, which, on the interpretation contended for, was unnecessary. In *The King* v. *Berchet* (1) a case decided in 1688, it was said to be a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent. In *The Queen* v. *Bishop of Oxford* (2) the Court applied this rule. The Statute under consideration in that case enacted that in certain cases "it shall be lawful" for a bishop on the application of the party complaining, or "if he shall think fit," of his own motion, to issue a commission of inquiry against a clerk in holy orders. The question was whether in the first part of the section the words "it shall be lawful" imposed a duty or gave a discretionary power. After referring to the rule in *The King* v. *Berchet* (1) (which they quoted from *Bacon's Abridgment*) the Court added (3): "But this is not all. The words are significant as indicating the sense in which the words 'it shall be lawful' in the preceding part of the section had been used by the framers of the Act. They would in any point of view have been idle if not introduced to qualify the effect of the words 'it shall be lawful' as imposing a duty." Conceding then that the words "shall answer on affidavit," standing alone, would be open to two constructions—one that the party should answer by his own affidavit, the other that he should answer by the affidavit of himself or some other person under his control—it is clear that on the latter contention the words relating to bodies corporate would be idle. The case of *Thomas* v. *The Queen* (4) was decided on the corresponding section of the English *Common Law Procedure Act* 1854, which is in identical words. It is not very easy to discover the exact grounds of the decision in that case, but if the point now

(1) 1 Show., 106.
(2) 4 Q.B.D., 245.
(3) 4 Q.B.D., 245, at p. 261.
(4) L.R. 10 Q.B., 44.

made is a good one, the case should have been decided in favour of the suppliant on that ground, which, however, does not appear to have been put forward. In my opinion we cannot, without treating the words of the second member of the sentence as surplusage, which would be contrary to settled canons of construction, interpret the words "shall answer on affidavit" as having any other meaning when applied to the party himself, than "shall answer by his own affidavit." It appears that in two instances orders were made in Chambers by learned Judges in England allowing discovery by a plaintiff to be made on the affidavit of his agent: *Barnett* v. *Hooper* (1). But, on examination, it appears that these orders were made at the plaintiff's instance, and as a concession to him in order to escape the consequences of the stay of proceedings which was incident to the order for discovery. This principle is explained by *Pearson* J. in *Dyke* v. *Stephens* (2), who seems to have thought that it was applied in *Ranger* v. *Great Western Railway Co.* (3). Again: it was never the practice of the Court of Chancery, which had large powers to order discovery, to order it to be made by the next friend of an infant or lunatic: *Dyke* v. *Stephens* (2). It is clear that the Commonwealth as such cannot make an affidavit. It cannot, therefore, in my opinion "answer on affidavit" within the literal meaning of sec. 102.

The second point made by the plaintiff is on the words "as nearly as possible." These words, it is said, are capable of two constructions—one, the more limited construction, being that they mean so far as the powers of the Court sought to be invoked in the course of a suit can be exercised against a body politic such as the Commonwealth—the other as meaning that the Court should treat the express provisions of any Statute conferring powers on the Court as laying down a general rule or principle, as well as prescribing the manner of its application, and may and ought to adapt or extend the words of the Statute to the particular case, although it does not fall within the meaning of the words used. This second construction is open to the grave objection that the adaptation or extension of the words of a

(1) 1 F. & F., 412, 467.
(2) 30 Ch. D., 189.
(3) 4 DeG. & J., 74; 28 L.J. Ch., 741.

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Statute to a case not within its actual provisions is the function of the legislature and not of the Court.

At one time, indeed, the Courts were inclined to assume the function of interpreting according to what they called the equity of the Statute. "Equity," said Lord *Coke* (1 Inst. 24b), "is a construction made by the Judges, that cases out of the letter of a Statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the Statute provideth; and the reason hereof is, for that the law-makers could not possibly set down all cases in express terms." But this doctrine is no longer followed.

In *Brandling* v. *Barrington* (1), decided in 1827, Lord *Tenterden* C.J. said: "I think there is always danger in giving effect to what is called the equity of a Statute, and that it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them"; and in *Attorney-General* v. *Sillem* (2), decided in 1863, *Bramwell* B. remarked, with reference to the old doctrine of the equitable construction of Statutes, that "such liberties are not now taken with Statutes." Such adaptations or extensions as are suggested must in any case be hazardous. For it may well be that, if the legislature had applied its mind to the subject, it would have refused to make the suggested adaptation or extension, or would have made it subject to conditions, of which the Court can have no knowledge, and on which it has no right to speculate. If room for speculation were open, I for one should be disposed to think that the right of discovery, if given at all, would probably have been limited to such documents as may be discovered without detriment to the public interest. [See *Hennessy* v. *Wright* (3).] Such a limitation is indeed suggested by the language of sec. 102 itself which uses the words "to the production of which he is entitled." I do not think that under that section the Court should make an order for the discovery of documents which it is clear ought not to be produced. It is settled that the Court will not require the production of documents the production of which would, in the opinion of the responsible Minister, be detri-

(1) 6 B. & C., 467, at p. 475.
(2) 2 H. & C., 431; 33 L.J., Ex., 92.
(3) 21 Q.B.D., 509, per *Field* J.

mental to the public interest, and will not review the decision of the Minister on the point.

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In my opinion the words "as nearly as possible" mean as far as the provisions the aid of which is invoked are applicable to such a party as the Commonwealth. And, as the words of sec. 102 of the *Common Law Procedure Act*, construed as requiring the party himself to make an affidavit, are not applicable to the Commonwealth, I think it is not reasonably possible to give the plaintiff the right which he claims. In other words, the express and limited jurisdiction given by the Statute to the Supreme Court of New South Wales does not extend to this particular case. Another illustration of a case in which it would not be possible to enforce against the Commonwealth as a party provisions applicable as between subject and subject is afforded by the provisions as to process of contempt. It would clearly be impossible to make an order for attachment or commitment, and the suggestion that this Court or any other Court could grant process of sequestration against a sovereign State, *i.e.*, appoint a subordinate officer of government to take possession of all the instruments of government, seems so inconsistent with the notion of a sovereign State that it need only be mentioned to be dismissed as impossible.

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It appears that in the present case the defendant has already offered to give the plaintiff all the discovery to which he is entitled, but it objects to the coercive powers of the Court being applied to it. For the reasons which I have given I think that the contention is right, and that the appeal must therefore be allowed. This decision does not in any way affect the question whether the High Court has under its rules jurisdiction to order discovery against the Commonwealth in a suit in this Court to which it is a party, or whether in a proper case the Supreme Court could impose the terms of consenting to give discovery as a condition of granting some application on the part of the Commonwealth.

Barton J. I am of the same opinion.

O'Connor J. The Commonwealth Parliament derives its power to legislate with reference to suits by and against the

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Commonwealth and the States from sec. 78 of the Constitution. The power thus given is "to make laws conferring rights to proceed against the Commonwealth or State in respect of matters within the limit of the judicial power." The power was first exercised in regard to the Commonwealth by a temporary Act, the *Claims against the Commonwealth Act* 1902. That was superseded by the *Judiciary Act* 1903, which by sec. 56 confers a right upon any person making a claim against the Commonwealth to sue the Commonwealth in the High Court, or in the Supreme Court of the State in which the claim arises. Thus the Commonwealth representing the Executive power of the community, or the Crown as it is sometimes called, is constituted a juristic person, and bound to answer in Court to claimants' suits. Sec. 64 declares that in such suits "the rights of the parties shall as nearly as possible be the same . . . . as in a suit between subject and subject." The rights of parties there referred to are of course rights of procedure. There is no power given by the section of the Constitution to affect any right of the Commonwealth outside procedure. What is the Commonwealth? Sec. 3 of the covering clauses of the Constitution declares the "Commonwealth of Australia" to be the name under which the people of the Australian Colonies have become united in a Federal Commonwealth. The Commonwealth is therefore not an individual, nor a partnership, nor a corporation, and in the nature of things there are steps in proceedings, which those parties could take, but which would be impossible to such a body as the Commonwealth. For instance, how could the Commonwealth make an affidavit or answer an interrogatory? Now it was in the power of the legislature to have removed these formal disabilities by enacting, for instance, that some officer should be appointed to make the affidavit or answer the interrogatories, as was done by the New South Wales *Common Law Procedure Act* 1899 in the case of corporations. Indeed in some instances the *Judiciary Act* 1903 recognizes the necessity of nominating an officer to represent the Commonwealth for the purposes of certain proceedings. By sec. 61, where the Commonwealth is plaintiff, suits may be brought in the name of the Commonwealth by the Attorney-General, or any person appointed by him in that behalf, and by sec. 63, where

the Commonwealth is a party, all process is to be served on the Attorney-General, or upon some person appointed by him to receive service. But in no other cases has any special provision been made. It was open to the legislature to have enacted without qualification that in suits in which the Commonwealth is a party the rights of the parties shall be absolutely the same as in suits between party and party. In that case no doubt the Court would have been justified in adapting and modifying the procedure so as to give effect to that direction. But the legislature has not adopted either of these methods, it has simply declared in regard to this new legal entity, which is neither individual, nor partnership, nor corporation, that when it is a party in a suit the rights as to procedure shall be "as nearly as possible" the same as in a suit between subject and subject. To adopt the plaintiff's contention in this case would be to treat the words "as nearly as possible" as if they were omitted from the section. According to every recognized rule of construction we must give a meaning to them. Having regard to the inherent difference in the matters I have referred to between the Commonwealth and any individual partnership, or corporation, when parties to a suit, I do not see much difficulty in giving a reasonable meaning to the words in question. Taking them in their ordinary grammatical signification, and applying them to the subject matter, they express the qualification that the rights of the parties shall be as nearly as possible the same as between party and party, having regard to the inherent incapacity of such a legal entity as the Commonwealth in respect of certain of the proceedings in a suit.

We must now look at the proceedings for obtaining a discovery order under the New South Wales *Common Law Procedure Act* of 1899, in order to ascertain whether the Commonwealth can have in respect of them the same capacity as an ordinary party. In considering sec. 102 of that Act, under which it is claimed that the plaintiff had the right to an order of discovery as against the Commonwealth, it must be borne in mind that we are not dealing with any general power to grant discovery such as Equity Courts possess. The common law Courts have no such general power. Their power is limited to that conferred by the Statute, and it is

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stated in these words ". . . upon affidavit . . . . the Court or a Judge may order that—

"(*a*) the party against whom such application is made; or

"(*b*) if such party is a body corporate, some officer to be named of such body corporate,

"shall answer on affidavit stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody such documents or any of them are in, and whether he or they objects or object to the production of such as are in his or their possession or power, and if so on what grounds." The object of the section is to obtain the oath of the party as to his knowledge of the documents or their whereabouts. Where, as in the case of a corporation, the Act is dealing with a party which from its nature cannot make an oath, special provision is made for obtaining the oath of a person who, as representing the corporation, is taken to have the knowledge of the corporation. It is not correct to say that the section entitles every litigant to an order for discovery against the opposite party. The effect of it may be more correctly stated to be that the Judge is authorized to make an order for the affidavit of discovery in two classes of cases only—one, the specially provided case of a corporation, the other where a party against whom the order is sought is capable of making a statement on oath. It is clear that the Commonwealth is not included in either of these classes. Probably the greater portion of the New South Wales *Common Law Procedure Act* can be applied to the Commonwealth in the same way as to any other party. This is one of the few cases in which it becomes necessary to apply the qualification of "as nearly as possible." Whether the omission in the *Judiciary Act* 1903 of some special provision in regard to the Commonwealth, similar to that adopted in the *Common Law Procedure Act* in the case of corporations, was or was not deliberately made, it is not perhaps material to inquire. But the express provisions for the representation of the Commonwealth by the Attorney-General in sections 61 and 63, to which I have already referred, are significant in this connection. Having regard to the protection which on grounds of public policy the law has always thrown round public documents, the

production of which might be prejudicial to the public interest, it may well be that the legislature thought it best to give no new facilities for the disclosure of such documents by Commonwealth officers. In my opinion, therefore, sec. 102 gives no power to a Judge to order an affidavit of discovery to be made by the Commonwealth. It follows that there can be no power to order an affidavit to be made by an officer on behalf of the Commonwealth. The case of *Ranger* v. *Great Western Railway Co.* (1) cannot, under these circumstances, be an authority to justify the order which has been made. I therefore agree that the order of Mr. Justice *A. H. Simpson* must be set aside, and the appeal upheld.

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Appeal allowed.

Solicitors for appellant, *McNamara & Smith*, for the *Crown Solicitor of the Commonwealth.*

Solicitor for respondent, *Mark Mitchell.*

C. A. W.

Appl Combulk Pty Ltd v TNT Management Pty Ltd (1993) 118 ALR 214 Appl Combulk Pty Ltd v TNT Management Pty Ltd (1993) 41 FCR 59

(1) 4 De G. & J., 74; 28 L. J. Ch., 741.

[HIGH COURT OF AUSTRALIA.]

LYSAGHT BROS. & CO. LTD. . . . APPELLANTS; DEFENDANTS,

AND

FALK . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *March* 27, 28, 29.

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

Evidence—Pleading—Principal and agent—Authority—Action against principal on contract made with agent—Plea of non-assumpsit—Fraud of Agent—Knowledge of Contractee—Regulæ Generales, Dec. 1902 (*N.S. W.*), *rr.* 64, 67.

It is not within the scope of an agent's authority to bind his principals by a contract which, although made ostensibly on their behalf, is, to the knowledge of the other party, really made for his own benefit, even though the contract is of a kind which he has a general authority to make; and there-