[HIGH COURT OF AUSTRALIA.]

BAYNE AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

BLAKE AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, March 19.

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

Practice—Appeal to High Court from Supreme Court of State—Cause remitted to Supreme Court—Postponement of proceedings by Supreme Court—Duty of Supreme Court—Relation of High Court to Supreme Court—Judiciary Act 1903 (*No.* 6 *of* 1903), *sec.* 37—*Commonwealth of Australia Constitution Act* 1900 (63 *&* 64 *Vict. c.* 12), *sec.* V.—*The Constitution, secs.* 51 (xxxix.), 73.

Sec. 37 of the *Judiciary Act* 1903, in so far as it authorizes the High Court in the exercise of its appellate jurisdiction to remit a cause to the Supreme Court of a State for the execution of the judgment of the High Court, and imposes upon the Supreme Court the duty of executing the judgment of the High Court in the same manner as if that judgment were the judgment of the Supreme Court, is a valid exercise by the Parliament of the power conferred by sec. 51 (xxxix.), of the Constitution.

On an appeal from the Supreme Court of a State to the High Court, the High Court, in allowing the appeal, ordered the judgment appealed from to be discharged, and that in lieu thereof there should be substituted a declaration that the plaintiffs were entitled to recover a sum to be thereafter ascertained, and further ordered that the cause "be remitted to the Supreme Court to do therein what is right in pursuance of the judgment." Leave to appeal to the Privy Council from the judgment of the High Court having been obtained by the defendants, and a stay of proceedings having been granted by the High Court and subsequently removed, an application to the Supreme Court to proceed with the inquiry directed by the High Court was made by the plaintiff.

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Held, that an order made by the Supreme Court, that the matter should be deferred until the decision of the Privy Council should be made known, was a stay of proceedings, and therefore was an order which the Supreme Court had no authority to make.

Peacock v. *D. M. Osborne & Co.*, 4 C.L.R., 1564, applied.

The High Court may directly order an officer of the Supreme Court of a State to obey a judgment of the High Court.

Judgment of the Supreme Court reversed.

APPEAL from the Supreme Court of Victoria.

In an action upon an administration bond, brought in the Supreme Court of Victoria by Lila Elizabeth Bayne and Mary Bayne against Arthur Palmer Blake and William Riggall, judgment was given for the defendants. An appeal to the High Court from this judgment was on 17th September 1906, allowed: *Bayne* v. *Blake* (1); and the Court ordered that the judgment appealed from should be discharged and that in lieu thereof the following declaration and judgment should be substituted:—"It is hereby adjudged and declared that the deed of 20th May 1886 in the pleadings mentioned is void as against persons beneficially interested in the estate of the deceased and that the plaintiffs as representing such persons other than the administratrix are entitled to recover from the defendants such sum not exceeding £5,000 as represents the amount by which the shares of such persons in distribution were diminished by reason of the failure of the administratrix to duly administer the said estate but so that no sum shall be recoverable in respect of any diminution of the share of any such person by reason of any failure in which such person concurred and acquiesced. And it is further ordered that the defendants do pay to the plaintiffs their costs of the action up to and including the hearing thereof but not including the cost of the reference of a certain question of law referred by Mr. Justice *Holroyd* to the Full Court. And let the further consideration of this action be adjourned and all parties are to be at liberty to apply as they may be advised." The High Court further ordered "that this cause be remitted to the Supreme Court to do therein what is right in pursuance of the judgment."

(1) 4 C.L.R., 1.

On 2nd November 1906 the Privy Council granted leave to appeal from the judgment of the High Court, but refused an application for a stay of execution. In November 1906 the case appeared in the list of cases for hearing in the Supreme Court before a Judge, and on 13th November 1906, the case coming on for hearing before *Hodges* J., his Honor made an order adjourning the case until the determination of the appeal before the Privy Council, or until further order.

On 14th December 1906, on the application of the defendants, *Griffith* C.J. in Chambers ordered a stay of all proceedings under the judgment of the High Court until further order on payment into Court by the defendants of the plaintiffs' taxed costs of the appeal to the High Court. Those taxed costs amounting to £388 11s. 4d. were subsequently paid into Court by the defendants.

On 6th March 1907 an application was made by the plaintiffs to *Griffith* C.J. in Chambers to remove the stay, but the application was on 15th March refused: *Bayne* v. *Blake* (1).

On 27th March 1907 the application of the defendants to remove the stay was renewed, and *Griffith* C.J. ordered that the stay granted on 14th December 1906 should be removed so far as might be necessary to enable the Supreme Court to proceed with the inquiries directed by the judgment of the High Court.

In July 1907 the case was in the list of cases for hearing in the Supreme Court before a Judge, and on 22nd July 1907 the matter came on for hearing before *Hodges* J., who adjourned the case *sine die* on the ground of the pending appeal to the Privy Council.

On 27th September 1907, on the application of the plaintiffs, *Griffith* C.J. in Chambers made an order that the stay of 14th December 1906 should be wholly removed, and that the sum of £388 11s. 4d. paid into Court by the defendants be paid out to the plaintiffs upon the plaintiffs giving their personal undertaking to repay such sum if ordered to do so.

On 24th October 1907 the plaintiffs applied to *Madden* C.J. to proceed with the inquiries directed by the High Court, but an order was made that the matter should be deferred until the result of the decision of the Privy Council had been made known.

(1) 4 C.L.R., 944.

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The plaintiffs now by special leave appealed to the High Court from the order of *Madden* C.J.

During the arguments it was intimated by counsel that the appeal to the Privy Council had been heard, and that judgment had been reserved.

Agg (with him *Ah Ket*), for the appellants. Under sec. 37 of the *Judiciary Act* 1903 it was clearly the duty of the Supreme Court to carry out the judgment of the High Court of 17th September 1906 so far as it could : *Peacock* v. *D. M. Osborne & Co.* (1). It was even more imperative that the Supreme Court should have had the inquiry made after the order of this Court of 27th September 1907.

[GRIFFITH C.J.—Having heard all that had happened I made that order considering that the defendants were in contempt in asking the Supreme Court not to proceed with inquiry, and were not entitled to any privilege whatsoever.]

If the Supreme Court will not direct its officer to make the inquiry ordered by the High Court, the High Court may make an order directing that officer to make the inquiry : *Martin* v. *Hunter's Lessee* (2). The order of *Madden* C.J. was an order thwarting the order of the High Court. This Court should either direct the Chief Clerk of the Supreme Court to make the inquiry, or should direct one of its own officers to make it.

Irvine K.C. and *Weigall* K.C., for the respondents. The leave to appeal should be rescinded as the matter is not an appealable one. The order of *Madden* C.J. was under the circumstances a right and proper order to be made. The order made by *Hodges* J. on 13th November 1906, adjourning the matter until the determination of the appeal by the Privy Council, was made without complaint as to the jurisdiction to make it or as to the propriety of making it. The main question turns on the meaning of the order of this Court of 14th December 1906 removing the stay so far as to enable the inquiry to be made. That order was either a mere removal of the stay so as to enable the Supreme Court to proceed with the inquiry, or was a direction to the Supreme Court to proceed at once with the inquiry.

(1) 4 C.L.R., 1564, at p. 1566. (2) 1 Wheat., 304.

[GRIFFITH C.J.—The only direction to the Supreme Court was in the original order of this Court of 17th September 1906.]

That raises the question of the precise relation between this Court and the Supreme Court. It is a relation which does not permit this Court to direct or order the Supreme Court to do anything. This Court is to hear appeals from the Supreme Court, and the Commonwealth Parliament has no power to impose any duty upon the Supreme Court in relation to such appeals. The Supreme Court is responsible only to the Parliament of the State. If this Court remits a cause to the Supreme Court, the Supreme Court is charged with the cause, and may deal with that cause as it would with any other cause that came before it. That is quite consistent with orders made by the Supreme Court being subject to appeal to this Court.

[GRIFFITH C.J.—A denial of justice is appealable.]

That is a generally admitted principle. But in the interests of justice this appeal should not be allowed. A cause being remitted by this Court to the Supreme Court, a Judge of that Court has a discretion as to when the cause will be heard, and he is bound to exercise that discretion: See *Rules of Supreme Court* 1906, Order XXXVI., r. 34. The power to postpone the hearing of a cause is discretionary, and an appellate Court will not review the exercise of that discretion: *Boucicault* v. *Boucicault* (1). Unless the effect of the partial removal of the stay, taken in conjunction with the original order of this Court, amounts to a command which is directly enforceable by this Court, there is nothing improper in a Judge of the Supreme Court exercising his discretion. The order of this Court removing the stay altogether indicates that this Court acted upon the view that there is a direct duty of official obedience imposed on the Supreme Court.

[GRIFFITH C.J.—The duty of obedience may be upon the parties and not upon the Supreme Court.]

There is no ground for saying that the defendants were in contempt. The defendants disclaim any intention to flout this Court, but they are entitled by all lawful means to resist an inquiry being entered upon which they believe will be rendered

(1) 4 T.L.R., 195.

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useless by the result of the appeal to the Privy Council, and which will involve them in expense which they have no hope of ever recovering. If the Supreme Court had jurisdiction to deal with the matter and may go wrong, it is not contempt for a party to ask the Supreme Court to act in a way which this Court afterwards decides to be wrong.

[GRIFFITH C.J.—I used the words "in contempt" in the sense in which they were formerly used in the Court of Chancery.]

That would not justify an order having the effect of allowing the plaintiffs to take out of Court a large sum of money belonging to the defendants which, if the appeal to the Privy Council is successful, the defendants have no hope of recovering. If sec. 37 of the *Judiciary Act* 1903 has the effect of making the Supreme Court an official means of carrying out the orders of the High Court, then that section is *ultra vires*. Under sec. 73 of the Constitution this Court has in relation to the Supreme Court only an appellate jurisdiction.

[GRIFFITH C.J.—Sec. 51 (xxxix.) of the Constitution gives the Parliament authority to make laws as to matters incidental to the execution of any power vested in the Federal Judicature. It is incidental to the powers of this Court that it should have power to give effect to its decrees.]

Sec. 51 (xxxix.) gives the Commonwealth Parliament no power to regulate the Supreme Court. The power which is authorized by that section is limited to the execution of the powers expressly given by sec. 73. Unless mandamus should go to the Supreme Court there is no substance in this appeal. It is neither desirable that the expense of the inquiry should be incurred, nor is it in the interest of justice that the inquiry should proceed.

Agg in reply. The applications made by the plaintiffs have been for the purpose of executing the judgment of this Court under sec. 37 of the *Judiciary Act* 1903. The orders of the Supreme Court are obstructive of the judgment of this Court. There is no difference between this case and *Peacock* v. *D. M. Osborne & Co.* (1), and that case was brought under the notice of *Madden* C.J.

(1) 4 C.L.R., 1564.

GRIFFITH C.J. delivered the judgment of the Court. This case raises a question which from one point of view is of very great importance as appertaining to the relations between the High Court and the Courts of the States, and from another point of view has become of trivial importance. It is necessary to refer to the facts in some detail. On 17th September 1906, upon the hearing of an appeal from a decision of the Supreme Court of Victoria, the High Court held (1) that the defence set up by the defendants in the suit was invalid, and declared that the plaintiffs were entitled to recover from the defendants a sum of money the amount of which was not then ascertained, but which was such a sum, not exceeding £5,000, as represented the amount by which the shares of the beneficiaries were diminished by failure of the administratrix to duly administer, but so that no sum should be recoverable in respect of any diminution of the share of any beneficiary by reason of any such failure in which such beneficiary had concurred or acquiesced. The Court adjourned further consideration of the action with liberty to apply, and further ordered that the cause should be remitted to the Supreme Court to do therein what was right in pursuance of the judgment. The order was made in pursuance of sec. 37 of the *Judiciary Act* 1903 which provides that the High Court in the exercise of its appellate jurisdiction may "remit the cause to the Court from which the appeal was brought for the execution of the judgment of the High Court; and in the latter case it shall be the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment." The validity of that order was impeached by Mr. *Irvine*, but it is obviously authorized by the powers conferred by sec. 51 of the Constitution, which authorizes the Parliament to make laws as to matters incidental to the execution of any power vested in the Federal Judicature. The power of an appellate Court has always in practice in the British dominions been held to imply a power to remit the judgment for execution to the Court from which the appeal is brought. Moreover, if that were not so, it would be necessary to appoint a number of officers in the several States for the purpose of executing the

(1) 4 C.L.R., 1.

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judgments of this Court, if anything remained to be done before final justice was done between the parties. We have no doubt as to the validity of the provision in sec. 37 of the *Judiciary Act* 1903, and the only question is as to its interpretation. In the case of *Peacock* v. *D. M. Osborne & Co.* (1), decided in September last by the Full Bench, this Court said:—"Now, there is no doubt that the Supreme Court has jurisdiction to make any order consequent on an order of this Court for the purpose of executing the latter order, but the Supreme Court has no power to make any order for the purpose of preventing its execution." It was then pointed out that the Supreme Court might formally make such an order, but that it would be invalid. The Court then went on to say:—"An order staying proceedings until further order is not an order in execution of a judgment of this Court, but is an order thwarting or obstructing the execution of that judgment. Therefore, whatever the merits may be, it is an order that ought not to be made, and must be set aside on appeal." With these preliminary observations I proceed to state the facts of this case.

After the judgment of this Court was given in September 1906, His Majesty with the advice of the Privy Council was pleased in November 1906 to grant special leave to appeal from the order then made. Thereupon application was made to a Judge of this Court, and the Judge thought it fit that such a stay should be granted, except in one particular which it is not necessary to further mention. Subsequently another application was made on behalf of the plaintiffs to allow some of the proceedings to go on notwithstanding the stay. That application was at first refused: *Bayne* v. *Blake* (2). It was pointed out that, as a general rule, proceedings should be stayed when an appeal to the Privy Council was pending, but that there might be circumstances which would justify some of the proceedings going on notwithstanding the pendency of the appeal. That application was adjourned, and was subsequently brought on again upon materials which were then debated, and, rightly or wrongly, the Judge to whom the application was made came to the conclusion that, under the circumstances, it was right that the inquiry which was

(1) 4 C.L.R., 1564, at pp. 1567, 1568. (2) 4 C.L.R., 944.

directed by the original order of this Court should be made at once, and the stay was to that extent withdrawn. Thereupon the original judgment of this Court came, to that extent, into full operation, and it was, in the words of sec. 37 of the *Judiciary Act* 1903, the duty of the Supreme Court "to execute the judgment of the High Court in the same manner as if it were its own judgment." I have already pointed out that, according to the opinion of this Court, an order staying proceedings is not an order in execution of a judgment of this Court. The plaintiffs, having obtained a withdrawal of the stay granted by this Court, made an application in July 1907 to *Hodges* J., and counsel for the defendants asked that the hearing of the case should be adjourned until the decision of the Privy Council was given. That was, in effect, asking a stay of proceedings. The learned Judge is reported to have said:—"The matter is now before the final Court of Appeal, and I think it would be a wicked waste of public time and a wicked waste of the private moneys of the parties to conduct the inquiry whilst that appeal is pending." Upon that I will only say that the language is somewhat unusual to use in reference to a judgment of an appellate Court. The learned Judge then adjourned the matter indefinitely. Subsequently the case of *Peacock* v. *D. M. Osborne & Co.* (1) came before this Court in which, as I have said, it was laid down by the Full Bench that the Supreme Court could not grant a stay of proceedings. Fortified by that decision, the plaintiffs made an application to *Madden* C.J. to proceed with the inquiries directed by this Court. That application came on for hearing in December 1907, and the learned Chief Justice, to whom *Peacock* v. *D. M. Osborne & Co.* (1) was cited, ordered that the matter be deferred until the result of the decision of the Privy Council should be made known, and he further ordered that the plaintiffs should pay the costs of their application which had been made to him in order that the order of this Court might be carried out. The learned Chief Justice is reported to have said:—"The High Court cannot direct the Chief Clerk of the Supreme Court to proceed with these inquiries; and I am not the servant of the High Court, so that anything I do must be as a Judge of the Supreme Court, according to the procedure of this Court, and there is no authority for the present

(1) 4 C.L.R., 1564.

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application in the Rules of this Court." I do not know what the last remark refers to. It probably refers to some formal matter. Although the learned Chief Justice is not a servant of this Court, yet he is a citizen, and he is a member of a Court of the Commonwealth, and, by the express language of sec. V. of the *Commonwealth of Australia Constitution Act*, "all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State." The learned Chief Justice is therefore bound by the *Judiciary Act* 1903 just as is any private person, and sec. 37 of that Act expressly says that it shall be the duty of the Court to which a cause is remitted to execute the judgment of the High Court in the same manner as if it were its own judgment. So that the learned Chief Justice, although he is not a servant of this Court, is an officer of the law required by law to execute the orders of this Court. Under these circumstances it is manifest that the order he made is wrong; he had no right to order that the inquiries directed by this Court should be adjourned until the decision of the Privy Council was made known. That was a stay of proceedings which this Court had shortly before declared the Supreme Court had no authority to make. It follows that the plaintiffs were entitled to an order. Whether proceedings should now be stayed on grounds which show a change of circumstances, is a matter irrelevant to the present discussion.

In the result the defendants, notwithstanding the order of this Court, and the withdrawal of the stay by this Court, have obtained a delay of about twelve months. Under those circumstances they are not entitled to any consideration. We were very glad to hear the disclaimer on behalf of the defendants of any intention to act in defiance of the High Court. But it is manifest that any attempt of that sort must be futile. The High Court is not only a Court having federal jurisdiction, but it is also a Court of Appeal for every State, and as much respect is due to it as if it were a Court of Appeal from the Supreme Court in the State.

We should like to add a word as to the observation of the learned Chief Justice that "the High Court cannot direct the Chief Clerk

of the Supreme Court to proceed with these inquiries." It is not necessary, for reasons I will give directly, to discuss that statement, but I may remark that this Court can make any order that the Supreme Court ought to have made, and, if it was the duty of the Supreme Court to direct its Chief Clerk to make the inquiries, this Court also can make that order. We will not contemplate the case of an officer of the Supreme Court refusing to obey an order of this Court. It is sufficient to say that in the United States it is the practice for the Supreme Court to make a direct order on a State officer to obey its judgment. For these reasons we are of opinion that the order appealed from is wrong and must be discharged.

It would follow in the ordinary course that this Court should direct an inquiry by the Chief Clerk of the Supreme Court. But for certain reasons there is apparently no necessity to make that order at the present moment. It will be sufficient to allow the appeal, to discharge the order appealed from, and to order the defendants to pay the costs of the appeal.

The costs of the application to the Supreme Court should be costs in the cause.

Appeal allowed with costs. Order appealed from discharged.

Solicitor, for the appellants, *J. L. Clarke.*

Solicitors, for the respondents, *Blake & Riggall.*

B. L.