[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . APPELLANTS;
DEFENDANTS,

AND

MILLER AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 9, 12.

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

Practice—Discovery—Action against the Commonwealth—Jurisdiction of Supreme Court of State to order discovery against the Commonwealth—Judiciary Act 1903 (*No.* 6 *of* 1903), *secs.* 56, 64—*Supreme Court Act* 1890 (*Vict.*) (*No.* 1142), *sec.* 2—*Rules of the Supreme Court* 1906 (*Vict.*), *Order XXXI., rr.* 1, 5, 12.

The "rights" referred to in sec. 64 of the *Judiciary Act* 1903 include the obtaining of discovery by one party from another.

In an action against the Commonwealth brought in the Supreme Court of Victoria, that Court has by the combined effect of the *Judiciary Act* 1903, secs. 56 and 64, the *Supreme Court Act* 1890, and the *Rules of the Supreme Court* 1906, Order XXXI., rr. 1 and 12, jurisdiction to order the Commonwealth to answer interrogatories and to make discovery of documents.

The Commonwealth v. *Baume*, 2 C.L.R., 405, distinguished.

Decision of the Supreme Court (*à Beckett* J.): *Miller* v. *The Commonwealth*, (1910) V.L.R., 299; 32 A.L.T., 1, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by Robert Miller and his wife, against the Commonwealth, seeking to recover damages for injuries sustained by the female plaintiff owing to the alleged negligence of the servants or workmen of the Commonwealth in erecting or repairing a certain telegraph

wire at Sale, in Victoria. By their defence, the Commonwealth denied negligence and alleged contributory negligence. On summons for directions, *à Beckett* J. ordered that the Commonwealth, by some officer named by them as conversant with the facts in dispute in the action, should answer interrogatories as provided by r. 5, and make discovery as provided by r. 12, of Order XXXI. of the Rules of the Supreme Court 1906: *Miller* v. *The Commonwealth* (1).

From this decision the Commonwealth now appealed to the High Court.

Starke and *Morley*, for the Commonwealth. The order made is without jurisdiction. The Commonwealth is in law merely another name for the Crown, and its position in legal proceedings is precisely the same as that which the Crown used to occupy in a petition of right. Although the Supreme Court of Victoria has the jurisdiction which the English Common Law Courts and the Court of Chancery had, there was no right at common law to discovery against the Crown and the Court of Chancery never compelled discovery against the Crown: *Thomas* v. *The Queen* (2). Order XXXI. r. 5 of the Rules of the Supreme Court 1906 will not cover the case of the Commonwealth. That rule is practically the same as sec. 102 of the *Common Law Procedure Act* 1899 (N.S.W.), on which the decision in *The Commonwealth* v. *Baume* (3) proceeded. The further words in r. 5, "or any other body of persons empowered by law to sue or be sued" cannot be applied to the Commonwealth, which is not the aggregate of all the people in Australia, but is a legal entity composed of the Crown and the Parliament.

[O'CONNOR J.—If those words applied to the Commonwealth they would equally apply to the Victorian Government.]

It has been held that under the *Crown Remedies and Liability Act* 1890, sec 11, there is no right of discovery against the Crown in Victoria: *Reg.* v. *National Insurance Co.* (4). In sec. 64 of the *Judiciary Act* 1903 the word "rights" refers to substantive rights and not procedural rights. There is no express language

(1) (1910) V.L.R., 299; 32 A.L.T., 1.
(2) L.R. 10 Q.B., 44.
(3) 2 C.L.R., 405.
(4) 13 V.L.R., 301; 8 A.L.T., 211.

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in sec. 64 giving the right to discovery of documents or to compel answers to interrogatories against the Commonwealth, and the Court will not infer such a right without express words: *Tomline* v. *The Queen* (1); *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (2); *Robertson's Civil Proceedings by and against the Crown*, pp. 598-600. Even if sec. 64 deals with the procedural rights, it gives no rights against the Commonwealth other than the law of a State gives against the Crown in that State, and in Victoria no right of discovery against the Crown exists. [They also referred to *Bray on Discovery*, p. 70; *Dyke* v. *Stephens* (3); *The Helvetia* (4).]

Holroyd, for the respondents. In *The Commonwealth* v. *Baume* (5), it was held that the effect of sec. 64 of the *Judiciary Act* 1903 is a submission by the Commonwealth to the jurisdiction of the Supreme Courts of the States. The Supreme Court of Victoria, having the jurisdiction of the Court of Chancery, the submission of the Commonwealth to its jurisdiction is to put the Commonwealth in the same position as that of a Sovereign State which submitted itself to the jurisdiction of the Court of Chancery: see *Commonwealth of Australia Constitution Act* 1900, Secs. III., IV; the Constitution, sec. 78. The Court of Chancery would order a Sovereign State so submitting to its jurisdiction to make discovery: *Prioleau* v. *United States of America* (6); *United States of America* v. *Wagner* (7); *Republic of Costa Rica* v. *Erlanger* (8); *Republic of Liberia* v. *Imperial Bank* (9); *s.c. sub nom. Republic of Liberia* v. *Roye* (10); *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (11). The Supreme Court, therefore, may order the Commonwealth to make discovery. The English cases in which it was decided that discovery would not be ordered against the Crown are cases under either the *Crown Suits Act* 1865 (28 & 29 Vict. c 104), or the *Petition of Rights Act* 1860 (23 & 24 Vict. c. 34). In the Rules made under the former Act the prerogatives

(1) 4 Ex. D., 252.
(2) (1897) 2 Q.B., 384.
(3) 30 Ch. D., 189.
(4) (1879) W.N., 48.
(5) 2 C.L.R., 405.
(6) L.R. 2 Eq., 659.
(7) L.R. 2 Ch., 582.
(8) 1 Ch. D., 171.
(9) L.R. 16 Eq., 179.
(10) 1 App. Cas., 139.
(11) (1898) 1 Ch., 190.

of the Crown not specifically dealt with are reserved, and by the Rules made under the latter the Attorney-General is expressly excepted. There is nothing reciprocal in either of those Acts as there is in sec. 64 of the *Judiciary Act* 1903. The words of r. 5 of Order XXXI. are wide enough to cover the case of the Commonwealth, but, if they are not, rr. 1 and 12 may be applied. The fact that no rule is aptly worded so as to cover the case of such a juristic person as the Commonwealth does not amount to an abandonment of the jurisdiction to order discovery against such a person when it submits itself to the Court's jurisdiction. [He also referred to *R.* v. *Officer* (1); *Ricketson* v. *Smith* (2); *Morissey* v. *Young* (3); *Anderson* v. *Bank of British Columbia* (4); *Attorney-General* v. *Gaskill* (5); *Moore* v. *Tate* (6).]

Morley, in reply, referred to *Daniel's Chancery Practice*, 7th ed., vol. II., p. 1542.

Cur. adv. vult.

Sept. 12.

GRIFFITH C.J. The question for determination in this case is whether the Commonwealth is bound to make discovery in an action brought against it in the Supreme Court of Victoria. The answer depends upon the construction of secs. 56 and 64 of the *Judiciary Act* 1903. Sec. 56 provides 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 arose." Sec. 64 provides that:—"In any suit to which the Commonwealth or a State is a party, the rights of 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." It is contended for the defendants, the Commonwealth, that, apart from any statutory provision, discovery could not be obtained from the Crown either in an action at common law or in a suit in chancery, and that was said to depend upon the Crown's prerogative. Probably that

(1) 20 V.L.R., 187; 15 A.L.T., 245.
(2) 16 N.S.W. L.R. (Eq.), 170.
(3) 17 N.S.W. L.R. (Eq.), 157.
(4) 2 Ch. D., 644, at pp. 654, 658.
(5) 20 Ch. D., 519, at p. 526.
(6) 10 Am. St. Rep., 712.

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contention is correct, but it ceases to have any relevance to the present case in view of sec. 64, which says that the rights of the parties shall as nearly as possible be the same as in a suit between subject and subject. The only question, therefore, is whether the obtaining of discovery by one party from another in the case of a suit between subjects is such a right as is meant in sec. 64. The obtaining of discovery in a proper case always was, according to English law, a right as between subject and subject, but originally that right could only be enforced by a suit in chancery—called a bill of discovery—and only as to matters of which that Court took cognizance. But it was a right. That right continued, and continues to exist, I apprehend, unless taken away, and it is one of the rights conferred by sec. 64. If in any State of the Commonwealth, New South Wales for instance, that right cannot be enforced except by a suit for discovery, then, in my opinion, it can be enforced by such a suit against the Commonwealth. But if the right can be exercised in the same suit in which the substantial relief is sought, that is not a difference in the right but only a difference in the mode of procedure. In my opinion, therefore, the only question in this case is whether discovery can be obtained in the Supreme Court of Victoria in all cases in a suit between subject and subject? Order XXXI., r. 1 of the *Rules of the Supreme Court* 1906 provides that:—"In any cause or matter the plaintiff or defendant, by leave of a Judge, may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties . . . ," and r. 12 provides that:—"Any party may, without filing an affidavit, apply to the Court or a Judge for an order directing any other party to the cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action." Those are general provisions, and I think they apply to all suits between subject and subject. Another rule, r. 5, was referred to in the debate before *à Beckett* J. which deals with the case of bodies corporate and joint stock companies. If that rule does not apply to the case of the Commonwealth, then the case falls within rr. 1 and 12. I accept the view taken by *Pearson* J. in *Dyke* v.

Stephens (1), where he pointed out that in the case of discovery being ordered against a corporation the making of an affidavit of discovery by an officer of the corporation is a privilege given to the corporation. The order is that the party shall make discovery. Then, if the party cannot make discovery, it is a privilege given to him to make discovery by some other person on his behalf. The sanction of the order is that, if the party does not make discovery when ordered to do so, his subsequent proceedings will be hampered. In the case of a plaintiff his action may be stayed, and in the case of a defendant his defence may be struck out. That is provided by Order XXXI., r. 21. That, in my opinion, disposes of the case.

Reference was made to the case of the *Commonwealth* v. *Baume* (2), in which this Court held that in a common law action in New South Wales discovery could not be obtained against the Commonwealth. That decision depended entirely upon the construction of the New South Wales *Common Law Procedure Act* 1899. In that State a distinction still exists between actions at law and suits in equity. The power of discovery given by that Statute is of a very limited character, and we held that it did not cover such a case as that of the Commonwealth. Whether the construction we put upon that section was too narrow or not is quite immaterial so far as the Supreme Court of Victoria is concerned. I am not sorry to think that in no other State of the Commonwealth is the power so limited as in New South Wales. I think, therefore, that the appeal must be dismissed.

BARTON J. In *The Commonwealth* v. *Baume* (3), the Chief Justice of this Court said:—"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* (4) affords a good illustration. On the other hand, a Court of justice has no jurisdiction against a sovereign power which does not subject itself,

(1) 30 Ch. D., 189.
(2) 2 C.L.R., 405.
(3) 2 C.L.R., 405, at p. 412.
(4) L.R. 2 Eq., 659.

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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 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." His Honor went on to discuss the power given to the Supreme Courrt of New South Wales by sec. 102 of the *Common Law Procedure Act* 1899, and came to the conclusion, in which I agreed, that the section did not authorize the order for discovery which in that case the Court below in its common law jurisdiction had made against the defendant, the Commonwealth.

As sec. 56 of the *Judiciary Act* 1903 operates as "a submission by the Commonwealth to the jurisdiction of . . . a State Court in cases falling within the section," and this is such a case, the next question is as to the limits of the jurisdiction of the Supreme Court of Victoria in that respect. By the consolidating *Supreme Court Act* 1890, the Court has confirmed to it as then existing a jurisdiction as full and ample in all cases as was possessed by the old Courts of King's Bench, Common Pleas and Exchequer in England, and also the entire equitable jurisdiction formerly exercisable by the Lord Chancellor. Had the matter rested there, the decision in *Baume's Case* (1), might have raised a difficulty in this. But the same consolidation includes the *Judicature Act* 1883, practically the English *Judicature Act* 1873, which effected the fusion of the legal and equitable jurisdictions and procedure. Sec 2 of the consolidating Statute, in repealing previous enactments, provides that nothing therein contained "shall be construed to take away lessen or impair any

(1) 2 C.L.R., 405.

statutory or other jurisdiction power or authority of the Court or the Judges thereof." The Court, then, has as much jurisdiction to grant discovery by way of substantive relief in any action as was possessed by the old Court of Chancery, and which it had also as an ancillary or incidental instrument of justice. The jurisdiction then exists as between subject and subject. Is it exercisable against the Commonwealth as a defendant? I look first at the Constitution and 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." Secs. 56 and 64 of the *Judiciary Act* 1903 need not be repeated. The 78th section of the Constitution seems to me to confer ample authority on the Parliament to give to the citizen against the Commonwealth remedies by action and suit as to any subject matter that is within the judicial power, and with them such rights of procedure as are necessary or proper to make the remedies effective. If it does not import such legislative power it is almost futile, and the Parliament could not make the Commonwealth fully answerable to redress the most grievous injuries. In view of the condition of the Statute law of the States in this respect at the time the Constitution was passed, it is hardly likely that the framers intended so to hamper the Parliament in the giving of such redress as it might deem just. Discovery and interrogatories are within the latter class of rights, if the Parliament in its turn has chosen to confer them, and discovery as a remedy is also within the power, if it has been exercised. Is sec. 64, then, such an exercise of the power as will include these under the word "rights?" Having regard to the use of the same word in the 78th section of the Constitution, I am of opinion that it is an apt exercise of the power. I think that the rights there intended to be given against the Commonwealth include such known remedies as might be utilized by a subject against a subject in cases of breach of contract or tort (see sec. 56), including all such methods of investigation as might be pursued for the better attainment of such remedies in the High Court or the Supreme Court of the State.

So far then as the Constitution and the *Judiciary Act* 1903

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are concerned, I do not think the objections of the Crown are sustained. As to the *Rules of the Supreme Court* 1906, rr. 1 and 12 of Order XXXI. are clearly applicable. Rule 5, relied on by the appellant, is an enabling rule to meet the cases of certain bodies, but it can scarcely be said that the Commonwealth as a party is within the words used. There is no similar rule as to the person to make discovery in the cases of such bodies, but it cannot be inferred that discovery is not to be granted where there is a party who, not being an ordinary person, is yet not such a party as is contemplated by r. 5.

I am of opinion that there is an appropriate jurisdiction in the Supreme Court of Victoria to which submission has been made by sec. 56 of the *Judiciary Act* 1903, and that the answers to interrogatories and the affidavit of discovery may be made in the manner ordered by *à Beckett* J. The appeal therefore fails.

O'CONNOR J. read the following judgment. Robert Miller and his wife, claiming that they had suffered damage from the negligence of the Commonwealth servants, sued the appellant Commonwealth in the Supreme Court of Victoria. On a summons for directions in the action Mr. Justice *à Beckett* made an order on the plaintiffs' application directing the Commonwealth by one of its officers to answer interrogatories and to make discovery in accordance with certain rules of the Supreme Court. The appellants have appealed on the ground that the learned Judge had no jurisdiction to direct the Commonwealth by that or any other form of order to answer interrogatories or make an affidavit of discovery. The respondents rely upon secs. 56 and 64 of the *Judiciary Act* 1903, and the matter in controversy depends upon what is the right construction of those sections. Since the decision of this Court in *Baume* v. *The Commonwealth* (1) it has become impossible to successfully contend that the Commonwealth is not as liable for the wrongful or negligent acts of its servants as any other principal would be liable under a similar state of facts. The appellants' counsel did not deny that position, but contended that, although the Commonwealth might properly be sued for negligence of its servants,

(1) 4 C.L.R., 97.

it carried with it into Court as a party to the suit the same immunity from compulsion to answer interrogatories or make affidavit of discovery by its servants as it would have had before the *Judiciary Act* 1903 was passed. I agree that Mr. Justice *à Beckett* rightly held that that contention is not maintainable. Sec. 56 empowers a claimant to force the Commonwealth into Court as a party defendant. Once being before the Court its rights in the suit are defined by sec. 64, which provides that "the rights of parties shall as nearly as possible be the same . . . as in a suit between subject and subject."

Whatever rights in procedure the Commonwealth's opponents would have against an ordinary defendant they will have against the Commonwealth "as nearly as possible." The words of qualification are not new. They are taken from Acts passed in the several States of Australia for the purpose of placing the Crown or Executive authority, when it is made liable to be sued, in the same position before the Courts as other parties, in so far as that is practicable. In sections of these Acts, substantially the same as those in question, the words "as nearly as possible" have been interpreted in the State Courts, and, as they stand in sec. 64 of the *Judiciary Act* 1903, they have been construed in this Court. As the result of these decisions their meaning may now be taken to have been authoritatively settled as expressing the intention of the legislature that the procedure of the tribunal in which the suit is pending will be the same for the Crown as for the subject, in so far as the procedure is applicable to such an entity as the Commonwealth or State. In all cases in which an objection is taken such as that now under consideration the test of the right against the Commonwealth must depend upon the answers to a twofold inquiry: First, what is the procedure of the Court between the parties; secondly, is the particular procedure in question applicable to the Commonwealth? In *The Commonwealth* v. *Baume* (1), which was an appeal from the Supreme Court of New South Wales, the sections now under consideration were considered with reference to an order for discovery made against the Commonwealth. The test to which I have referred was there applied, and it was because the answer to the second

(1) 2 C.L.R., 405.

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branch of the inquiry in that case had to be in the negative that the applicant failed. The application was to the Supreme Court of New South Wales in its common law jurisdiction. In that State rights in law and rights in equity are still administered in separate Courts. Common law Courts have no general inherent jurisdiction to order discovery. The only power in that respect possessed by Courts of common law in New South Wales is that conferred by Statute, viz., the *Common Law Procedure Act* 1899, sec. 102, which expressly provides for two forms of order and for those only. In ordinary cases the party against whom the application is made must make the affidavit. In cases where the party respondent is a corporation some officer of the corporation is to be named to make the affidavit. If the party respondent is not so constituted as to be capable of making an affidavit, and yet is not a corporation, neither form of order is applicable. Under those circumstances the Statute cannot apply, there being no general power in a common law Court to order a person not a party to make an affidavit of discovery on behalf of the party against whom the application is made. That was the sole ground of the decision, but it is quite inapplicable where the Court before which the application is made possesses the general power of compelling discovery which have always been exercised by Courts of Equity. Under the system of judicature obtaining in Victoria Mr. Justice *à Beckett* was entitled to exercise all the powers of a Court of Equity, and, having determined that it was just to grant discovery, he had jurisdiction to direct the discovery to be made in accordance with equity procedure, and in the manner which he deemed most effective. The Courts of Equity have always exercised the jurisdiction of compelling discovery by affidavit according to well recognized methods. Their practice has been to direct the making of the affidavit in such a way as will be effective, having regard to the parties before them. In the early practice, where the remedy was asked against a corporation, one of its officers was ordered to make the affidavit, he being when necessary added as a party for that purpose. There are cases also in which an Equity Court, having before it a foreign Government which, by becoming the party plaintiff, had submitted itself to the jurisdiction, has directed the foreign

Government to make discovery by the affidavit of one of its officers. The order made in the case of *Republic of Liberia* v. *Imperial Bank* (1) is a case of that kind. The operation of secs. 56 and 64 of the *Judiciary Act* 1903 is to bring the Commonwealth into Court compulsorily as a party and to subject it as far as possible to the procedure of the Court. Under these circumstances it must be at least as amenable to the procedure of the Court as if it had voluntarily submitted itself to the jurisdiction. To a Court exercising the jurisdiction in equity it is no objection that the Commonwealth is incapable of making an affidavit. The form of procedure to which I have referred enables the difficulty to be overcome as it is always overcome in the class of cases which I have mentioned. I am therefore of opinion that the procedure which enables the Court, in cases where the party respondent is so constituted as to be incapable of making an affidavit, to enforce discovery by the affidavit of some individual either appointed by the Court or directed by the Court to to be appointed by the respondent, is applicable to the Commonwealth. I therefore hold that the order made by the learned Judge under Rule 12 was properly within his jurisdiction. The order as to interrogatories must stand on the same footing. I agree, however, that r. 5 of Order XXXI. is not applicable to the Commonwealth. The order should be based on r. 1, the Commonwealth being by virtue of sec. 64 of the *Judiciary Act* placed in the same position as an ordinary party in a suit. For these reasons I am of opinion that the objections to the order must fail and this appeal must be dismissed.

ISAACS J. read the following judgment. I agree that this appeal should be dismissed. I base my opinion solely on the construction of sec. 64 of the *Judiciary Act* 1903. The declared intention of Parliament is that in any suit to which the Commonwealth or a State is a party the litigants on both sides shall have the same rights as if both were subjects. The full force of the provision is better appreciated if we suppose a case where the litigants are the Commonwealth on one side and a State on the other, or a case between two States. Can it be

(1) L.R., 16 Eq., 179.

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imagined that in such a suit the means of attaining justice which might be afforded by means of discovery are excluded? That would be contrary to the whole tendency of the legislation, and it would, in either of the cases supposed, be absurd to cut down the natural import of the words by setting up a privilege of the Crown to deny information to the Crown itself; and it is therefore plain, seeing that the interpretation of the section must always be the same, that the power of ordering discovery must also exist in favour of a subject litigant.

All that the legislature leaves open for consideration is to inquire what rights litigants who are subjects on both sides would have in such a suit; and then, when those are once ascertained, sec. 64 by force of its own provisions applies those same rights, as nearly as possible, to both the litigants where the Crown is a party.

Of course in a suit in the Supreme Court of Victoria between subject and subject both sides may in proper circumstances be directed to give discovery, and all that remains is to determine in the first place whether the power to ask for and obtain discovery is a right within the meaning of sec. 64, and then whether it is a right which can fairly be applied consistently with the manifest requirements of the situation.

I have no doubt that to begin with it is a right within the meaning of the term in sec. 64.

In *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (1) *Lopes* L.J. speaks of the right of the Crown to discovery. Singularly enough the passage in which the phrase occurs contains these words "the same as in a suit between subject and subject." One might almost think that passage was the source of the identical form of words in sec. 64.

Now that phrase "the right to discovery" is not a chance one. It occurs repeatedly and in precise and authoritative quarters. For instance it is the language of Lord *Cottenham* L.C. in *Attorney-General* v. *London Corporation* (2). So in *Wigram on Discovery*, as for instance at p. 47. This was before the Judicature Acts and even before the *Common Law Procedure Act* 1852, and when discovery could be had only by a bill in equity.

(1) (1897) 2 Q.B., 384, at p. 389.

(2) 2 Mac. & G., 247, at p. 262.

Then came the *Common Law Procedure Act* 1852, which enabled a common law Court to give discovery in an action. The *Judicature Act* 1873 makes the practice uniform and renders a special suit for discovery unnecessary. See *per Farwell* L.J. in *James Nelson & Sons Ltd.* v. *Nelson Line (Liverpool) Ltd.* (1). Just after that Act came into operation in England, the case of *Ramsden* v. *Brearley* (2) was decided by *Lush* J. It was an action for libel against the *Standard* newspaper, and in that action the learned Judge allowed an interrogatory on the ground that what he called the "right of discovery" given by a Statute of William IV. in aid of such an action was not intended to be abrogated, though the mode of obtaining it by bill of discovery was abolished. He said (3) "that right still exists." He clearly distinguished between the right and the remedy. And it is nothing to the point to say that the right was given by Statute, and for this reason. A Court of Equity did not lend its aid to enforce discovery where the action was in respect of a mere tort, but where it did lend its aid the right existed, and the Statute of William IV. put libel on the same footing.

I may refer on this point to a case of very great authority: *Lyell* v. *Kennedy* (4). Lord *Selborne* L.C. there says (5) that the "right of discovery" under the Judicature Rules is not in principle more extensive than formerly existing in Chancery. Throughout his judgment the Lord Chancellor constantly speaks of it as a "right;" and (6), quotes *Sir James Wigram*, who used the word "right." So Lord *Bramwell* (7) refers to the party's "right to discovery from his opponent," and adds significantly: "This must be because the law supposes that the ends of justice will be furthered thereby." Lord *Fitzgerald* (8) also speaks of the "right to discovery," and pointedly says that the Judicature Rules do make an alteration in what has been called "right," giving by way of example the case of a tort already referred to. See also the recent case of *James Nelson & Sons Ltd.* v. *Nelson Line (Liverpool) Ltd.* (9), *per Collins* M.R.

(1) (1906) 2 K.B., 217, at p. 226.
(2) 33 L.T. (N.S.), 322.
(3) 33 L.T. (N.S.), 322, at p. 323.
(4) 8 App. Cas., 217.
(5) 8 App. Cas., 217, at p. 223.
(6) 8 App. Cas., 217, at pp. 225, 226.
(7) 8 App. Cas., 217, at p. 230.
(8) 8 App. Cas., 217, at p. 233.
(9) (1906) 2 K.B., 217, at p. 223.

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Reliance was placed on the words, "as nearly as possible," to exclude the Crown from liability to discovery, because the requirement of an affidavit would be an indignity. I quite acquiesce in the argument that there is excluded all coercive action incompatible with the dignity of the Crown and unwarranted by the express words of the enactment. But the nature of the legislation is unmistakeable. The subject is no longer compelled to petition the Sovereign for redress, and remain a mere suppliant. The Commonwealth is made a party as representing the community, and the claimant may demand, not beg for, justice, and so, when Parliament declares that he is to have the same "rights" as nearly as possible as if his opponent were also a subject, all means ordinarily recognized for obtaining a just decision are open, short of violating two well understood principles of law. One is, that the Courts will not place any indignity upon those representing the Government, and the other is that the right of discovery given to the litigant for the furtherance of public justice must be subject to the still higher consideration of the general welfare. The first is analogous to the case of a foreign Sovereign who under the former practice was plaintiff in a suit in Chancery. The Court could not compel the plaintiff when sued on a cross bill to give discovery, but could stay his own proceedings until he named a proper person to do so. *Per James* L.J. in *Republic of Costa Rica* v. *Erlanger* (1); and in the same case *Blackburn* J. (2) says something very pertinent indeed to the present case. He observes:—"I quite agree that where a foreign Sovereign sues in this country he should, *so far as the thing can be done*, be put in the same position as a body corporate." And then he referred to r. 4 of Order XXXI. of the Rules of 1875, which is, with quite immaterial alterations, the same as the Victorian r. 5 of Order XXXI., and goes on to point out that on this point the sovereignty makes no difference when a corporation is out of the jurisdiction; and that in either case the suit may be stayed until the plaintiff selects a proper person to give the necessary discovery. That, in the judgment of *Blackburn* J., satisfies the condition, "so far as the thing can be done," which is really the same as the statutory

(1) 1 Ch. D., 171, at p. 173. (2) 1 Ch. D., 171, at p. 174.

phrase, "as nearly as possible." In *Willis & Co.* v. *Baddeley* (1), the rule expounded by *James* L.J. was re-affirmed and acted on.

Where a foreign Sovereign is defendant he need not submit to the jurisdiction, but he may elect to do so by appearing: *Mighell* v. *Sultan of Johore* (2). In that case r. 21 of Order XXXI., so far as it relates to striking out the defence, could be applied without in the least degree offending the personal or national dignity of the defendant. And that would satisfy Lord *Blackburn's* condition.

Mr. *Holroyd's* analogy between the foreign Sovereign submitting to the jurisdiction and the Commonwealth similarly submitting by the Statute comes in at this point, and is well founded, and what would satisfy Lord *Blackburn's* condition in the one case would satisfy the statutory qualification in the other. That keeps the Court clear of infringing the first principle to which the general power of the Court is impliedly subject.

The other principle is plain. The order to make a proper discovery does not destroy the privilege of public interest, and, when it comes to a question of disclosure as distinguished from proper discovery, there the ground of public policy and interest may intervene and prevent the injury to the community which further coercive action might produce. See *per Turner* L.J. in *Wadeer* v. *East India Co.* (3), and *Hennessy* v. *Wright* (4). That stage, however, has not yet been reached. For these reasons I am of opinion there was ample jurisdiction to make the order.

HIGGINS J. read the following judgment. I concur in the opinion that this appeal should be dismissed. I also base my judgment on sec. 64 of the *Judiciary Act* 1903: "In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, . . . as in a suit between subject and subject." Now this is a suit brought in the Supreme Court of Victoria: and in a suit between subject and subject in that Court the plaintiff has a right, by leave of a Judge, to deliver interrogatories for the

(1) (1892) 2 Q.B., 324.
(2) (1894) 1 Q.B., 149, at pp. 159, 160, 162.
(3) 8 DeG. M. & G., 182, at p. 191.
(4) 21 Q.B.D., 509.

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examination of the defendant (Order XXXI., r. 1); and he has also a right, if the Judge so order, to compel the defendant to make discovery on oath of documents (r. 12). If there were no other rule in the Order, and if it were a proper case for interrogatories and for discovery as between subject and subject, it would be the duty of the Judge to frame an order therefor suitable to the circumstances of the defendants with which he has to deal—the Commonwealth. The Commonwealth cannot itself take an oath; for the Commonwealth consists of the people of six Colonies of Australia united, by Act of the British Parliament, under the name of the Commonwealth of Australia (*Commonwealth of Australia Constitution Act*, clause III.) Therefore, to comply with the words "as nearly as possible" in sec. 64, the obvious course is to direct that the answer to interrogatories and the affidavit of discovery be made by some suitable officer of the Commonwealth. The appellants do not object in this case to the actual form of the order made, although the order does not specify any particular officer. I do not look on Order XXXI., r. 5, as covering this case, but merely as affording an analogy. Under that rule, in the case of a body corporate or a joint stock company (whether incorporated or not), "or any other body of persons, empowered by law to sue or be sued," the opposite party "may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body." I am not at all convinced that "the Commonwealth"—the people united under that name—would not come within the terms of r. 5 as strictly construed. But it is not necessary to decide that question. The case turns on sec. 64 of the *Judiciary Act* 1903. That section applies clearly to proceedings "in any suit." The Commonwealth can no longer, for example, use the privilege of the Crown and "plead double," as in *Tobin* v. *The Queen* (1). The rights conferred are mutual, reciprocal, between the parties; and if the Commonwealth cannot be ordered to give discovery, neither can it—so far as the *Judiciary Act* 1903 is concerned—get an order for discovery against the other side. It is admitted that the order made does not take away the privilege of the Crown's officers as to affairs of State, &c.

(1) 32 L.J.C.P., 216.

The case of *The Commonwealth* v. *Baume* (1) must be regarded as resting on the limited scope of the New South Wales *Common Law Procedure Act* 1899.

Appeal dismissed with costs.

Solicitor, for the appellants, *C. Powers*, Crown Solicitor for the Commonwealth.

Solicitor, for the respondents, *H. Jennings* for *C. H. Becher.*

B. L.

(1) 2 C.L.R., 405.

END OF VOL. X.