Solicitor, for the appellant, *A. H. Pace.*
Solicitors, for the respondents, *Atthow & McGregor.*

H. C. OF A. 1910.

FRACKELTON v. ATTHOW.

H. V. J.

[HIGH COURT OF AUSTRALIA.]

HENRY WILLIAM HOGAN . . . . PLAINTIFF;

AND

ALFRED GRAHAM OCHILTREE . . . DEFENDANT.

H. C. OF A. 1910.

SYDNEY, *March* 30.

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

Judiciary Act 1903 (*No.* 6 *of* 1903), *secs.* 40, 42—*Cause arising under the Constitution, or involving its interpretation—State legislation inconsistent with previous decision of High Court—Case remitted to State Court.*

In August 1909 the High Court, in an appeal from the Supreme Court of New South Wales, held that the plaintiff had no title to occupy the land, in respect of which this action was brought, in the previous June. The legislature of New South Wales subsequently passed an Act declaring, in effect, that the plaintiff should be deemed to have had a title to occupy the lands in question at that date.

Held, that this did not raise any question under the Constitution, or involving its interpretation, within sec. 40 of the *Judiciary Act* 1903. The question of the validity of this Act having been referred to the High Court by the State Court, upon objection taken by counsel for the defendant in that Court that the Act was unconstitutional, the High Court, on the plaintiff's application, remitted the case to the Supreme Court, and ordered the defendant to pay the costs of the application.

APPLICATION by the plaintiff for an order remitting the suit to the Supreme Court of New South Wales in Equity from which it had been removed to the High Court under sec. 40 (1) of the *Judiciary Acts* 1903-7.

In June 1909 this suit was brought by the plaintiff against the defendant in the Supreme Court of New South Wales in Equity

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for relief in respect of certain alleged trespasses to the plaintiff's land committed in June 1908. On 20th November 1909 certain written admissions were made by the parties, and on 27th November a notice of motion for decree on the admissions was filed by the plaintiff.

By the admissions it was mutually agreed between the parties that if the *Improvement Leases (Declaratory) Act* 1909, which was an Act of the legislature of New South Wales, had in law rendered the plaintiff's application for a settlement lease valid, the plaintiff was entitled to a decree for a perpetual injunction against the defendant as prayed. It was further agreed that if such Act should be held to have no such effect, but was to be disregarded, the plaintiff had no title to maintain the suit.

In February 1910 his Honor the Chief Judge in Equity, on the hearing of the motion for decree in the suit, delivered judgment on the construction of the Act, holding that it was retrospective, and bound the lands, but the further point was taken by counsel for the defendant that the said Act was invalid as being in conflict with the decision of the High Court in the *Minister for Lands (N.S.W.)* v. *Bank of New South Wales* (1), in which it was held by the High Court, in August 1909, that the plaintiff had in June 1908 no title to the lands in question, and that there thus arose a question as to the limits *inter se* of the power of the Commonwealth and the State within the meaning of sec. 40 (*a*) of the *Judiciary Act* 1903. The learned Chief Judge thereupon held that the question of the validity of the Act must be referred to the High Court, and the suit was removed accordingly.

Langer Owen K.C. and *Bethune*, for the plaintiff in support of the application. No question arises in this suit under sec. 40 (1) of the *Judiciary Act* 1903. The suit should therefore be remitted to the Court below, and the defendant having raised this point should be ordered to pay the costs of this application.

Bavin (*Whitfeld* with him), for the defendant. This application is misconceived and premature. The Court if it thinks fit to do

(1) 9 C.L.R., 322.

so can make the order now asked for at the hearing. It is not necessary at this stage to show that the objection taken is a good one. It is sufficient to show that the point taken is substantially arguable, and is not frivolous: *Baxter* v. *Commissioners of Taxation (N.S.W.)* (1). The State legislation is in fact a direct interference with the judicial functions of the High Court.

[GRIFFITH C.J.—The Act is new matter arising since the judgment of this Court.]

The judgment of the High Court gave the defendant a right. The State legislature cannot retrospectively take away that right, and so, in effect, reverse the judgment of this Court. That judgment, although a mere affirmation of the decision of the Supreme Court, was an exercise of the judicial power of the Commonwealth. In any event the order should be made without costs. The Judge referred the matter to the Court of his own motion.

GRIFFITH C.J. In August last this Court delivered judgment in the case of *Minister for Lands (N.S.W.)* v. *Bank of New South Wales* (2) which was an appeal from a decision of the Supreme Court of New South Wales, to which the present plaintiff was a party. By that decision this Court, in effect, declared that, according to the law of New South Wales, as it then stood, the present plaintiff had no title in the preceding June to occupy the land in respect of which this suit is brought. That decision must be taken to have declared the law of New South Wales as it was in August last. Afterwards the legislature of New South Wales, in the exercise of its power to deal with the Crown lands of the State, passed a law declaring, in effect, that the plaintiff should be deemed to have had a title to occupy that land from the preceding June, and this action is continued upon the basis of that Statute.

It may be considered a singular thing that a man who went into occupation of land in June with no title to it, and afterwards, by an Act of Parliament passed in October, obtained a retrospective title going back to the preceding June, should be entitled to maintain an action against another for a trespass committed at the time when he had no right to possession. It is a

(1) 4 C.L.R., 1087, at pp. 1118, 1119. (2) 9 C.L.R., 322.

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strange thing to find in an Act of Parliament; but the questions whether or not that is the true construction of the Act, and whether it is within the competence of the legislature so to enact, are not questions arising under the Constitution of the Commonwealth, and it is not necessary to express an opinion upon them. When these facts were brought under the notice of the learned Chief Judge in Equity by counsel for the defendant, it was suggested to him that, in substance, the legislature of New South Wales were attempting to reverse a decision of the High Court. It occurred to his Honor that a question arose as to limits *inter se* of the constitutional powers of the Commonwealth and the State, and he, accordingly, assuming that the case came within the meaning of sec. 40 (1) of the *Judiciary Act* 1903, directed all the proceedings to be transmitted to the High Court. Now a motion is made that the suit be remitted back to the Supreme Court for decision.

I am at a loss to understand how any question arises under the Constitution. The decision of this Court remains deciding that under the law as it stood in August last the plaintiff had no title to the land. It is now the law, as declared by a Statute passed in October, that he then acquired a retrospective title to the land; but whether that entitles him to maintain an action upon his retrospective title is not a matter which arises under the Constitution. If the legislature of the State has power to say that from an antecedent date a piece of land shall be deemed to have ceased to be the property of one man, and to have become the property of another, the propriety of their doing so is a question entirely between the legislature and their constituents. In my opinion there is no question arising under or involving the interpretation of the Constitution. I think, therefore, that the application must be granted.

BARTON J. I concur.

O'CONNOR J. I am of the same opinion.

ISAACS J. I agree.

GRIFFITH C.J. In the result the case must be remitted to

the Supreme Court, and in the circumstances we see no reason why the unsuccessful party should not pay the costs of the motion.

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Cause remitted, defendant to pay costs of the motion.

Solicitor, for plaintiff, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for defendant, *Macnamara & Smith.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

CHARLES EDWARD SUTTON TURNER . APPELLANT;
PLAINTIFF,

AND

THE NEW SOUTH WALES MONT DE PIETE DEPOSIT AND INVESTMENT CO. LTD. . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

SYDNEY, *April* 19, 20, 21, 22.

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

Pleading—Admission of balance due to mortgagor under bill of sale—Common counts.

Detinue—Property passing under bill of sale — Realization of security — Goods remaining in hands of mortgagee after satisfaction of mortgage debt—Provision that security should remain in force until memorandum of satisfaction signed—Waiver—Legal title to goods—Equitable replication—Departure.

Detention of business papers—Damages.