[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

MURRAY AND CORMIE AND OTHERS.

EX PARTE THE COMMONWEALTH.

H. C. OF A. 1916.

MELBOURNE, *Sept.* 6, 7, 8; *Oct.* 16.

Griffith C.J. Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

High Court—Appellate jurisdiction—Exception—Original jurisdiction—Prohibition—Judge of Inferior Court of State exercising federal jurisdiction—Officer of Commonwealth—Commonwealth a party—Workmen's compensation—Determination by County Court—Order as to investment and application—Excess of jurisdiction—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 73, 75—*Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 39 (2) (c)—*Commonwealth Workmen's Compensation Act* 1912 (*No.* 29 *of* 1912), *secs.* 3, 4; *Sched.* 1, *clauses* 5, 9; *Sched.* 2, *clause* 2—*Workmen's Compensation Regulations* 1913 (*Statutory Rules* 1913, *No.* 336), *regs.* 4, 5, 6, 7, 10 (*Statutory Rules* 1916, *No.* 124).

The provision in clause 2 of the Second Schedule to the *Commonwealth Workmen's Compensation Act* 1912 that the decision of a County Court (which term includes a District Court) shall be final unless within a prescribed time either party appeals to the High Court or the Supreme Court of the State in which the County Court is situated, is an exception from the appellate jurisdiction of the High Court within the meaning of sec. 73 of the Constitution; and, therefore, no appeal having been brought within the prescribed time, the High Court has no jurisdiction to grant special leave to appeal from such a decision.

So *held* by *Griffith* C.J. and *Barton, Isaacs, Higgins* and *Powers* JJ. (*Rich* J. doubting).

A Judge of an inferior Court of a State invested with, and purporting to exercise, federal jurisdiction is not an "officer of the Commonwealth" within the meaning and for the purposes of sec. 75 (v.) of the Constitution.

So *held* by *Isaacs, Higgins, Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting).

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A workman in the service of the Commonwealth having died as the result of injuries received in the course of his employment and a claim having been made on behalf of his dependants for compensation, the Commonwealth admitted liability under the *Commonwealth Workmen's Compensation Act* 1912 and instituted proceedings under reg. 10 of the *Workmen's Compensation Regulations* 1913 (Statutory Rules 1916, No. 124) in a District Court of New South Wales for the determination of the total amount of compensation payable, the persons who were dependants, and the amount of compensation payable to each dependant. The District Court Judge made an order determining those matters; and, in addition, directed that the moneys payable to certain of the dependants should be paid to the Secretary to the Treasury and by him invested and applied from time to time in a stated manner, and that the terms of investment and application might be revised by further order of the District Court. On the application of the Commonwealth an order *nisi* was granted by a Justice of the High Court for a prohibition, in accordance with Order XLVII. of Part I. of the *Rules of the High Court*, directed to the District Court Judge and the dependants, on the ground of alleged excess of jurisdiction.

Held, by *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Barton* and *Powers* JJ. dissenting), that the High Court had no jurisdiction under sec. 75 (III.) of the Constitution to make absolute the order *nisi* for prohibition:

By *Isaacs* J., on the ground that although the Commonwealth was a "party" within the meaning of sec. 75 (III.) it had no suitor's interest in the subject matter of the excess of jurisdiction;

By *Higgins*, *Gavan Duffy* and *Rich* JJ., on the ground that the Commonwealth was not, within the meaning of sec. 75 (III.), a "party" to the proceedings for prohibition.

Per Griffith C.J. The District Court Judge had no jurisdiction to make the directions above referred to.

PROHIBITION.

Douglas Thompson Cormie, a workman in the service of the Commonwealth, having died as the result of injuries received in the course of his employment in Sydney, a claim was made on behalf of his widow and children for compensation against the Commonwealth. The Commonwealth admitted liability under the *Commonwealth Workmen's Compensation Act* 1912, and a notice of motion was taken out in the District Court at Sydney on behalf of the Commonwealth for the determination of (1) the total amount of compensation payable by the Commonwealth, (2) the persons who were dependants, and (3) the amount of compensation

payable to each and every dependant. The District Court Judge found that the total amount payable for compensation was £500, of which the sum of £85 13s. 4d. had been paid to the widow. Of the balance, £414 6s. 8d., he found that £262 6s. 8d. was payable to the widow, and £30 was payable to one son, £70 to another son, and £52 to a daughter, of the deceased. He then directed that the sum of £414 6s. 8d. should be paid to the Secretary to the Treasury of the Commonwealth to be by him invested in such manner as he should, as trustee for the several dependants, think proper, and that out of the fund of £262 6s. 8d. there should be paid to the widow the weekly sum of £2 10s. towards the sustenance of the widow and her children living with her; that the fund of £30 should be invested until the son entitled to it should come of age, and should then be paid to him; that out of the fund of £70 there should be paid the weekly sum of 10s.; and that out of the fund of £52 there should be paid to the daughter the weekly sum of 10s. He further directed that each beneficiary should have the right to forego at any time and to any extent the payment of any instalment, and that the payments should otherwise continue until each several fund should be exhausted. He then ordered that, by future order of the Court, all or any of the terms on which, and the manner in which, the compensation was directed to be invested and applied might be varied from time to time and at any time and in any respect, including directions as to the disposition of the funds in trust for their benefit.

On the application of the Commonwealth, *Rich* J. granted an order *nisi* for a prohibition directed to the District Court Judge and the widow and three children to prohibit them from further proceeding in respect of the order and directions so far as they ordered and directed the manner in which the several sums determined to be payable should be dealt with, and so far as they provided for the future variation of the directions.

The order *nisi* was first argued on 18th and 21st August before *Griffith* C.J., *Isaacs* and *Rich* JJ., when the question whether the High Court had jurisdiction under sec. 75 of the Constitution to grant a prohibition in such a case was directed to be argued before a Full Bench.

The State of New South Wales obtained leave to intervene.

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Starke, for the Commonwealth. The difficult questions which arise in connection with the prohibition can be avoided by this Court now granting special leave to appeal, and the Commonwealth asks that that leave should now be granted. The provision in clause 2 of the Second Schedule to the *Commonwealth Workmen's Compensation Act* 1912 making the decision of a County Court final unless appealed from within the prescribed time, applies only to arbitrations, and not to a proceeding such as the present under reg. 10 of the *Workmen's Compensation Regulations* 1913 (Statutory Rules 1916, No. 124). This proceeding is a judicial one under sec. 4 (3) of the *Commonwealth Workmen's Compensation Act*. The power conferred by sec. 39 (2) (*c*) of the *Judiciary Act* to grant special leave to appeal is not taken away by clause 2.

[RICH J. May not this Court under Order LIII., r. 6, of the *Rules of the High Court* extend the time for appealing from the decision of the District Court ?]

That rule is applicable under rule 1 of Sec. V. of Part II.

[ISAACS J. But there is no jurisdiction to extend the time until the appeal is instituted (*Delph Singh* v. *Karbowsky* (1)).]

Mitchell K.C. (as *amicus curiæ*). Having regard to the provisions of clause 2 of the Second Schedule to the *Commonwealth Workmen's Compensation Act*, which is part of the Act, there is no power to grant special leave to appeal. The general provisions of sec. 39 (2) (*c*) do not override the provisions of the later special Act. Sec. 39 (2) (*c*) does not apply where an appeal is not permitted by the laws of the Commonwealth. The provision in clause 2 is an exception from the appellate jurisdiction of the High Court within the meaning of sec. 73 of the Constitution. Even if there were power to grant special leave to appeal, in this case no special circumstances have been shown.

Starke, in reply. Clause 2 does not take away jurisdiction. It is not a jurisdictional fact, but is a condition introduced for the benefit of a party and may be waived (see *Enders* v. *Rouse* (2)).

(1) 18 C.L.R., 197.

(2) 11 V.L.R., 827.

GRIFFITH C.J. The application must be refused. In my opinion it is not within the power of the Court to grant it. Jurisdiction to entertain appeals is given by the Constitution but is given "with such exceptions and subject to such regulations as the Parliament prescribes." By the express terms of clause 2 of the Second Schedule to the *Commonwealth Workmen's Compensation Act* the provision that the decision of a County Court, which term includes a District Court of New South Wales, is to be final is made subject to the condition that, unless an appeal is brought within the time prescribed by regulation, the decision is to be final. That is a clear exception of such a case from the jurisdiction of this Court to entertain appeals from such decisions, and, the time prescribed having expired, we have no jurisdiction to grant leave to appeal.

On the point of discretion, I think that every reason which can be suggested for refusing to exercise it in favour of an applicant exists in this case.

BARTON J. I agree.

ISAACS J. I think the leave should be refused because I think that the word "final" in clause 2 of the Schedule means without appeal except upon the conditions which follow. Whether those conditions can or cannot be waived in any particular case, I do not decide; but at the present moment they have not been waived, and certainly unless and until they have been waived this Court cannot grant leave to appeal.

As to the question of discretion, personally I do not take the same view as that expressed by the learned Chief Justice, because, supposing discretion existed, I should desire not to raise any unnecessary conflict as to the power of this Court over State tribunals, and therefore should be disposed to take the simpler course which has been suggested.

HIGGINS J. I agree with what has been said by the Chief Justice and my brother *Isaacs*.

GAVAN DUFFY J. I say nothing.

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POWERS J. I agree with what has been said by the Chief Justice.

RICH J. As at present advised, I do not feel the same certainty about the matter as the majority of the Court do, but the expression of the reason for my doubts will be of no avail.

Starke. The High Court has jurisdiction under sec. 75 of the Constitution to issue prohibition to a Judge of a District Court invested with federal jurisdiction. In this proceeding the Commonwealth is a "party" within the meaning of sec. 75 (III.). The Commonwealth is suing in the sense of proceeding. A proceeding to restrain a Court or a person from invading the rights of the Commonwealth or from attempting to enforce rights against the Commonwealth is within sec. 75 (III.). It is not necessary that the Commonwealth should be pecuniarily interested in order that it may be a "party" (*In re Debs* (1)). The Commonwealth is entitled to protect federal rights as a matter of public propriety, and may do so under sec. 75 (III.).

[HIGGINS J. referred to *Story's Commentaries on the Constitution of the United States*, 5th ed., sec. 1686.

GRIFFITH C.J. referred to *Story's Commentaries*, 5th ed., sec. 1674; *Quick and Garran on the Commonwealth Constitution*, p. 772.]

A prohibition is in many aspects the same as a cause. The High Court may under Order XLVII., r. 27, direct the prosecutor to deliver a statement of claim; when the proceedings are to be the same as in an action. The word "matters" in sec. 75 (III.) has the same meaning as in sec. 2 of the *Judiciary Act*, and so includes any proceeding in a Court. With that meaning it includes prohibition. The word "sue" means seek or request, and in this present proceeding the Commonwealth is seeking or requesting a remedy (see *In re Wallis' Trusts*; *Ex parte Wallis* (2)). The words "suing or being sued" should not be read as indicating that there must be an opposing party.

[HIGGINS J. referred to *Ede* v. *Jackson* (3).

GRIFFITH C.J. referred to *Hesketh* v. *Lee* (4).]

(1) 158 U.S., 564, at pp. 583, 586.
(2) 23 L.R. Ir., 7.
(3) Fortes., 345.
(4) 2 Saund., 94.

The District Court Judge in this case is an officer of the Commonwealth within the meaning of sec. 75 (v.) of the Constitution, and prohibition will therefore lie to him. The District Court being invested with federal jurisdiction, the Judge purporting to exercise that jurisdiction is, *pro hac vice*, an officer of the Commonwealth (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Brisbane Tramways Co. and Adelaide Municipal Tramways Trust* [*No.* 1] (1)). In sec. 75 (v.) the words "officer of the Commonwealth" have a wider meaning than in sec. 51 (xxxix.). They include any persons who are State officers and who are performing functions by direction of the Parliament of the Commonwealth. Sec. 75 should, if capable of different constructions, be so construed as to give the High Court effective control over all Courts exercising federal jurisdiction.

Mitchell K.C. (with him *J. A. Browne*), for the State of New South Wales. Chapter III. of the Constitution does not give the High Court jurisdiction to issue prohibition to a State Court invested with federal jurisdiction. The foundation of prohibition is that the royal prerogative has been infringed (*Shortt on Informations*, p. 444). If the royal prerogative has been infringed in this case it is the prerogative of the Sovereign in right of the State. There is no case in which prohibition has gone from the Court of what would in that sense be one sovereign power to a Court of another sovereign power. That distinction is recognized in *Sydney Municipal Council* v. *The Commonwealth* (2). The District Court Judge is not appointed by the law of the Commonwealth to execute the judicial power of the Commonwealth, but the District Court is by the law of the Commonwealth invested with certain federal jurisdiction, and it is the law of the State which appoints the District Court Judge to execute the jurisdiction of his Court including the jurisdiction conferred upon it by the Commonwealth Parliament.

[ISAACS J. referred to *United States* v. *Hartwell* (3).]

Assuming that sec. 75 (III.) of the Constitution would give this Court jurisdiction in certain cases to issue prohibition, it does not

(1) 18 C.L.R., 54, at p. 68.

(2) 1 C.L.R., 208, at p. 231.

(3) 6 Wall., 385.

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give that jurisdiction in the case of a State Court exercising federal jurisdiction. The primary object of sec. 75 (III.) is to give the High Court original jurisdiction in all matters in which the Commonwealth is concerned. If it would authorize prohibition to an inferior Court of a State, it would authorize prohibition to the Supreme Court of a State. The two cases cannot be distinguished. The Parliament of the Commonwealth has no power to authorize some other federal body to invest a State Court with federal jurisdiction. The particular federal jurisdiction said to have been exercised here was not given by the *Commonwealth Workmen's Compensation Act*, but by regulations made by the Governor-General under the authority of the Act.

Starke, in reply, referred to 7 *Comyns' Digest*, 5th ed., pp. 139, 141, *sub* "Prohibition," (C), (E); *Lloyd on Prohibition*, p. 55.

Cur. adv. vult.

Oct. 16.

The following judgments were read :—

GRIFFITH C.J. This is an order *nisi* for prohibition, granted in accordance with the practice prescribed by Order XLVII., and directed to a Judge of a District Court of New South Wales invested with federal jurisdiction, the ground of the application being a suggested usurpation or excess of jurisdiction by the District Court in a matter instituted in that Court to which the Commonwealth *eo nomine* was a party.

A preliminary point was raised, to the effect that the High Court has not original jurisdiction to entertain such an application. As the point is one of great and general importance it was directed that it should be argued before a Full Bench.

Sec. 75 of the Constitution provides (pl. III.) that the High Court shall have original jurisdiction in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party. The words "or a person suing &c." are parenthetical, and do not grammatically affect the words "in which the Commonwealth is a party." See *Duke of Devonshire* v. *O'Connor* (1).

(1) (1890) 24 Q.B.D., 468, at p. 478.

I will venture to state some propositions which seem to me elementary, premising that the Australian Constitution, like other great instruments of government, deals with substantive rights and not with technicalities of procedure. For instance, it speaks of "proposed laws," not of "bills," and says nothing about first, second, and third readings.

The propositions are these :—In sec. 75

(1) The term "matter" includes any case whatever in which the exercise of the judicial power of the Commonwealth is invoked :

(2) A proceeding in which the exercise of that power is invoked to restrain usurpation or excess of jurisdiction by an inferior Court is therefore a "matter" :

(3) The person by whom or against whom that exercise is invoked is a party in the "matter" :

(4) If the Commonwealth is aggrieved by such an usurpation or excess by an inferior Court, it may as a party invoke the exercise of the judicial power to restrain it :

(5) The name in which a sovereign State may invoke the exercise of judicial power in any Court, or under which that exercise may be invoked against it, is a matter of procedure, largely, though not altogether, governed by positive law. In the United Kingdom, for instance, the King invokes the exercise in the name of his Attorney-General. The exercise is invoked against him (in permitted cases) in his own name. In the United States of America the designation "United States" is used in both cases. In the Australian States the practice is various. The right of the Commonwealth to invoke the judicial power in its own name is expressly recognized by the provision in debate.

The question, then, is whether the present case is such a "matter." The question appears to answer itself.

There are few things more embarrassing than to be called upon to prove the truth of an elementary proposition or the meaning of a word in common use. But I suppose it is accurate to say that when a word has always been used in a particular context to designate a particular concept, then when used in that context it means that concept. This is a mere truism.

Ever since the time of Edward I. the word "prohibition" has

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been used in English jurisprudence to denote a judicial proceeding in which one party seeks to restrain another from usurping or exceeding jurisdiction. It is now, for the first time, I think, in legal history, suggested that it does not mean any such thing. I have done my best to appreciate the grounds upon which this suggestion is based. So far as I can understand them they are twofold: first, that the person at whose suit a writ of prohibition is granted will not be a party to the writ when granted, and, second, that under the Rules of Court the preliminary proceedings are to be entitled *Rex* v. *A.B. Ex parte C.D.* To the first argument I reply that the question for decision is not whether the person who asks for the grant of the writ will be a party to the writ after grant, but whether he is a party to the application for it. The history of the writ makes it quite clear that an application for a prohibition has always been regarded as a proceeding *inter partes*, the parties being often described as plaintiff and defendant in prohibition. In the reports the preliminary application was sometimes reported under the heading of the name of the case in which jurisdiction was alleged to have been usurped or exceeded (*e.g.*, *Remington* v. *Dolby* (1)), sometimes under the words "In the matter of" the person against whom the writ was sought (*e.g.*, *In the Matter of the Dean of York* (2)), and sometimes, as under our rules, under the heading *R.* v. *A.B.* (*e.g.*, *R.* v. *Bishop of Ely* (3)). The King is, in truth, no more a party to the application than he is to any other suit in which the judgment is executed by a writ in his name. For prohibition is a writ issued after judgment given in an independent litigious proceeding, and not a writ originating a proceeding. As to the second ground, it is manifest that the circumstance that by the practice of the Court a particular title or the absence of any title is prescribed cannot affect the nature of the proceeding itself.

At one period certain fictions, analogous to the fiction of the lessor of the plaintiff in an action of ejectment, were introduced in the practice of the Court of King's Bench regarding prohibition. These fictions were not applied to applications for prohibition in the Courts of Common Pleas and Exchequer, and they were long since abolished by a Statute of William IV. None of them affected the substantial

(1) 9 Q.B., 176. (2) 2 Q.B., 1. (3) 1 W. Bl., 71.

character of an application for prohibition as I have already described it.

It is also suggested that the Constitution could not have intended to allow a direct order to be made by the High Court against a State Court. A complete answer to this suggestion is to be found in the language of *Isaacs* J. in the case of *R.* v. *Registrar of Titles (Vict.)* (1), to which I will only add that, when a person usurps a jurisdiction which, if he had it at all, he would have by virtue of a federal law, a restraint imposed upon such usurpation is not in any conceivable sense an interference with a State instrumentality.

The argument *à priori* as to constitutional powers is always dangerous, and, in my opinion, inadmissible. But, if it is treated as admissible, it cannot be better answered than in the words of *Story* J. (*Commentaries*, sec. 1674) :—" It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national Courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own Courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals. And there would not only not be any compulsory power over those Courts to perform such functions, but there would not be any means of producing uniformity in their decisions. A sovereign without the means of enforcing civil rights, or compelling the performance, either civilly or criminally, of public duties on the part of the citizens, would be a most extraordinary anomaly. It would prostrate the Union at the feet of the States. It would compel the national government to become a suppliant for justice before the judicature of those who were by other parts of the Constitution placed in subordination to it."

The *à priori* argument must therefore be rejected.

It is further contended for the Commonwealth that the case is within pl. v. of sec. 75 of the Constitution, which confers on the High Court original jurisdiction in all matters in which a writ of

(1) 20 C.L.R., 379, at p. 388.

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mandamus or prohibition is sought against an officer of the Commonwealth. The operation of that provision is not limited to applications made by the Commonwealth for relief against refusal or usurpation of jurisdiction, but extends to give redress to all private citizens prejudiced by such refusal or usurpation. I agree with the opinion expressed by *Barton* J. in the *Tramways Case* [*No.* 1] (1) that a Judge of an inferior Court of a State exercising federal jurisdiction is *pro hac vice* to be regarded as a judicial officer of the Commonwealth.

If this is not so, the Commonwealth has not, and cannot acquire, any remedy in its own Courts against the refusal or usurpation of jurisdiction by an inferior Court of a State to its prejudice. Under sec. 77 of the Constitution the Parliament has authority to make the jurisdiction of the High Court exclusive in any case falling within sec. 75. I can hardly conceive of any matter more fitting to be brought under this provision than the control of inferior State Courts invested with and assuming to exercise federal jurisdiction. A contrary view would let in all the evils adverted to by *Story* J.

On both grounds I am of opinion that this Court has jurisdiction to entertain the present application. The preliminary objection should, therefore, be overruled.

I will deal with the merits separately.

BARTON J. As to sec. 75 of the Constitution, sub-sec. III., I think that all the propositions laid down by the learned Chief Justice are amply sustained, and that therefore the objection taken on behalf of the State of New South Wales must fail. See the reasoning of *Brewer* J., delivering the opinion of the Supreme Court of the United States in the case of *In re Debs* (2) upon words in the Constitution of the United States similar to those of sec. 75 (III.). See also the case of *R.* v. *Registrar of Titles* (*Vict.*); *Ex parte the Commonwealth* (3), in which the Chief Justice and my learned brother *Isaacs* used words strongly sustaining the present contention of the Commonwealth. My learned brothers *Higgins*, *Gavan Duffy* and *Rich* rested their judgments on the construction

(1) 18 C.L.R., 54, at p. 68.
(2) 158 U.S., 564, at pp. 584 *et seq.*
(3) 20 C.L.R., 379, at pp. 387, 388.

of certain Statutes, and seem to have assumed, no doubt only for the purpose of argument, that the Commonwealth was a party to that proceeding. It was a "matter" within the meaning of sec. 75; an application by the Commonwealth for a mandamus to be directed to the Registrar of Titles of Victoria. My learned brother *Powers* also decided on grounds of statutory construction, and did not think it necessary to consider the constitutional question. My learned brother *Isaacs* concluded his cogent reasoning on this question in these words: "If this power did not exist, then the Commonwealth, for the protection and assertion of its rights, would be driven to enter the State Courts." That is a result which can scarcely be attributed to the framers of the Constitution as their intention, for it would mean that in respect of a portion of those rights which is not only considerable in extent, but of the highest importance and value, the Commonwealth would find the doors of its own Courts barred against it. Now, I do not think there is any ambiguity in the provision debated; but, if there were, the result pointed out by my learned brother would be of great assistance in solving the ambiguity. It is in that regard that the passage quoted by the learned Chief Justice from *Story's Commentaries*, sec. 1674, is as important as it is interesting; for as between the construction that a supreme executive power, owning also great proprietary interests, has, and the construction that it has not, the right to assert its interests in its own Courts, it would be absurd to contend that the former is not the more reasonable, in fact the only reasonable, interpretation. To repeat a few words of the learned commentator, such a conclusion "would compel the national government to become a suppliant for justice before the judicature of those who were by other parts of the Constitution placed in subordination to it."

As to sub-sec. v. of the same section of the Constitution, a passage has been cited from my judgment in the *Tramways Case* [*No.* 1] (1). As in my view the position of the Commonwealth in this case is supported by the third sub-section, it is not necessary to refer in detail to the opinion I then expressed. But I ought to

(1) 18 C.L.R., 54, at p. 68.

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say that I shall not qualify it unless convinced by some future argument that it is erroneous.

I think, therefore, that the preliminary point must be overruled.

ISAACS J. The Commonwealth applies for a common law writ of prohibition against Judge *Murray* and certain private persons. The prohibition sought is to restrain them from further proceeding with a certain order made by the learned Judge as Judge of a District Court of New South Wales, which for the purpose of the federal Act (No. 29 of 1912) under which the order was made is called a "County Court." It is essential for the determination of this case to examine carefully the nature of the order complained of as having been made without jurisdiction.

An employee of the Commonwealth suffered injuries in the service from which he died, and his dependants applied for compensation under the Act. An order was made which determined: (1) the liability of the Commonwealth to pay compensation; (2) the total amount of compensation payable by the Commonwealth; (3) who were dependants; (4) the amount payable to each dependant; (5) that the moneys be paid to the Secretary of the Commonwealth Treasury. So far no objection is raised to the validity of the order. The Commonwealth is so far bound to pay over the amount awarded to the prescribed authority and is thereupon discharged, just as any private employer would be in a like situation. Then the order proceeded to declare: (6) that the moneys to which certain of the dependants are entitled should, when paid to the Secretary of the Treasury, be by him invested and applied in a stated manner. That is challenged as being made without jurisdiction, and I agree it is. But if the matter stood there, prohibition would not be an appropriate remedy, because prohibition does not correct or reverse or alter what has been done; but it is for the sole purpose of *preventing* something being done by a Court in the future; and so far the order prescribes nothing to be done, and nothing could be done by a Court in the future (*Denton* v. *Marshall* (1)). Appeal is one remedy for such a case; mandamus to the officer to pay the money according to law is another. The officer is not a party

(1) 1 H. & C., 654, at pp. 660, 661.

here. But the order goes on further to declare: (7) that the ordered terms of investment and application might be revised by further order of the Court on application. That does relate to the future action of the Court, and is matter for prohibition in a competent proceeding, and, as I read the order, this portion, which is equally unwarranted with the sixth subject ordered, is so bound up with it as to make both 6 and 7 together one unified direction and subject, apart from other objections, to the ordinary law of prohibition.

But one thing is clear, and is, in my view, of supreme and decisive importance in this case. The only portion of the order which concerns the Commonwealth as an employer, and therefore as a suitor in the District Court, is perfectly right. Its liability, the total amount of its liability, its separate liability to each dependant, and the hand into which its money is to be paid, are all matters which are lawfully stated. And there the Commonwealth's interest *under the Act* entirely ceases. Whatever becomes of the money after it reaches the hands of the prescribed authority does not concern the Commonwealth, except perhaps in a totally different capacity, namely, its governmental capacity. The prescribed authority, who happens to be the Secretary to the Treasury, has a personal duty prescribed by the law itself not performable by other persons and not to be performed under the direction of the Commonwealth Government. His obligation to deal with the money is towards the dependants (*Fulton* v. *Norton* (1)), and not towards the Commonwealth, and it is they, and they alone, who would enforce the officer's obligation, because they alone (see *Ivey* v. *Ivey* (2)) are interested in its proper application. (*Halsbury's Laws of England*, vol. xx., par. 463.) This position is clear from a consideration of the fact that, where death does not ensue, the money is payable to the injured person direct, except weekly payments where disability exists (clause 6 of the First Schedule), and in case of death is payable either to the prescribed authority (under clause 5) or, where agreed, to certain private persons direct (*ibid.*). The prescribed authority is in this respect in the position of a trustee appointed by law and

(1) (1908) A.C., 451.

(2) (1912) 2 K.B., 118.

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holding moneys to which private persons are entitled as *cestuis que trustent*.

Now the question is whether under sec. 75 of the Constitution the Commonwealth can in these circumstances obtain a common law writ of prohibition against a State Judge exercising the federal jurisdiction of a State Court under the Act referred to. The distinction between a public officer acting as the agent of the State and as a person having independent duties imposed by law is clear. The answer to the question stated depends upon the application of two sub-clauses, the third and the fifth of sec. 75 of the Constitution. No other ground was suggested, and therefore no other calls for any opinion.

Sub-sec. v. of sec. 75 relates to "an officer of the Commonwealth." It has been urged that the Judge of a State Court when exercising federal jurisdiction is "an officer of the Commonwealth" *pro hac vice*. I cannot agree with that contention.

The Constitution, by Chapter III., draws the clearest distinction between federal Courts and State Courts, and while enabling the Commonwealth Parliament to utilize the judicial services of State Courts recognizes in the most pronounced and unequivocal way that they remain "State Courts." No reference is made to State Judges. Federal jurisdiction may be entrusted to State Courts, and, if so, the Judges of those Courts exercise the jurisdiction not because they are "officers of the Commonwealth"—which they are not—but because they are State officers, namely, Judges of the States. An "officer" connotes an "office" of some conceivable tenure, and connotes an appointment, and usually a salary. How can it be said that a State Judge holds a Commonwealth office? When was he appointed to it? He holds his position entirely under the State; he is paid by the State, and is removable by the State, and the Constitution knows nothing of him personally, but recognizes only the institution whose jurisdiction, however conferred, he exercises. If, for instance, a State Court exercises the powers conferred by the Imperial *Merchant Shipping Act* 1894 under sec. 711, it cannot be said the Judges who do so are "officers of the United Kingdom." If any State Judges are "officers of the Commonwealth," then all are, including the Supreme

Court Judges, for the Constitution does not differentiate between the officer except so far as the inherent nature of prohibition or mandamus requires that the officer must be someone not a member of the tribunal to which the application is made, or superior to it. The expression " officer of the Commonwealth " has not a fictional meaning. It has a real meaning that the person referred to is individually appointed by the Commonwealth; and therefore the Constitution takes his Commonwealth official position as in itself a sufficient element to attract the original jurisdiction of the Commonwealth High Court, supposing, of course, the " matter " is of the requisite nature. The phrase " officer of the Commonwealth " is found in sub-sec. XXXIX. of sec. 51 in the same sense. See also the term " officers " in secs. 64, 67 and 84, which strengthen the view I have indicated.

So far as sub-sec. v. of sec. 75 is concerned I am of opinion that this Court has no original jurisdiction in the present case.

Then it was urged that the case fell within sub-sec. III. This is a more difficult question. To some extent I have already expressed my views on the sub-section in the case of *R.* v. *Registrar of Titles (Vict.)* (1). I adhere to what I said in that case on the subject; but the question now to be determined did not arise, and therefore could not be decided, in the case referred to. The right there urged as the foundation of the application for mandamus was carefully described both by the learned Chief Justice and myself. The Chief Justice said (2) :—" The Registrar of Titles is called upon by a competent party to do an act which he is required to do by the law of Victoria. An enforcement of the laws of a State at the suit of a private suitor cannot in any intelligible sense be called an interference with the executive functions of the State." " Private suitor " in that case meant clearly a suitor in right not of sovereignty but of proprietorship. For myself, I first ascertained the proprietary interest of the Commonwealth as suitor, as distinguished from its sovereign character. I emphasized the " personal " right, and said (3) :—" The claim by the Commonwealth is not made in any governmental capacity, but in its proprietary capacity, just as any private

(1) 20 C.L.R., 379, at p. 388.
(2) 20 C.L.R., at p. 387.
(3) 20 C.L.R., at p. 390.

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individual would claim in a similar case. The distinction between the two is clear and broad." If there be alleged an antecedent legal right, the claim made in respect of it is a "matter" within the meaning of sec. 75. I adhere to the words I used in the case referred to "that the word 'matters' includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties" (1). If that were not correct, and if the mere fact that the Commonwealth commenced a proceeding in its own name were sufficient to constitute a "matter," then it could intervene in every case in other Courts exercising federal or State jurisdiction throughout Australia, where private persons alone were interested, and if jurisdiction were exceeded could invoke the original jurisdiction of this Court to restrain it. That is an impossible position.

Testing this case by the standard I have set, I ask: "How has the District Court Judge, by ordering the person designated by law as the dependants' trustees to invest and distribute the moneys in a particular way, affected any legal right of the Commonwealth, civil or criminal?" It is undoubted law that, though a litigant is interested in a suit, he is only entitled *quâ party* to get that part of it prohibited in which he is interested. In all other respects he is a stranger (*per Cockburn* C.J. in *Forster's Case* (2)). The interest which every sovereign has in the lawful discharge of public duties by persons individually entrusted with them is not an interest which can be made the subject of litigation. If it were, then where an officer refused to perform some duty demanded of him the Commonwealth could get a mandamus, and this Court would have to try the question of executive duty.

But if such a violation could be shown here as existed in *R.* v. *Registrar of Titles* (*Vict.*) (3), if, for instance, the Commonwealth were defending or enforcing any proprietary right, or any recognized legal right whatever—not political,—that is, where, as *Hale* C.B. said in *Pawlett* v. *Attorney-General* (4), "the King is in here, and

(1) 20 C.L.R., at p. 388.
(2) 4 B. & S., 187, at pp. 198, 199.
(3) 20 C.L.R., 379.
(4) Hardres, 465, at p. 467.

not by his prerogative," it might sue in this Court in original jurisdiction to establish and enforce the right. On the one ground that I have stated, namely, that on the face of the proceedings it clearly appears there is *no such right*—which fundamentally distinguishes this from the Registrar's case,—I am of opinion that the case turns out now not to be a "matter" within the meaning of sec. 75, and the application should be dismissed. It resembles the Indian case decided by the Privy Council to which I made reference in *State of South Australia* v. *State of Victoria* (1), in this respect, that the applicant indicates no legal right resident in itself which any Court can adjudicate upon. Whatever interest it has in the officer performing his duty is a political interest.

In the view I have taken, it is not in strictness necessary to consider another essential condition of jurisdiction, namely, whether the Commonwealth is a "party." But not only is it desirable to express an opinion upon this point, which has been most fully argued, for the sake of its own importance as affecting a salient part of the Constitution, and which has led to a difference of opinion in this Court, but its consideration helps greatly to elucidate and enforce the first point with which I have already dealt.

I agree that the sub-section contemplates "the Commonwealth suing" or "being sued" either in its own "person," so to speak, or by some natural person—not the King or his representative, the Attorney-General—on its behalf. The Commonwealth or that natural person must be a "party" on the face of the proceedings, familiarly called the "record." But, as I said in *R.* v. *Kidman* (2), I do not think that when the Commonwealth is sued in its own "person" the precise name of "The Commonwealth" must of necessity be used. "The Commonwealth" in point of law is short for "the King in right of his Commonwealth," and a suit by or against "The King in right of the Commonwealth of Australia," or simply "The King," where the title could mean only in relation to the Commonwealth, would, in my opinion, be a sufficient precedural compliance with the requirements of sub-sec. III. of sec. 75.

It has been to some extent assumed that the very name of "The Commonwealth" must be used; and this assumption was to some

(1) 12 C.L.R., 667, at p. 721.

(2) 20 C.L.R., 425, at p. 446.

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extent at least, rested on the analogy of the American Constitution, and decisions under it. But those decisions do not support it. What was said in *Osborn* v. *Bank of United States* (1) by *Marshall* C.J. must be read with the case of *Governor of Georgia* v. *Madrazo* (2) and with *Ayers' Case* (3); and these cases, read together, draw the distinction on which I personally rest this case, namely, the personal duty of an officer under the law as contrasted with his duty as representing the State, which in that event is supposed to be itself performing the duty by his agency.

Examining the present position apart from those cases, it is plain that the name of "The King" does not in itself conclusively satisfy the requirement of sub-sec. III. as to the Commonwealth being a party. "The King" would be the heading even if the applicant were a private person, and even if that private person were seeking to prohibit the Commonwealth as respondent. That shows that "The King" in this connection means the King in his character of supreme guardian of the administration of royal justice, and not as a suitor interested in the subject matter. Therefore the question comes to this: "*Is an application by any private person for a writ of prohibition a suit to which he is a party?*" I use the term "suit" in the larger sense as any proper proceeding in the Court for redress in respect of an alleged breach of law. Whatever forms the law prescribes must, of course, be followed, but conforming to that the proceeding is a "suit." The point is not without high authority. It arose directly in America as a point of common law, and was decided by *Marshall* C.J. in clear terms. Any decision on such a point by that consummate jurist is welcome.

In *Weston* v. *Charleston Corporation* (4) the Court entertained an appeal where its jurisdiction depended on whether a writ of prohibition was a suit. The learned Chief Justice said (5):— "Is a writ of prohibition a suit? The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a Court of justice, by which an individual pursues that remedy in a Court of justice, which the law affords him. The

(1) 9 Wheat., 738.
(2) 1 Pet., 110.
(3) 123 U.S., 443, at pp. 487 *et seqq.*
(4) 2 Pet., 449.
(5) 2 Pet., at pp. 464, 465.

modes of proceeding may be various, but if a right is litigated between parties in a Court of justice, the proceeding by which the decision of the Court is sought, is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a Court; and at his suggestion, a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals; and, in the highest Court, the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit." Every element is mentioned: "party," "party aggrieved," "suit," "right," "suggestion," "writ of prohibition." That case has been followed in 1915 in *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.* (1).

The question is: Does this correctly state the common law? After a careful search for and examination of the authorities, I believe it does. The circumstances require me to state my reasons.

A common law writ of prohibition must always be sued out in the name of the Crown, or in America in the name of the State (see *per Gray* C.J. in *Connecticut River Railroad Co.* v. *County Commissioners* (2)). Consequently, if using the name "The King" as in the present instance, which necessarily means the King in right of the Commonwealth, precludes the Commonwealth as a party, then under sub-sec. III. no common law prohibition is in any case possible in the original jurisdiction of this Court, notwithstanding the carefully phrased extensiveness of the language of the sub-section, because no person suing on its behalf could be made more completely a party than the Commonwealth itself is here.

The English authorities bearing on the subject are bewildering in their number and diversity; they begin at a very early date in our law, and have developed in a manner that makes them difficult, and sometimes impossible, to reconcile. Notwithstanding the very decided opinion of Lord *Esher* (when *Brett* J.) in *Worthington* v. *Jeffries* (3), which certainly occasioned hesitation, I conclude that at all events in 1900, when the Constitution was passed, and

(1) 240 U.S., 30.

(2) 127 Mass., 50, at p. 59.

(3) L.R. 10 C.P., 379, at p. 382.

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in my opinion very much earlier, the law regarded prohibition not only as a means of safe-guarding the royal prerogative at the suit of the King, but *also as a means of protecting the subject at his own suit* from any unwarranted assumption of judicial jurisdiction with which he was actually threatened. As a consequence a person applying for relief to himself is in my opinion a "party." If refused, he could appeal, and he would certainly be a "party" to the appeal. *Cockburn* C.J. in *Martin* v. *Mackonochie* (1) expressly speaks of the "parties" to the application for a prohibition in a sense which includes the applicant.

I do not base my opinion upon the circumstance that in prohibition cases there may be pleadings and that the party applying might be compelled to declare. The meaning of that procedure is very clearly stated in the notes to *Croucher* v. *Collins* (2). "The action for prohibition," according to those notes and the authorities cited, was founded on a fiction or series of fictions. So also *Hall* v. *Maule* (3). In imagination, and in imagination only, an original writ of prohibition was issued out of the Chancery, was duly served, was possibly followed by an *alias* and a *pluries*, and these were all disobeyed, and there was therefore an imaginary contempt by reason of which the applicant was compelled to proceed before the inferior Court and thereby suffered damage, and thereupon also the Courts of common law entertained an action for prohibition consisting of pleadings. *Willes* J. confirms this view in *London Corporation* v. *Cox* (4).

The origin of the attachment is explained in the *Anonymous Case* (5). The original writ of prohibition was not returnable (*Coke*, 4 *Inst.*, 81). The new action was supposed to be commenced by an independent but, in the circumstances, quite imaginary proceeding called a writ of attachment, which was in theory returnable, and on this the pleadings proceeded. See also *Blackstone*, vol. III, p. 112. The old practice of pleadings therefore does not touch the real point at issue here, which is whether the initial application for the prohibition is a suit to which the applicant is a party. The old

(1) 3 Q.B.D., 730, at p. 783.
(2) 1 Saund., 136.
(3) 4 A. & E., 283, at p. 285.
(4) L.R. 2 H.L., 239, at pp. 277, 288.
(5) 3 Salk., 289.

practice lasted till 1831, when by the Act 1 Will. IV. c. 21 the fictions were abolished, suggestions were rendered unnecessary in all the Courts, and the action made one on behalf of the subject only and not of the King. This Act was adopted in Australia, as, for instance, in Victoria by Act No. 274 (*Common Law Procedure Statute* 1865), sec. 245.

The initial process was originally in a form which throws much light on the subject and helps to elucidate much of what is at first sight confusing. As early as 1548 the law, by the Act of 2 & 3 Edw. VI. c. 13, sec. 14, spoke of the matter thus: "If any party . . . *sue for any prohibition* in any of the King's Courts where prohibitions before this time have been used to be granted, that then in every such case the same party, before any prohibition shall be *granted to him or them*, shall bring and deliver to the hands of some of the Justices or Judges of the same Court where such party *demandeth* the prohibition, the very true copy of the libel depending in the Ecclesiastical Court, concerning the matter wherefore the *party demandeth the prohibition*; and under the copy of the said libel shall be written the suggestion wherefore the party so demandeth the said prohibition." Then the section provides that, unless the suggestion be proved true within six months, the *party prohibited* may on his "request and suit" have a consultation, and recover double costs and damages against "the party that so *pursued the said* prohibition." This Act was applied as late as 1823 by Lord *Eldon* L.C. in *In re Magor* (1).

Though a prohibition might be granted not only by the King's Bench but also by other superior Courts, there was a certain difference that marks the point we are considering very distinctly, and which, as it occurs to me, solves the whole difficulty. The King's Bench was *par excellence* the King's Court, it was in theory *coram ipso rege*, and was the supreme Court of common law in the Kingdom (*Blackstone*, vol. III., p. 41), and part of its functions was to keep all inferior jurisdictions within the bounds of their authority. It also protected the liberty of the subject by speedy and summary interposition (*ibid.*, p. 42). But it had two sides, the Crown side and the civil side, its complete civil jurisdiction being accomplished only

(1) 1 Turn. & R., 314, at p. 319.

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by means of fiction. It was on the Crown side that prohibition issued to restrain inferior jurisdictions. And, according to *Blackstone* (*ibid.*, p. 112), properly speaking the prerogative writ issued only out of the King's Bench, " but," adds the learned author, " *for the furtherance of justice*, it may now also be had in some cases out of the Court of Chancery, Common Pleas or Exchequer." That was as late as 1768. The Court of Common Pleas therefore also issued prohibition. Then comes the distinction to which I refer, and which I think determines the matter. The Court of Common Pleas was essentially the subjects' Court, and Magna Charta expressly fixed that Court at Westminister so that suitors might not be harassed with following the King's person. *Eyre* C.J., in *Jefferson* v. *Bishop of Durham* (1), said it was " emphatically a Court of pleas between party and party; though the Crown may elect to proceed here for the maintenance of its civil rights." " All the King's Courts have an equal right to grant prohibitions," said Lord *Mansfield* in *R.* v. *Bishop of Ely* (2).

In both the Court of King's Bench and the Court of Common Pleas the application for a prohibition was founded in the first place on a suggestion of usurpation or encroachment of judicial authority. But in an early case in the reign of Charles I. it was pointed out that the position was not the same in both Courts in respect of the mode in which an application for prohibition became a suit of the party applying. In *Dixye* v. *Brown* (3), called also *Watkin's Case* (4), it was held by the King's Bench that a prohibition may be there granted on a " bare surmise " without any suggestion of record, and is then only in the nature of a " commission prohibitory " which is discontinued by demise of the King, unless it has, in the meantime, been followed by other process. The Court said " but if attachment issues and returns, or if the party appears and puts in bail, *then* it becomes the *suit of the party* and there is no discontinuance by demise of the King." But in the Common Bench, said the Court, a prohibition cannot be awarded until the suggestion be of record, adding: " And for that the *prohibition is the suit of the party* and shall not be discontinued by demise of the King."

(1) 1 B. & P., 105, at p. 128.
(2) 1 W. Bl., 71, at p. 81.
(3) Noy, 77; Pal., 422.
(4) Lat., 114.

The authorities frequently speak of a party "suing a prohibition" or "suing out a writ of prohibition": See *Lyss* v. *Watts* (1). *Sellon's Practice* (vol. II., p. 312), on the authority of this case, describes the proceeding in the Common Bench as "the suit of the party." I am indebted to my learned brothers *Duffy* and *Rich* for a reference to *Sellon's* work. In *Comyns' Digest*, "Prohibition" (E), it is stated that "a prohibition may be sued by him in the reversion, if a libel be for tythes against his lessee." See *Bacon's Abridgement*, "Prohibition," p. 568, where it is stated that no man is entitled to prohibition unless he is in danger; and, p. 569, where the author uses the expression "sue a prohibition." In contradistinction to the party, the same work points out (p. 568), as to a *stranger*, that anyone may pray a prohibition *for the King*. In *Anonymous* (2) the Lord Keeper recognized that a prohibition might go "at the suit of a party" or "for the King," and that though it might be refused in certain cases to the party it would go for the King. As to procedure in Chancery, Lord *Hardwicke* as early as 1749 (*Worcester Corporation* v. *Bennet* (3)) laid it down that all motions for prohibition were to be grounded on affidavit, not suggestion. The same rule was affirmed in 1775 by Lord *Mansfield* in *Caton* v. *Burton* (4). The Act 1 Will. IV. c. 21 already referred to made it necessary in any case to file a suggestion on any application for a writ of prohibition, and provided that the application might be made on affidavits only. Since then, as *Willes* J. points out in *Cox's Case* (5), there must always be an affidavit—that is, as the mode by which the applicant must proceed.

At this time, 1831, at all events, it seems to me to be quite clearly recognized in all Courts, that a party improperly harassed by usurpation of judicial authority is entitled to demand a prohibition if he informs the Court so as to make its conscience clear that usurpation has been attempted. The superior Courts which came at last to be co-ordinate Courts, and though in some degree retaining separate ancient characteristics, became tribunals where the subjects of the King might equally obtain relief from any unwarranted assumption of judicial authority. And for this, while the declared foundation

(1) 1 Cro. Eliz., 277.
(2) 1 Vern., 300.
(3) 1 Dick., 143.
(4) Cowp., 330.
(5) L.R. 2 H.L., at p. 290.

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for interposition by way of prohibition was the guardianship of the royal prerogative of justice, the occasion might be either the King's application on the information of a stranger, or the request for relief of the harassed subject. For instance, in *Chabot* v. *Viscount Morpeth* (1) Lord *Campbell* C.J. said that the Court ordered the plaintiff to declare in prohibition on a strong representation by his counsel "that he had sustained a grievous wrong" and that he had no other remedy. The subject had in such a case a right to the Court's interposition.

In *In re Knowles* v. *Holden* (2) the Court of Exchequer granted a prohibition and *Pollock* C.B. said (3): "A party has a *right* to the interposition of the Court, where an inferior Court exceeds its jurisdiction." True, the summary remedy would not go unless the conscience of the Court was clear as to the usurpation, and the party asking for it must make out a clear case (*In re Birch* (4)). The right of the party is not absolute; that is, though the writ is of right when the Court's conscience is clear, he cannot claim the writ as of course, in the same way as he might obtain an ordinary writ of summons. He must, as *Willes* J. points out in *Cox's Case* (5), make a special application to the Court upon affidavit and convince the Court of the want of jurisdiction asserted. If the defect is apparent on the facts of the proceedings, the Court is bound to accede to his request; if the defect requires evidence, the party has a right to furnish it unless he has "by misconduct or laches lost his right." The application is then refused, not because the Court refuses to prohibit usurpation, but because the usurpation does not appear and the applicant has lost the right to make it appear. In the latter case the party is left to the ordinary remedy if any wrong is done (*In re Birch*). *Farquharson* v. *Morgan* (6) confirms the view of *Willes* J. that the party has a *right* to the writ. He is therefore not a mere informant, but is entitled to relief *ex debito justitiæ* (*Forster's Case* (7), cited with approval by *Willes* J. in *Cox's Case* (8)).

(1) 15 Q.B., 446, at p. 457.
(2) 24 L.J. Ex., 223.
(3) 24 L.J. Ex., at p. 224.
(4) 15 C.B., 743, at p. 755.
(5) L.R. 2 H.L., at p. 279.
(6) (1894) 1 Q.B., 552.
(7) 4 B. & S., 187.
(8) L.R. 2 H.L., at p. 280.

The case of *Ex parte Evans* (1) well illustrates the position of a person applying for prohibition. The affidavits cannot be entitled in a cause, because there is no cause. Even the words "In Prohibition" were wrong, because until the Court accedes there is no cause of prohibition in the Court in any sense. But, as *Wightman* J. said in *Evans's Case* (2), the rule *nisi* for prohibition is "the first step towards that object." Now, a party who takes the first recognized step to obtain a writ of prohibition thereby begins his "suit" or "pursuit" of the writ. *Coke* says "an action is the legal demand of a man's right" (*Co. Litt.*, 285*a*), which accords with the judgment of *Marshall* C.J. in *Weston* v. *Charleston Corporation* (3).

In my opinion, therefore, so far as procedure is concerned, the Commonwealth is properly in Court under sub-sec. III. of sec. 75 and is in the strictest sense a "party" to what is for convenience called the "record." It fails, in my judgment, only because there is no substance behind the form, the Commonwealth has no suitor's interest whatever in the subject matter of the excess of jurisdiction, and therefore there is no original jurisdiction in this Court to grant the prohibition.

HIGGINS J. An order *nisi* has been made against a Judge of a New South Wales District Court and the widow and children of one Cormie to show cause why a writ of prohibition should not issue, directed to the Judge and the others, to prohibit them from proceeding further upon an order made by the Judge on 1st May 1916.

The nature of the proceedings which led to the order made by the District Court Judge on 1st May has been stated; a full Court consisting of three Justices of this Court has heard arguments on the question as to the jurisdiction of the learned Judge to make the directions to which objection is taken; and the only point as to which the three Justices have invited the attendance of the full bench of seven is this—assuming that the directions given are beyond the powers of the District Court Judge, has the High Court power to make the order *nisi* absolute?

(1) 2 Dowl. (N.S.), 410. (2) 2 Dowl. (N.S.), at p. 412.
(3) 2 Pet., 449.

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It has been already decided that there can be no appeal against the order, because the time for appealing has expired under clause 2 of the Second Schedule to the *Commonwealth Workmen's Compensation Act*.

The question turns on sec. 75 of the Constitution. In the first place, it is urged that the prohibition sought is sought "against an officer of the Commonwealth," and that therefore this Court has original jurisdiction. The answer is that a District Court Judge of New South Wales is not an officer of the Commonwealth. It is true that he was exercising federal jurisdiction under a Commonwealth Act; but he remains an officer of New South Wales, selected by New South Wales, paid by New South Wales, removable by New South Wales, responsible to New South Wales. The District Court has been invested with certain federal jurisdiction under sec. 77 (III.); but the fact that additional powers have been conferred upon that Court by the Commonwealth Parliament no more makes the Court, or the Judge, an officer of the Commonwealth than the gift of a rifle by the British Government to a Belgian soldier would make the latter a British soldier.

Then it is urged that sec. 75 (III.) applies, which gives to the High Court original jurisdiction "in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party." It is said that, even if the Supreme Court of New South Wales could grant a prohibition, these words enable the Commonwealth to choose the High Court as its forum and enable the High Court to grant a prohibition. But on this order *nisi* is the Commonwealth a "party"; or is it a party "suing"? It is true that the words "suing" and "sued" are directly applicable only to a person acting on behalf of the Commonwealth; but they throw a reflex light on the meaning of sec. 75 (III.) in the case where the Commonwealth has no one acting on its behalf. What party is "suing" under this order *nisi*, if "suing" is an appropriate word? The order *nisi* is headed "The King against C. E. R. Murray, Judge" &c., "Agnes Wilson Cormie" &c., "*Ex parte* the Commonwealth of Australia." It is the King that sues Murray at the instance of the Commonwealth. "The King may sue for a prohibition" (*Bac. Abr.*, "Prohibition" (C)). The King

is a plaintiff in his own Court, the learned Justice who made the order *nisi* having in effect allowed the King's name to be used. As the King lends the sanction of his name as prosecutor when a grand jury informs him on their oath that there is sufficient ground for instituting criminal proceedings, so he lends the sanction of his name in prohibition proceedings when a Justice is satisfied that there is sufficient ground for prohibition proceedings. The King is the party on the one side of the record; and here the Judge of the District Court and the Cormies are the parties on the other side. The word "party" is obviously used in the litigious sense—not in a loose vernacular sense as in the phrase "a jolly old party," or even in the sense of "a party to the contract," or "a party to a conspiracy."

No doubt, in the District Court the Commonwealth was a party; but this proceeding is "in no sense a part or continuation of the action prohibited"—it is wholly collateral to the District Court proceeding, "distinct and independent" (*High on Extraordinary Legal Remedies*, p. 554). The theory on which the proceeding for prohibition is based is that by exceeding his jurisdiction the Judge of the District Court is acting in derogation of the King's Crown and dignity (*Bac. Abr., ubi sup.*). He is usurping the prerogative (*per Willes* J., *London Corporation* v. *Cox* (1)). The offence is done to the King, and the King complains. As *Brett* J. said in *Worthington* v. *Jeffries* (2):—"These authorities show that the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all. . . . The real ground of the interference by prohibition is not that the defendant below is individually damaged, but that the cause is drawn *in aliud examen*, that public order in administration of law is broken." The Commonwealth here has merely informed the High Court by affidavit of the exceeding of jurisdiction (*Blackstone*, 3 *Comm.*, p. 112); and any stranger in interest could do the same (*Bac. Abr., ubi sup.*); *de Haber* v. *Queen of*

(1) L.R. 2 H.L., 239.

(2) L.R. 10 C.P., 379, at p. 382.

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Portugal (1). The position of the Commonwealth is analogous, for this purpose, to that of a next friend of an infant, or to that of a relator in an information. The next friend is responsible for costs, but he is not a "party" to the litigation (*Dyke* v. *Stephens* (2)). A relator is responsible for costs, but he is not a "party"; the Crown is the party, acting through the Attorney-General (*Attorney-General* v. *Logan* (3)). As the Crown is the party, and not the relator, the Attorney-General, and not the relator, has absolute control of the proceedings (*Attorney-General* v. *Haberdashers' Co.* (4)); counsel will not be heard for the relator as distinct from counsel for the Attorney-General (*Attorney-General* v. *Governors of Sherborne Grammar School* (5)). No motion will be heard in the suit as "on behalf of the relator" (*Attorney-General* v. *Wright* (6)). "Whatever the relief prayed it is still the information of the Attorney-General" (*Attorney-General* v. *Vivian* (7)).

It is important to determine at what moment of time the proceedings for prohibition begin. In the case of ordinary actions, the action begins at the issue of the writ of summons; in the case of an application for prohibition, the proceedings for prohibition in the High Court begin at the grant of the order *nisi* for a writ of prohibition. Before that moment there is no cause pending in the High Court, the order *nisi* is merely the first step towards the object of bringing the matter before the High Court (*Ex parte Evans* (8)). Before that moment there are no parties; the affidavits on which the order *nisi* is obtained are not intituled in any cause because there is no cause; do not show any parties because there are no parties; are intituled merely "In the High Court of Australia" (*R.* v. *Plymouth and Dartmoor Railway Co.* (9)). After that moment—the grant of an order *nisi*—the affidavits are intituled in the cause, naming the parties (*Breedon* v. *Capp* (10)). This practice is expressly embodied in Order XLVII. of the *High Court Rules*, rr. 3 and 4. It shows that the proceedings before the order *nisi* are one thing and the proceedings after the order *nisi* are

(1) 17 Q.B., 171, at p. 214.
(2) 30 Ch. D., 189.
(3) (1891) 2 Q.B., 100.
(4) 15 Beav., 397.
(5) 18 Beav., 256, at p. 264.
(6) 3 Beav., 447.
(7) 1 Russ., 226, at p. 237.
(8) 2 Dowl. (N.S.), 410.
(9) 37 W.R., 334.
(10) 7 Jur., 781.

quite distinct, the door of the High Court having been opened. The point which I take is not—as supposed— that the Commonwealth will not be a party to the writ of prohibition when issued; but that it is not a party to the present proceeding—the proceeding for a prohibition. It is quite true that the title of the proceeding does not change the nature of the proceeding; but the title, as prescribed by the cases and by the Rules of Court, indicates correctly the nature of the proceeding.

The case of an *action* for prohibition has to be carefully distinguished from a proceeding such as the present. Sometimes the Court of King's Bench enlarged the order *nisi*, and directed the informer or "suggester" to declare in prohibition—to bring an action for damages. In that case, the difficulty was to find any cause of action in the "suggester" such as would support damages; and a series of feigned facts was devised, not to be traversed, the person to be prohibited being treated as having injured the suggester by disobeying the King's writ alleged to have been issued, and by causing damage to the suggester thereby: *damnum* was combined with *injuria* and gave the cause of action (1 *Wms. Saunders*, 154*n.*); *Home* v. *Earl Camden* (1)). In such an action the suggester became a true plaintiff, a true party to an action. The King was also a party, as in a *qui tam* action, until the Act 1 Will. IV. c. 21 prescribed that the suggester should be the only party plaintiff, and that the suggester should verify his statements by affidavit. The practice is now regulated by the Judicature Acts and Rules; there are no parties to any litigation since the litigation in the inferior Court until the King becomes a party by virtue of the issue of the order *nisi* for prohibition.

Considerable light and confirmation are to be derived from the decisions in the United States. If we turn to the Constitution of the United States, we find that under the words on which sec. 75 (III.) is based, "controversies to which the United States shall be a party," the United States are not treated as a party unless they—or their officer, acting on their behalf—are actually named as a party, plaintiff or defendant, on the record. It was even held that if the Postmaster-General sue a deputy postmaster-general on

(1) 2 H. Bl., 533.

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the latter's bond to account and even if it be clear that the Postmaster-General sues on behalf of the United States, and that the United States are the substantial party to the actual controversy, it was not a controversy to which the United States were a "party" within the meaning of the Constitution (*Osborne* v. *Bank of the United States* (1); *Postmaster-General of the United States* v. *Early* (2)). It was no doubt because of these decisions that in sec. 75 (III.) of the Constitution the words were added "or a person suing or being sued on behalf of the Commonwealth." This extreme view has been modified in more recent decisions (*In re Ayers* (3)); and it may be accepted that the same result has been achieved by judicial decisions as in sec. 75 (III.) of our Constitution by express words. It is a controversy to which the United States are a "party" if some officer or agent of the United States sue or be sued on behalf of the United States. But after all the critical examinations of the words used in the United States Constitution, there is no case in which an informant or relator or suggester has been treated as a party where the United States (or its officers) are plaintiffs on his information or relation or suggestion. The case of *Weston* v. *Charleston Corporation* (4) turned solely on the construction of a particular Act—the *Judiciary Act*, sec. 25; it was a case of appeal from a State Court; and all parties requested the Supreme Court to give its decision on the substantial question involved, promising entire acquiescence even if the procedure were wrong (5).

For these reasons, I am of opinion that the order *nisi* should be discharged.

GAVAN DUFFY AND RICH JJ. In this case a writ of prohibition is sought against His Honor Charles Edward Robertson Murray, Judge of the District Court of the Metropolitan District holden at Sydney, and the application is based on sub-secs. III. and V. of sec. 75 of the Constitution of the Commonwealth, which are as follows: —"In all matters . . . (III.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a

(1) 9 Wheat., 738, at pp. 850-857.
(2) 12 Wheat., 136.
(3) 123 U.S., 443.
(4) 2 Pet., 449.
(5) 2 Pet., at p. 451.

party : . . . (v.) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth : the High Court shall have original jurisdiction."

First it is argued that the proceeding before us is a "matter" within the meaning of sec. 75 and that the Commonwealth is a party to such matter within sub-sec. III. of that section. It may be conceded that the proceeding is such a matter, but is the Commonwealth a party to it? We think not. It is said that the word "party" should be read as including all those substantially interested in the litigation, and therefore the Commonwealth which is the applicant for the writ; but Parliament has thought it necessary to provide specially for the case of a person suing or being sued on behalf of the Commonwealth, and such a provision would be unnecessary and tautological if the word "party" had the vague meaning which is suggested. In our opinion the word "party" must be given the meaning which lawyers ordinarily attach to it when speaking of litigious proceedings in a Court of Record, namely, "party to the record." The Commonwealth is not and could not be a party to the record here. The parties are the King on the one side and the District Court Judge and the dependants of Douglas Thompson Cormie, deceased, on the other. The proceeding is *ex parte* the Commonwealth of Australia, but "in its primary sense," the phrase "'*ex parte*,' as applied to an application in a judicial proceeding, means that it is made by a person who is not a party to the proceeding, but has an interest in the matter which entitles him to make the application" (*Sweet*).

All this is in strict accordance with the history of the writ and the procedure for obtaining it established in the King's Bench, and adopted with modifications in the King's Bench Division and in our own Court (Order XLVII.). The Court of King's Bench often directed the applicant to bring his action to establish the alleged usurpation. In that action the applicant for the writ was a party as probably he would be a party under the procedure prescribed for this Court by Order XLVII., rr. 27-30. The practice as it existed before the amendment introduced by the Statute of William IV. is thus described by a contemporary writer :—"The proceedings in prohibition are briefly as follows :—The party aggrieved applies

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to the superior Court, setting forth, in a suggestion upon record, the nature and cause of his complaint, in being drawn *ad aliud examen* by a jurisdiction, or manner of process, disallowed by the laws of the kingdom ; upon which, if the matter alleged appears to the Court to be sufficient, the writ of *prohibition* immediately issues, commanding the Judge not to hold and the party not to prosecute the plea ; but sometimes the point may be too nice and doubtful to be decided merely upon a motion, and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the Court to *declare in prohibition* ; that is to prosecute an action, by filing a declaration against the other, upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if upon demurrer and argument the Court shall finally be of opinion, that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior Court, shall be prohibited from proceeding any further. On the other hand, if the superior Court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him when he applies for the prohibition in the Court above, and a *writ of consultation* shall be awarded, so called, because, upon deliberation and consultation had, the Judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined in the inferior Court " (*Sellon's Practice* (1798), vol. II., p. 309). The writ is now and always has been issued to vindicate the King's authority which is alleged to have been usurped by the person against whom the writ is sought. It is true that it is sometimes issued in the public interest on the suggestion or application of a person who is not affected by the alleged usurpation, and sometimes on the suggestion or application of a person who complains that some right of his has been affected by such usurpation, but whatever reason may induce the Court to assent to the application, the proceeding is thenceforward the King's proceeding, and it is his name that appears as a party on the order *nisi* and the order absolute if it be made absolute. If the opinion we have

expressed is correct, sub-sec. III. will enable this Court itself to declare rights and afford remedies *inter partes*, but will not enable it to issue an original writ of mandamus or prohibition for the purpose of controlling proceedings in other Courts.

The second contention seems to us somewhat inconsistent with that which would extend the language of sub-sec. III. so as to make it apply to writs of prohibition. It is said that the present procedure may be maintained because a District Court Judge being a Judge of a Court invested with federal jurisdiction is an officer of the Commonwealth within the meaning of sec. 75 (V.). On a former occasion we intimated our doubt as to whether a Judge of a federal Court was such an officer, but in deference to a previous considered judgment of this Court agreed that he was. We see no reason for extending the meaning of the expression so as to include a Judge of a State Court who holds and exercises his office and is paid under the State law. It is admitted that such a Judge is not always an officer of the Commonwealth, but it is said that he is so *pro hac vice* while exercising federal jurisdiction. We do not assent to this view. The Constitution draws a clear distinction between federal Courts and Courts invested with federal jurisdiction (secs. 71, 73 (II.), 77), and contains nothing which suggests that Judges of Courts invested with federal jurisdiction should be regarded as officers of the Commonwealth. As far as we have been able to discover, the expression "officer of the Commonwealth" is used elsewhere in the Constitution only in sec. 51 (XXXIX.), where it does not seem to apply to a judicial officer whether federal or State. It is said that the effect of our interpretation of sec. 75 (III.) and (V.) would be to deprive the Commonwealth of the benefit of its own Court "and compel the national Government to become a suppliant for justice before the judiciary of those who are by other parts of the Constitution placed in subordination to it." No such consequences need be apprehended. Parliament, when investing State Courts with federal jurisdiction, can retain over them such control as it chooses, either by reservation in respect of the original jurisdiction or by retention and regulation of the appeal jurisdiction.

POWERS J. The application before this Court has been fully

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described by my learned brothers. It is admitted that the Judge of the County Court had no jurisdiction to make any of the orders or directions in question. The sole question for consideration is whether this Court itself has jurisdiction to restrain by prohibition a State County Court exercising federal jurisdiction when it is clear that the State Court is exceeding its jurisdiction.

It is admitted that there is an appeal in such a case to this Court under sec. 73 of the Constitution—subject to any exceptions Parliament may prescribe—but that the right of appeal has been lost, notice of appeal not having been given within the time prescribed. It is, however, contended by counsel for the State of New South Wales, as intervener, that the High Court has no jurisdiction to grant a writ of prohibition against a State Court invested with federal jurisdiction. The Commonwealth contends that this Court has the power to restrain a State Court exercising federal jurisdiction vested in it, if it exceeds its jurisdiction. That that power is vested in the High Court by sec. 75 of the Constitution because that section vests original jurisdiction in the High Court in all matters "(III.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party . . . (V.) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth."

It has been contended :—(1) That the Commonwealth is not a party to these proceedings within the meaning of sec. 75 (III.), and therefore that this Court has no original jurisdiction to deal with this matter under that section. (2) That sec. 75 (III.) only refers to cases in which *The Commonwealth* is sued or being sued *in the High Court* as a party in the ordinary sense of the term ; and not to proceedings by prohibition in the High Court in the name of The King although the Commonwealth was a party in the proceedings in the Court which exceeded its jurisdiction. This is said to be the case even if the rule *nisi* is granted, as in this case, on the application of counsel for the Commonwealth, the party affected by the order which is admittedly in excess of jurisdiction.

It follows, if that is the case, that the only Courts authorized to grant writs of prohibition against inferior Courts exercising federal

jurisdiction are State Supreme Courts vested with federal jurisdiction by the Commonwealth Parliament; while the High Court, vested with original jurisdiction by the Constitution itself, is powerless to restrain any inferior State Court exercising federal jurisdiction from exceeding its jurisdiction. It also follows, if that is true, that this High Court can only issue writs of prohibition against *officers of the Commonwealth.*

After what has been said by the learned Chief Justice and by my brothers *Barton* and *Isaacs*, in their judgments, about the right of this Court to restrain by prohibition a State Court exercising federal jurisdiction when it is clear that the State Court is exceeding its jurisdiction, I do not think it is necessary to say more than that I agree that this Court has jurisdiction, under sec. 75 (III.).

It is said not only that the Commonwealth is not a party, but that it is not interested, and therefore is not entitled to prohibition. I also agree with the learned Chief Justice that the Commonwealth has, in a very real sense, an interest in preventing its executive officers from being controlled in the exercise of their executive functions (prescribed by the Commonwealth) by tribunals which have no jurisdiction to do so. I cannot see how it can be said the Commonwealth is not, under the circumstances of this case, interested.

It is not necessary for me to decide whether this Court could grant the relief asked for under sec. 75 (v.), as I hold there is power under sec. 75 (III.) to issue a writ of prohibition; but, as the act of the Judge who made the order was unauthorized by the State, and beyond the jurisdiction of the State Court as a State Court or as a federal Court, it cannot well be said that an order to prohibit the Court proceeding to enforce its unauthorized order is an interference with a State instrumentality exercising State functions, or that the rights of a State, or of any of its Courts, is in any way affected.

GRIFFITH C.J. I proceed to deal with the merits of the case. The *Commonwealth Workmen's Compensation Act* (No. 29 of 1912) prescribes (sec. 4) that if personal injury by accident is caused to a workman in the service of the Commonwealth the Commonwealth

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shall be liable to pay compensation in accordance with the First Schedule to the Act. If any question arises in any proceeding under the Act as to the liability to pay compensation or as to the amount or duration of the compensation, the question, if not settled by agreement, is, subject to the provisions of the First Schedule, to be settled by arbitration as provided, or by proceedings in a County Court, which term when applied to New South Wales means a District Court.

The First Schedule provides (par. 5) that payment of the sum determined to be payable as compensation shall in the case of death, unless otherwise provided by the Schedule or by regulations, be paid to the "prescribed authority," and shall be dealt with as prescribed for the benefit of the persons entitled thereto.

By a Regulation (Statutory Rules 1913, No. 336) it is directed (clause 4) that wherever a prescribed authority is referred to in the First Schedule to the Act, that authority shall be the Secretary to the Treasury, and (clause 5) that all moneys received by a prescribed authority in pursuance of par. 5 of the First Schedule shall be dealt with as the Secretary to the Treasury directs.

In the present case proceedings were instituted in the District Court to recover compensation in respect of a fatal injury. The matters which the District Court Judge was called upon to settle were the amount of compensation, the persons who were entitled to share in it as dependants of the deceased workman, and the amount payable to each.

He duly determined these matters and fixed the sums to be payable to the several dependants, and proposed to order them to be paid to the Secretary to the Treasury, but he proposed also to prescribe the manner in which they should be invested by that officer, and the times when, and instalments in which, they should be paid to the dependants, and further to order that any of these directions might be varied by any future order of the Court.

It is objected that the attempted imposition of these restraints upon the Secretary to the Treasury is beyond his jurisdiction. They are manifestly inconsistent with the direction of the regulation that the money shall be dealt with as that officer himself directs.

But reliance is placed on par. 9 of the First Schedule which is as follows :—

" (9) Where, on application being made to a prescribed authority that, on account of neglect of children on the part of a widow, or on account of the variation of the circumstances of any of the dependants, for any other sufficient cause, an order of the Court or an award as to the apportionment amongst the several dependants of any sum paid as compensation, or as to the manner in which any sum payable to any dependant is to be dealt with, ought to be varied, the prescribed authority may make an application to a County Court for the variation of the order or the award, and the County Court may make such order thereon as it thinks just."

This paragraph, no doubt, confers on the District Court jurisdiction to vary an order in certain cases, but only on the application of the prescribed authority. It also seems to assume that the original order may have contained directions as to the manner in which a sum payable to a dependant is to be dealt with. If the regulations said, as, I suppose, they might say, that the manner in which the money is to be dealt with by the prescribed authority may be controlled by an order of the Court, the provision would probably come into effect. But, as the regulations leave the matter to be dealt with at the absolute discretion of that officer, the case does not arise. This tacit assumption of a possible jurisdiction in some cases does not, in my opinion, operate to create an independent jurisdiction in all cases.

It follows that the proposed directions would be beyond the jurisdiction of the District Court.

It is then said that this is no concern of the Commonwealth, and that it is therefore disqualified from asking the intervention of this Court. To this contention there are two answers, first, that it is settled law that a prohibition may be asked for by a stranger to the proceedings, and, second, that the Commonwealth has, in a very real sense, an interest in preventing its executive officers from being controlled in the exercise of their executive functions by tribunals which have no jurisdiction to do so.

If this were not so, the only remedy would be by an application

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by the Secretary of the Treasury to the Supreme Court of New South Wales for a prohibition (unless the District Court Judge is *pro hac vice* an officer of the Commonwealth), or by treating the order as a nullity (see *per Mansfield* C.J. in *St. John's College* v. *Todington* (1)), a course which would not contribute to the seemly and orderly government of the Commonwealth.

For these reasons I think that the order should be made absolute.

Case directed to stand over for judgment.

Solicitor for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor for the State of New South Wales, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.

(1) 1 Burr., 158, at p. 199.

[HIGH COURT OF AUSTRALIA.]

ARTHUR THOMAS HALL . . . . . APPELLANT;
PETITIONER,

AND

JESSIE HALL . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 14.

Griffith C.J., Barton, Isaacs and Rich JJ.

Husband and Wife—Divorce—Desertion—Duty of husband to illegitimate child of wife—Refusal of wife to return to husband without child—Marriage Act 1915 (*Vict.*) (*No.* 2691), *sec.* 122.

If a man marries a woman believing her to be of untainted character, and after marriage discovers that she has an illegitimate child, he is not bound to receive that child into his home.