

[HIGH COURT OF AUSTRALIA.]

DALY AND OTHERS PLAINTIFFS ;

AND

THE STATE OF VICTORIA DEFENDANT.

High Court—Jurisdiction—Action by resident of one State against another State— H. C. OF A.
Cause of action—Statutory remedy—Claim against Crown for return of probate 1920.
duty—The Constitution (63 & 64 Vict. c. 12), sec. 75 (iv.)—Judiciary Act 1903-
 1915 (No. 6 of 1903—No. 4 of 1915), sec. 58—*Crown Remedies and Liability* MELBOURNE,
Act 1915 (Vict.) (No. 2638), secs. 20, 21, 23—Administration and Probate Act Oct. 20, 21.
 1915 (Vict.) (No. 2611).

KNOX C.J.,
 ISAACS, HIGGINS,
 RICH and
 STARKE J.J.

Sec. 20 of the *Crown Remedies and Liability Act 1915* (Vict.) provides that
 “When any person has any claim or demand against His Majesty which has
 arisen or accrued since the fourth day of June one thousand eight hundred and
 fifty-eight within Victoria or which hereafter arises or accrues within Victoria,
 it shall be lawful for such person to set forth in a petition the particulars of his
 claim or demand as nearly as may be in the same manner as in a statement of
 claim ; and such petition shall be filed in the Supreme Court in order that such
 Court may proceed to hear and determine the same as hereinafter mentioned ;
 and the filing of such petition in the manner aforesaid shall be the commence-
 ment of the suit.” Sec. 21 provides that “In case the matter disclosed and
 stated in the said petition would be the ground of an action if the same had
 arisen between subject and subject, the proceedings on such petition shall be
 conducted in the same manner and subject as nearly as may be to the same
 rules of practice as an action.” Sec. 23 provides that “The said Court shall
 and may give and pronounce such and the like judgment order or decree in
 any such petition as such Court would give and pronounce in any action
 between subject and subject.”

Held, that a contractual obligation against the Crown in favour of a subject
 may exist apart from that section, which does no more than prescribe the
 method of procedure by which claims by a subject against the Crown may be
 enforced.

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Sec. 75 of the Constitution provides that "In all matters . . . (iv.) between States, or between residents of different States, or between a State and a resident of another State . . . the High Court shall have original jurisdiction."

Held, that the word "matters" in that section includes a claim founded on a contract entered into by some person on behalf of the Crown, and that sec. 58 of the *Judiciary Act* provides for the enforcement of such a claim.

Held, therefore, that an action might be brought in the High Court by a resident of New South Wales against the State of Victoria for a declaration that money claimed by and paid under protest to the Victorian Commissioner of Taxes as probate duty under the *Administration and Probate Act* 1915 (Vict.) was not properly payable and for a refund of the amount so paid.

SUMMONS referred to the Full Court.

An action was brought in the High Court by Patrick Daly, Frederick William Tietjens and William Percy Daly, the executors of the will and codicil of John Daly deceased, against the State of Victoria. By the writ the plaintiffs, who were residents of New South Wales, claimed a declaration that no duty was payable under the *Administration and Probate Act* 1915 (Vict.) in respect of certain bequests in the testator's will, a declaration of what amount of duty was rightly payable in respect of the Victorian estate of the testator, and a return of the probate duty which had been paid under protest to the Victorian Commissioner of Taxes in respect of a sum of £1,750 and without payment of which the plaintiffs had been unable to procure the sealing of the New South Wales probate of the will by the Supreme Court of Victoria.

The defendant entered a conditional appearance, and applied on summons to set aside the service of the writ; and on the application coming on for hearing before *Starke J.* he referred it to the Full Court.

Latham, for the defendant. Sec. 75 (iv.) of the Constitution and sec. 58 of the *Judiciary Act* relate to procedure only, and give no cause of action where, apart from them, none exists. The cause of action in the present case must be sought elsewhere. By the rules of English jurisprudence the King is incapable of making a contract with a subject (*Anson on Contracts*, 14th ed., p. 68).

[HIGGINS J. If that were so, how could the Crown have priority as to debts?]

On the theory that the King is outside the ordinary rights and duties of subjects. H. C. OF A.
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[KNOX C.J. The Crown may be a trustee, and that is a matter of contract (*Halsbury's Laws of England*, vol. VI., p. 494).

[HIGGINS J. referred to *Thomas v. The Queen* (1); *Bankers' Case* (2).

[ISAACS J. In *Windsor and Annapolis Railway Co. v. The Queen* (3) it is admitted that the King can make a contract.

[STARKE J. referred to *Baron De Bode's Case* (4); *Monckton v. Attorney-General* (5).]

All the authorities deal with a compound subject as to which it was unnecessary to distinguish between the legal right and the means of enforcing it. Sec. 20 of the *Crown Remedies and Liability Act* creates a cause of action and gives a mode of enforcing it. Sec. 21 assumes that apart from the Act there would be no "ground" for an action against the King, that is, that there would be no right infringed, or, in other words, no cause of action. Sec. 20 creates the obligation and the right and provides the means of enforcing the right, and the means of enforcing the right are inseparable from the right itself.

[RICH J. referred to *Farnell v. Bowman* (6).]

Sec. 75 (iv.) does not submit the King in right of a State to the jurisdiction of the High Court in any additional manner to, or to any greater extent than, that to which he had already submitted himself, although it extends the category of Courts in which his liability may be enforced. Apart from statutory provisions or special submission to tribunals in particular cases, the Crown cannot be a party to any obligations with a subject—that is, the subject cannot have a right to a definite act or forbearance on the part of the Crown. That is expressed in a definite form by saying that the King can do no wrong. [Reference was also made to *Lorimer v. The Queen* (7); *R. v. Brown* (8); *Townsville Harbour Board v. Scottish Shire Line Ltd.* (9); *The Commonwealth v. Baume* (10).]

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(1) L.R. 10 Q.B., 31.

(2) 14 How. St. Tr., 1.

(3) 11 App. Cas., 607, at pp. 610, 613.

(4) 8 Q.B., 208, at p. 271-274.

(5) 2 Mac. & G., 402.

(6) 12 App. Cas., 643, at p. 649.

(7) 1 W. & W. (L.), 244.

(8) 14 C.L.R., 17.

(9) 18 C.L.R., 306, at p. 329.

(10) 2 C.L.R., 405.

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Hayes and Hassett, for the plaintiffs, were not called upon.

Cur. adv. vult.

The COURT delivered the following written judgment :—

This is an application on behalf of the defendant for an order setting aside the service upon it of the writ of summons in this action.

The statement indorsed on the writ discloses that the plaintiffs are residents of the State of New South Wales and sue as executors of the will of John Daly deceased, who was at all material times domiciled in that State. The plaintiffs claim a declaration that portion of the duty claimed by and paid under protest to the Victorian Commissioner of Taxes on the sealing of probate of the will of John Daly was not properly payable, and a refund of the amount alleged to have been overpaid. The defendant entered a conditional appearance denying the jurisdiction of this Court to entertain this action without the consent of the defendant.

The plaintiffs rely on sec. 75 (iv.) of the Constitution as conferring jurisdiction on this Court to entertain the action. Mr. *Latham*, for the defendant, while admitting that the Supreme Court of Victoria has jurisdiction under the *Crown Remedies and Liability Act* 1915 to entertain and adjudicate upon the claim of the plaintiffs, contends that sec. 75 (iv.) of the Constitution only confers jurisdiction on the High Court in cases in which the plaintiff has a cause of action against the defendant independently of the provisions of that section, and that in this case the plaintiffs have no such independent cause of action. He says that the *Crown Remedies and Liability Act* 1915 is not limited to prescribing the *procedure* by which a subject may obtain redress by process of law against the Crown as represented by the State of Victoria, but that it is that statute and that alone which confers on the subject his *right or cause of action*. It follows, he argues, that it is only by proceeding in conformity with the provisions of that statute that a subject can obtain redress in respect of a claim against the Crown as represented by the State of Victoria. He summed up his argument in the contention that if the Victorian statute were not in force no legal proceedings could be taken by a

subject against the State of Victoria, that this proved that no right of action existed apart from that statute, and that, as the only right given by that statute was to proceed in the Supreme Court in the manner prescribed by the statute, there was no such independent cause of action in the plaintiffs as was necessary to found the jurisdiction of this Court under sec. 75 (iv.) of the Constitution. Assuming, without deciding, that the jurisdiction of the High Court under sec. 75 of the Constitution is limited to cases in which the party suing has some right of action independently of that section, we are still clearly of the opinion that this application must fail. The Victorian statute, in our opinion, does no more than prescribe the method of procedure by which claims by a subject against the Crown may be enforced. Part II. of that Act is headed "*Mode of enforcing claims against the Crown*," and is clearly directed to cases in which the subject has, apart from the Act, a claim or demand against the Crown. The condition on which the right to present a petition depends is "when any person has any claim or demand against His Majesty which has arisen or accrued since the fourth day of June one thousand eight hundred and fifty-eight within Victoria or which hereafter arises or accrues within Victoria" (sec. 20). Secs. 21-26 are clearly directed to matters of procedure only, and sec. 27 in express terms recognizes the existence of claims and demands founded on and arising out of some contract entered into on behalf of His Majesty or by the authority of his local government. It is well settled by decisions of the Supreme Court of Victoria that a claim such as that made by the plaintiffs is a claim founded on and arising out of a contract entered into by some person on behalf of His Majesty within the meaning of the section last quoted. Mr. *Latham* contended that at common law and apart from statutory authority the Crown cannot create a contractual obligation in favour of a subject, and as authority for the proposition relied on a statement in *Anson on Contracts*, 14th ed., p. 68. In our opinion it is abundantly clear both on principle and on authority that this contention cannot be supported. It is unnecessary to do more than refer to the following cases in support of this opinion and of the further proposition that at common law damages for breach of contract were recoverable from the Crown by petition of right: *Feather v. The*

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It is neither necessary nor desirable that we should express any opinion as to the precise scope of sec. 75 of the Constitution, further than by saying that in our opinion it is clear that a claim founded on and arising out of a contract entered into by some person on behalf of His Majesty is a "matter" within the meaning of that section. The claim being a "matter" within sec. 75, its enforcement by the High Court is provided for by sec. 58 of the *Judiciary Act*, a provision passed under the power conferred by section 78 of the Constitution.

The application is dismissed with costs.

*Application dismissed with costs.*

Solicitor for the plaintiffs, *W. E. Pearcey*.

Solicitor for the defendant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

(1) 6 B. & S., 257, at p. 294.

(2) L.R. 10 Q.B., 31.

(3) 11 App. Cas., at p. 612.