[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH OF AUSTRALIA . PLAINTIFF;

AGAINST

THE STATE OF NEW SOUTH WALES . DEFENDANT.

H. C. OF A. 1923.

SYDNEY, *April* 23, 24.

MELBOURNE, *June* 5.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Constitutional Law—Judicial power—High Court—Original Jurisdiction—Action by Commonwealth against State—Consent of State—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 75, 78—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *secs.* 38, 56-59, 64—*Acts Interpretation Act* 1901 (*No.* 2 *of* 1901), *sec.* 22 (*a*).

Held, that the High Court has jurisdiction to entertain an action for a tort brought by the Commonwealth against a State without the consent of that State :

By *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ., on the ground that such jurisdiction is conferred by sec. 75 (III.) of the Constitution ;

By *Higgins* J., on the ground that such jurisdiction is conferred by sec. 58 of the *Judiciary Act* 1903-1920 enacted under the power given by sec. 78 of the Constitution.

Per Isaacs, *Higgins*, *Rich* and *Starke* JJ. : The expression "sovereign State" as applied to a State of Australia is not justified ; and a State is not a foreign country in relation to the Commonwealth.

Per Higgins J. :—Sec. 75 of the Constitution merely means that, if there is a matter (of the kinds mentioned) to be tried, the High Court can try it ; it does not create a new cause of action, or make a matter justiciable which is not justiciable otherwise. But, by virtue of sec. 78 of the Constitution, the *Judiciary Act* makes justiciable a complaint on the part of the Commonwealth, as one agent of the King, against a State, as another agent of the King.

QUESTION referred to the Full Court.

An action in the High Court by the Commonwealth against the State of New South Wales was instituted by a writ of summons, whereby the plaintiff claimed £1,000 for damages occasioned to the

plaintiff by a collision which took place in Port Jackson on 5th December 1921 between the defendant's steamship *Kiama* and a motor-launch, No. 322, of the plaintiff. The defendant applied to the High Court by summons for an order setting aside the service of the writ or, in the alternative, for an order staying all proceedings in the action, on the ground that the High Court has no jurisdiction to entertain an action brought by the Commonwealth against the State of New South Wales without the consent of that State.

The summons came on for hearing before *Higgins* J., who directed that the question raised by it should be argued before the Full Court.

Flannery K.C. (with him *Harry Stephen*), for the defendant. The High Court has no jurisdiction either under the Constitution or under the *Judiciary Act* to entertain an action by the Commonwealth against a State without the consent of that State. A State has the prerogative right of the King not to be sued without its consent. Sec. 75 of the Constitution is an enumeration of the matters which are within the judicial power of the Commonwealth, but does not subject the King as representing the State to being sued in the High Court. The word "matters" in that section means subjects which can be litigated, and the section gives the High Court jurisdiction over matters only and not over persons. One of the facts in existence at the time the Constitution was enacted was that in the United States of America it had been held that the States might be sued in the Supreme Court without their consent (*Chisholm* v. *Georgia* (1); and see *Hans* v. *Louisiana* (2)), and that an amendment of the American Constitution had been made to prevent that being done. (See *Quick and Garran's Commonwealth Constitution*, 1st ed., pp. 774, 804; *Harrison Moore on the Commonwealth*, 2nd ed., p. 496.) That being so, secs. 75 to 78 of the Constitution were enacted, of which sec. 75 must be read in the light of sec. 78; and there is no reason for giving an *ex necessitate* meaning to sec. 75. The Crown is not to be impleaded adversely unless there is competent legislation to that effect (*The Mogileff* (3); *Young* v. *s.s. Scotia* (4)). Sec. 78 was intended to give the Commonwealth Parliament power to coerce

(1) (1792-93) 2 Dall., 419.
(2) (1890) 134 U.S., 1.
(3) (1921-22) 38 T.L.R., 71, 279.
(4) (1903) A.C., 501, at p. 504.

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the States if it thought fit. Sec. 75 should not be read by itself, but should be read with the law existing as to the rights of sovereigns and States (see *The Parlement Belge* (1); *Tobin* v. *The Queen* (2)). On the ordinary principles of construction sec. 75 (III.) should not be read as giving power to any State of the Commonwealth, or even a foreign State, to sue the Commonwealth; which would be the result if the contrary view of sec. 75 were correct. The words "conferring rights to proceed" in sec. 78 show that rights to proceed were lacking without sec. 78. This view of sec. 75 does not dep ive the High Court of jurisdiction to entertain an appeal from a State Court in an action in which the State was defendant, for the State must have consented by statute to being sued in the State Court; and that consent carried with it consent to the incidents of being so sued, including an appeal to the High Court. The Parliament has enacted sec. 38 of the *Judiciary Act* 1903-1920, not under sec. 78 of the Constitution, but under sec. 77. Sec. 38 is a definition of the jurisdiction over the subject matters referred to in sec. 75, but in itself confers no jurisdiction; and no implication must necessarily be drawn from sec. 38 (*c*) that the Commonwealth can sue a State without its consent. The word "person" is not used in the *Judiciary Act* as including the Commonwealth or a State; and that is apparent from secs. 56 to 59, where "person" in secs. 56 and 58 is contrasted with "State" in secs. 57 and 59. The result is that there has been no legislation under the power conferred by sec. 78 which enables the Commonwealth to sue a State without its consent.

E. M. Mitchell (with him *Evans*), for the plaintiff. Sec. 75 of the Constitution by itself confers jurisdiction on the High Court to entertain an action by the Commonwealth against a State without its consent; and sec. 63 of the *Judiciary Act* provides for the service of process in such an action. The plain meaning of the words "the High Court shall have . . . jurisdiction" is that the Court may go on and determine the matter (*United States* v. *Texas* (3); *United States* v. *Michigan* (4)). Sec. 78 of the Constitution should be read in conjunction with secs. 76 and 77, and is not necessary to confer jurisdiction if it has been previously conferred. Its purpose is to

(1) (1880) 5 P.D., 197.
(2) (1864) 16 C.B. (N.S.), 310, at pp. 353, 356.
(3) (1892) 143 U.S., 621, at pp. 639, 642, 646.
(4) (1903) 190 U.S., 379.

give rights to proceed in cases other than those as to which jurisdiction had already been given. If sec. 78 means that legislation must be passed before there is a cause of action, it does not extend to cases where causes of action already existed under sec. 75; but sec. 78 has to do with cases contemplated by secs. 76 and 77, which provide for the creation of new Courts whose jurisdiction had not yet been defined in the Constitution. So that sec. 78 has its uses apart from cutting down the meaning of sec. 75. Once a Court is created giving jurisdiction over two Governments, the objections relied on with reference to sovereign States are inapplicable (see *Dominion of Canada* v. *Province of Ontario* (1)). Assuming that legislation is necessary before the Commonwealth can sue a State in the High Court, sec. 38 (*c*) of the *Judiciary Act* effects that object. That sub-section means that the High Court shall have a right to try suits by the Commonwealth against a State and that no other Court shall. Then sec. 64 provides that the suit is to be assimilated to an action between subject and subject. The words of sec. 64 were intended to have the same effect as similar words were determined to have in *Farnell* v. *Bowman* (2). (See also *Commonwealth* v. *Miller* (3); *Commonwealth* v. *Baume* (4); *Baume* v. *Commonwealth* (5).) Reading secs. 38 (*c*) and 64 together, the suits mentioned in sec. 38 (*c*) are included in sec. 64, and sec. 64 contains the legislation which is said to be necessary under sec. 78 of the Constitution. The Constitution did not contemplate that it was necessary to give any right to proceed against a State in the High Court if the right was already given by State law to proceed against the State in the Supreme Court of that State. Alternatively, the word "person" in sec. 58 of the *Judiciary Act* is wide enough to include the Commonwealth (*Acts Interpretation Act* 1901, sec. 22 (*a*)). [Counsel also referred to *Commonwealth* v. *New South Wales* (6); *Commonwealth* v. *Queensland* (7); *South Australia* v. *Victoria* (8); *Commonwealth* v. *New South Wales* (9).]

Flannery K.C., in reply.

Cur. adv. vult.

(1) (1910) A.C., 637, at p. 645.
(2) (1887) 12 App. Cas., 643, at pp. 648, 650.
(3) (1910) 10 C.L.R., 742, at p. 753.
(4) (1905) 2 C.L.R., 405, at p. 418.
(5) (1906) 4 C.L.R., 97, at pp. 110, 118.
(6) (1915) 20 C.L.R., 54.
(7) (1920) 29 C.L.R., 1.
(8) (1911) 12 C.L.R., 667.
(9) (1918) 25 C.L.R., 325.

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The following written judgments were delivered :—

KNOX C.J. This is an application by the defendant—the State of New South Wales—for an order setting aside the service of the writ or staying proceedings in an action brought by the Commonwealth against the State to recover damages in respect of a collision between vessels belonging to the plaintiff and defendant respectively. The ground of the application is that this Court has no jurisdiction to entertain an action brought by the Commonwealth against the State of New South Wales without the consent of that State. Sec. 75 of the Constitution provides that in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party the High Court shall have original jurisdiction. Apart from authority I should have thought that the meaning of the words used in sec. 75 was not open to doubt, and that under that section the right of this Court to entertain this action could not be seriously disputed. But it is unnecessary for me to state at length my views on the matter, for the question now raised is, in my opinion, concluded by the decision of this Court in *South Australia* v. *Victoria* (1), and by the reasoning by which that decision was supported. The plaintiff in that action claimed recovery of possession, an account of mesne profits and an injunction to restrain trespass by the defendant State in respect of a piece of land de facto in the occupation of the defendant which was alleged to belong to the plaintiff. In effect the cause of action was trespass to land. For the defendant it was argued that the High Court had no jurisdiction to entertain the action because the dispute was not justiciable before Federation, and that the jurisdiction given by sec. 75 of the Constitution to deal with matters between States was limited to matters arising in connection with the Constitution or which at the time the Constitution was enacted were justiciable between States. The unanimous decision of the Court was (1) that the word " matters " in sec. 75 meant matters which were of a like nature to those which would arise between individuals and which were capable of determination upon principles of law, and (2) that the High Court had jurisdiction to entertain an action by one State against another founded on an alleged trespass by the latter

(1) (1911) 12 C.L.R., 667.

on the territory of the former. It necessarily involved a decision that the High Court had what has been called in argument in the present case "compulsive jurisdiction" against a State, or, in other words, that the jurisdiction of the High Court under this section over a State was not dependent on the consent of the State against which proceedings were instituted.

The following extracts from the reasons given in the case referred to cover, in my opinion, the whole ground of the present case:— *Griffith* C.J. said, at p. 675:—"The word 'matters' was in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice. . . . In my opinion a matter between States, in order to be justiciable, must be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined upon principles of law. This definition includes all controversies relating to the ownership of property or arising out of contracts. In the simple case of a trespass by one State upon territory in the de facto possession of another, I have no doubt that this Court would have jurisdiction." And at p. 676:—"There is another way in which the point of jurisdiction may be approached, which leads to the same result. The law of the Empire, including the statute law, is binding as well upon the dependencies, regarded as political entities, as upon individual subjects. If, therefore, any dependency infringes the law of the Empire governing its relations with a neighbouring dependency it is guilty of a wrong towards that other dependency. Similar wrongs committed by one independent State against another are not justiciable, because there is no tribunal which has jurisdiction to take cognizance of them. But if there is a tribunal which has jurisdiction to summon a dependency before it, there is no reason why such a wrong should not be redressed. This Court has such jurisdiction. The question, therefore, whether the State of Victoria has infringed the statute law of the Empire as regards South Australia may be inquired into by this Court as a 'matter between States,' within the meaning of sec. 75 of the Constitution." *O'Connor* J. said, at p. 707:—"The suit is . . . in substance one in which a State seeks to recover portion of her territory, of which she alleges that an adjoining State is in wrongful occupation." And

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at p. 709 :—" The language of the Commonwealth Constitution in this respect is so entirely free from ambiguity that in my opinion no authorities are needed for its interpretation. It plainly says, and it clearly means, that whenever a question is raised as to the position of a boundary line between two States this Court will have jurisdiction to entertain it, if the question arises in a controversy between the States which is capable of being determined on recognized legal principles." At p. 715 my brother *Isaacs* said :—" The first question is as to the jurisdiction of the Court to entertain the suit. This depends on the meaning of the word ' matters ' in sec. 75 of the Constitution. In my opinion that expression, used with reference to the Judicature, and applying equally to individuals and States, 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." And at p. 721 he said :—" If on examination of the case it be found that the claim is not supported by any law binding the defendants, but is dependent on political considerations merely, the Court must say so. It has jurisdiction to entertain the suit, but in the course of its exercise it may be compelled to adjudge adversely to the plaintiffs on the ground that no paramount law can be found to support their claim." *Barton* J. agreed with the reasons given by the Chief Justice; and my brother *Higgins* (at p. 742) concurred with the other members of the Court in rejecting the argument that the High Court had not power to entertain the action and to give some judgment in favour of the plaintiffs, if the plaintiffs had a cause of action.

It is evident, indeed it was not disputed, that a claim to recover damages in respect of a collision between two vessels is a " matter " within the meaning of sec. 75. It is apparent also that in this " matter " the Commonwealth is a party. It follows that by sec. 75 original jurisdiction is conferred on the High Court in this case, and " jurisdiction " means " the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision " (*Halsbury's Laws of England*, vol. IX., p. 13, par. 10).

This power is conferred by the Constitution itself on this Court

to take cognizance of this matter. Any legislation by Parliament directed to conferring this power would, therefore, be as superfluous as legislation by Parliament to restrict the limits of the jurisdiction would be ineffective. The argument for the applicant based on sec. 78 of the Constitution ignores the essential distinction between matters which come within the terms of sec. 75 and those which come within sec. 76. In respect of the former class the jurisdiction of the High Court is independent of, while in respect of the latter class it is dependent upon, Parliamentary enactment. The result of acceding to this argument would be in effect to remove sub-sec. III. from sec. 75 and place it in sec. 76.

In my opinion the application should be dismissed.

ISAACS, RICH AND STARKE JJ. In this case the Commonwealth has sued the State of New South Wales in this Court in original jurisdiction for damages occasioned to the plaintiff by a collision between a vessel belonging to the defendant and a motor-launch belonging to the plaintiff. The cause of action, as a tort in its inherent nature, would as between subject and subject be justiciable in a competent Court. It therefore falls within the meaning of the word "matters" in sec. 75 of the Commonwealth Constitution. The question arising on the defendant's summons—referred by our brother *Higgins* to the Full Court—is whether this Court has jurisdiction to entertain this action, without the consent of the State. The Commonwealth maintains that there is jurisdiction, and rests primarily on sec. 75 of the Constitution. Alternatively, it contends that in various ways the *Judiciary Act* has made whatever Parliamentary provision is necessary. The defendant State has entered a conditional appearance, and contests jurisdiction unless it elects to consent.

The contention urged at the Bar on behalf of the defendant was (1) that it is a sovereign State and therefore cannot be sued without its consent; (2) that no actual consent has been given; (3) alternatively, that the jurisdiction given by the terms of the Constitution in sec. 75 is conditioned on Parliament under sec. 78 of the Constitution conferring on the Commonwealth the right to proceed against the State.

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It may be convenient to refer first to the assertion (which is at the root of the defendant's contention) that an Australian State is a "sovereign State." Learned counsel placed the matter on the same plane as a foreign independent State, the "representative" of which is included in sub-sec. II. of sec. 75. As to such a "representative" it was said the consent of the foreign State was necessary, and so of an Australian State. There are two fallacies involved in this. The first is that there is any analogy whatever between the position of the "representative" of a foreign State and that of one of the States of Australia. In saying that, we put aside all the distinctions between consuls and ambassadors and assume the highest character, that of an ambassador. This is conceding very much, seeing that it is difficult to imagine an ambassador to Australia. But what is the principle of the immunity of an ambassador? We need refer to three cases only, as they are very recent: *Musurus Bey* v. *Gadban* (1), *In re Republic of Bolivia Exploration Syndicate Ltd.* (2) and *In re Suarez*; *Suarez* v. *Suarez* (3). In the first mentioned case *A. L. Smith* L.J. quotes (4) with approval from Lord *Campbell's* judgment in *Magdalena Steam Navigation Co.* v. *Martin* (5), that an ambassador "is not supposed even to live within the territory of the sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country." *Davey* L.J. (6), quoting from the head-note to *The Parlement Belge* (7), says: "As a consequence of the *absolute* independence of every sovereign authority and of the *international* comity which induces every sovereign State to respect the independence of every other sovereign State, *each State declines to exercise by means of any of its Courts any of its territorial jurisdiction* over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory." There is nothing in the Constitution to prevent the

(1) (1894) 2 Q.B., 352.
(2) (1914) 1 Ch., 139.
(3) (1918) 1 Ch., 176.
(4) (1894) 2 Q.B., at p. 356.
(5) (1859) 2 E. & E., 94.
(6) (1894) 2 Q.B., at p. 361.
(7) (1880) 5 P.D., 197.

Court from observing in a proper case the respect due to the independence and dignity of foreign nations on the principle of what is called international comity (see per Lord *Shaw* in *Lecouturier* v. *Rey* (1), and *Westlake on Private International Law*, 6th ed., pp. 256 *et seqq.*). But what possible analogy is there between such a case—where person and property are judicially deemed to be outside the territory and beyond the territorial jurisdiction of the local Courts—and the case of an Australian State, an integral and necessary part of the territory of the Commonwealth in relation to this Court? New South Wales is not a foreign country. The people of New South Wales are not, as are, for instance, the people of France, a distinct and separate people from the people of Australia. The Commonwealth includes the people of New South Wales as they are united with their fellow Australians as one people for the higher purposes of common citizenship, as created by the Constitution. When the Commonwealth is present in Court as a party, the people of New South Wales cannot be absent. It is only where the limits of the wider citizenship end that the separateness of the people of a State as a political organism can exist. To appeal to the analogy of an entirely foreign independent State is to appeal to an impossible standard. And again, this Court is not a foreign Court. It is the tribunal specially created by the united will of the Australian people, as a Federal Court and as a national Court. It has very special functions in relation to the powers, rights and obligations springing from the Constitution and the laws made under it—matters which concern the Commonwealth as the organization of the whole population of this Continent, the States in their relations to the Commonwealth and to each other, and the people in their relation to the Commonwealth and to the States regarded as constituent parts of the Commonwealth. Besides those Federal functions, this Court has by the Constitution an appellate jurisdiction, which extends to the interpretation and enforcement of purely State laws, unrelated to any Federal consideration. In this aspect, it is as truly an appellate Court for each State as if it were competently created for the purpose by State or Imperial legislation. How in the face of these considerations can there possibly be any

(1) (1910) A.C., 262, at p. 266.

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logical resemblance between the case of an independent sovereign or his representative at the bar of the Court of a foreign country and the position of a State of Australia at the bar of this the highest Australian tribunal ?

The second fallacy in the defendant's argument is in the use of the expression " sovereign State " in relation to a State of Australia. Before the great struggle of the American Union for existence, costing uncounted lives and treasure, that expression was not uncommon in the United States. And that, despite the warning given by *Story* J. in his work on the *Constitution*. He says :— " In the first place, antecedent to the Declaration of Independence none of the colonies were, or pretended to be, sovereign States, in the sense in which the term ' sovereign ' is sometimes applied to States. The term ' sovereign ' or ' sovereignty ' is used in different senses, which often leads to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions." (par. 207). The conclusion to which we were invited to come in interpreting the Constitution upon the assumption that New South Wales is a " sovereign State " would be both mischievous and unfounded. The term " sovereign State " as applied to constituent States is not strictly correct even in America since the severance from Great Britain (see *Story*, par. 208). Still further from the truth is it in Australia. The appellation " sovereign State " as applied to the construction of the Commonwealth Constitution is entirely out of place, and worse than unmeaning. This Court has recently, in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1), stated the true method of interpreting the compact made by the people of Australia in founding their wider citizenship. That method is to ascertain the true meaning of its language, as applied to the subject matter. We applied the standard, universal in British Courts, by giving effect to the actual bargain made with all its mutual rights and obligations, as they are stated on the face of the instrument. Applying now the same method of interpretation, by allowing the words of the Constitution to speak for themselves, it is difficult to see how any real doubt can exist. Sec. 75 of the Constitution is explicit. It says :—" In all matters—(I.) Arising under any treaty : (II.)

(1) (1920) 28 C.L.R., 129.

Affecting consuls, or other representatives of other countries: (III.) In which the Commonwealth, or a *person* suing or being sued on behalf of the Commonwealth, is a party: (IV.) Between States, or between *residents* of different States, or between a State and a resident of another State: (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." What can be plainer? "In all matters" (and this is one) "in which the Commonwealth . . . is a party" (and this is such a matter) "the High Court shall have original jurisdiction." How, without direct violence to these explicit words, can it be contended then that this Court has not in this case "original jurisdiction"? We put aside for reasons already given the contentions as to "foreign sovereigns," and "sovereign States," and take up the other grounds of contest. Sec. 78 says: "The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power." The exercise of that power, it is said, is a condition precedent to the suability of a State in the High Court in original jurisdiction. That is an error which it is not difficult to detect. There is undoubtedly in our common law a principle that the Sovereign cannot be sued in his own Courts. A tort by the Sovereign is impossible at common law; the fault, if any, being attributed to the subject who actually committed or authorized it—the Sovereign being assumed never to authorize a breach of the law. A contract or deprivation of property is open to redress by means of a petition of right, when, by consent of the Sovereign, justice is done. But there is also another principle in our common law, that the Sovereign may always sue in his own Courts (see *Bradlaugh* v. *Clarke* (1)). Even apart from statute the Crown may in some instances sue in one right and defend in another (see *Williams* v. *Attorney-General for New South Wales* (2)). Obviously the matter was one to be dealt with by the Constitution, which created mutual rights and obligations between Commonwealth and States and foresaw the necessity of some tribunal, not the judicial organ of any one State exclusively,

(1) (1883) 8 App. Cas., 354, at p. 360. (1915) A.C., 573, at p. 580; 19 C.L.R., 343, at p. 346.
(2) (1913) 16 C.L.R., 404, at p. 430;

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to determine or finally determine possible disputes between Commonwealth and States, and between different States, and between States and residents of other States. As to these the Constitution at once enacted sec. 75 as a self-executing provision in the terms mentioned. The words " in all matters " are the widest that can be used to signify the subject matter of the Courts jurisdiction in the specified cases. " Matters " read with the context and in relation to " judicial power " are limited by the inherent sense of matters which a Court of law can properly determine, that is, by some legal standard. In the *Boundary Case* this point was fully expounded (1). The word " matters " is certainly wide enough to include the words which formed the basis of decision in *Farnell* v. *Bowman* (2). The Privy Council referring to the words in sec. 2 of the Act 39 Vict. No. 38, namely, " Any person having or deeming himself to have any just claim or demand whatever against the Government," say (3): " These words are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants." Their Lordships made some valuable observations showing why they considered those earlier words should not be restricted by the maxim " The King can do no wrong." They referred to the circumstances of local Governments as pioneers of improvements, and to the consequential difference of circumstances when compared with those in England, and to the " greater hardship " that would arise here from the strict application of the maxim. Again, reference is made to a recital as to the reasons inducing the Legislature to pass the earlier Act afterwards amended, and their Lordships say (4):— " It could not, therefore, have been intended to limit the operation of the Act to cases in which the subject had a remedy by petition of right. The very object of the Act was to give a remedy in cases to which a petition of right did not extend. Why, then, should it be supposed that the Legislature intended to exclude cases of tort? Justice requires that the subject should have relief against the colonial Governments for torts as well as in cases of breach of contract or the

(1) (1911) 12 C.L.R., at pp. 675-676 (*Griffith* C.J.); at p. 706 (*Barton* J.); at p. 708 (*O'Connor* J.); at pp. 715, 721 (*Isaacs* J.); at p. 742 (*Higgins* J.).

(2) (1887) 12 App. Cas., 643.

(3) (1887) 12 App. Cas., at p. 648.

(4) (1887) 12 App. Cas., at p. 649.

detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace *new remedies*, it is hard to see why full effect should be denied to them." It is true that their Lordships went on to state further reasons confirming the conclusion just stated; and those further reasons included a reference to sec. 3 in which the rights of the parties were declared to be as between subject and subject. But the earlier reasons are the broad main reasons, and are sufficient in themselves. They amount to saying that, notwithstanding the common law maxim, plain words of a statute expressly dealing with actions against the Crown are not to be cut down from their full signification where the nature of the statute requires for its proper and just effect that their full sense should be retained. Applying that principle, is it not obvious that the Constitution would fail greatly in effect if the word "matters" were not considered to include even "torts," in other words, if it were not considered to include all claims for infringements of legal rights of every kind —all claims referable to a legal standard of right? The word would, without question, include a claim for breach of contract. Why should it not include a breach of some constitutional declaration of right or duty created by the very instrument containing sec. 75? For instance, sec. 90, forbidding States imposing customs laws or granting bounties on the production or export of goods after uniform customs duties were imposed by the Commonwealth. Suppose a State proceeded to raise a military force, contrary to sec. 114, or suppose the Commonwealth imposed a tax on the property of a State, or suppose the Commonwealth proceeded to make a railway in a State without that State's consent: in any of those cases is it possible to think that sec. 75 of the Constitution was not intended to enable the complaining party—whether Commonwealth or State—to approach the High Court for redress? And if so, where is the room for the maxim at all in sec. 75 in view of this new Constitutional situation? The truth is that the King in his Imperial Parliament in passing the Constitution not only preserved the doctrine of the indivisibility of the Crown that applies throughout his dominions, but also recognized the divisibility of the powers of the

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Crown in respect of self-governing units of the Empire. In distributing powers, and providing for their respective spheres of application, and the effect of possible conflict, specific provision was also made by means of sec. 75 for the royal power of administering justice through the High Court in the cases mentioned, so that the new political relations established for Australians should in case of controversy be effectively determined. In a much higher degree and with a vastly greater force can these considerations be applied to sec. 75 so as to preserve the full meaning of the word "matters" in sec. 75, than could the important but less far-reaching considerations mentioned in *Farnell* v. *Bowman* (1) be applied to the phrase there in question. Further, if the word "matters" does not include tort, then nowhere is it included. If it be said that it does include torts but that torts have to be additionally dealt with, the question at once arises: Under what provision of the Constitution can a State be made liable for torts? It is, of course, unthinkable that a State can defeat sec. 75 by declining to be liable for its torts against the Commonwealth or another State.

It was, however, suggested that sec. 78 enabled the Federal Parliament to declare either the Commonwealth or a State liable for torts. That would be at best a very one-sided provision. It would enable the Commonwealth to render a State liable to the Commonwealth, and to refuse a reciprocal liability. It would also enable the Commonwealth to make one State liable to another, and leave that other irresponsible to the first. In short, there would be no certainty of equal and undiscriminating responsibility to obey the law or make reparation. The always present duty of the Crown to abide by and obey the law (*Eastern Trust Co.* v. *McKenzie, Mann & Co.* (2)) would be one of imperfect obligation except so far as the Commonwealth chose to impose a perfect sanction. But in truth sec. 78 has no such ambit or purpose. Approaching the matter once more from the standpoint of sec. 75, we see that, as to the cases there set out wherein the Commonwealth and the States are specifically mentioned, it is plain those organizations are bound—that is, the Crown in right of them is bound. But that was not a provision that covered all possible cases. As to the Commonwealth it was complete

(1) (1887) 12 App. Cas., 643. (2) (1915) A.C., 750, at 759.

so far as original process in the High Court was concerned. As to all cases of controversies in which there might be the element of conflicting interests politically considered, an opportunity was definitely created of invoking the jurisdiction of a tribunal independent of any State, and so placed as to tenure as to be specially secure, even in relation to the Commonwealth. But the Constitution itself gave no right to anyone, whether State or individual, to proceed against the Commonwealth in any other Court, whether a Federal or a State Court. As to States, it gave no right to any of the residents of a State to sue that State, either in the High Court or any other Court. There was not the same apparent necessity. Much ground remained to be covered within the ambit of the judicial power of the Commonwealth before there existed the same facility of suing the Crown as exists in most of the States within their own jurisdiction. To this, sec. 78 is directed, and by that section the Commonwealth Parliament is empowered to confer, in respect of all matters within the Federal judicial power, rights to proceed that are not already conferred by sec. 75. Observe the expression is "*rights to proceed.*" It is not "the *right* to proceed," which is really the sense which the defendant's argument applies to sec. 78. We do not read sec. 78 as directed to mere procedural regulations which affect not any right to proceed, but the method of procedure. That is covered by other sections, as, for instance, sec. 51 (xxxix.). But we do read it as merely supplementary to what the Constitution, so far as sec. 75 extends, did for itself in relation to the matters there mentioned. It enables the Commonwealth Parliament, if it thinks right, to do the same in other matters within the judicial power. But it does not enable the Commonwealth to subject a State to liability for tort in cases within sec. 75. That is not its function. The Constitution assumes that a right to proceed, either under sec. 75 of its own force or under sec. 76 by force of sec. 78, connotes an effective procedure. The various sections of the *Judiciary Act* which were referred to in argument thus fall, at all events for the most part, into their appropriate places. But it is profitless to pursue them in detail, except to say that none of them provides for the Commonwealth suing a State. The word "person" (even if sec. 22 of the *Acts Interpretation Act* 1901 be assumed to include Commonwealth and State as a body

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politic, unless the contrary intention appears, as to which we say nothing) does not include either Commonwealth or State in the relevant sections in the *Judiciary Act* because the contrary intention plainly appears.

Unless, therefore, sec. 75 of the Constitution embraces this case, this action cannot stand. But sec. 75 needs no parliamentary enactment to include this case. The jurisdiction conferred by sec. 75 is beyond the power of Parliament to affect. It can aid it and direct the method of its exercise: but it cannot diminish it. The Court needs no actual consent of Commonwealth or State to the exercise of this jurisdiction. The High Court for the purposes there set out is the King's Court to which His Majesty has entrusted the duty of judicial determination in the cases specifically enumerated.

It is unnecessary, and in a sense irrelevant, to refer to American decisions as to the suability of States or the United States. But whatever the hesitation of the Supreme Court in America with respect to such jurisdiction in earlier years, it appears to be now a definitely settled doctrine, resting on Constitutional provisions certainly no clearer than our own, that both the United States and the States themselves are subject to the jurisdiction of the Court. The pertinent cases are: as to the States—*United States* v. *Texas* (1) and *Oklahoma* v. *Texas* (2); as to the United States—*Minnesota* v. *Hitchcock* (3) and *Kansas* v. *United States* (4). And see *Willoughby on the Constitution*, vol. II., p. 1058.

The summons therefore ought, in our opinion, to be dismissed.

HIGGINS J. An action has been brought by the Commonwealth in the High Court for damages against the State of New South Wales —damages occasioned by a collision between a steamship belonging to the State and a motor-launch belonging to the Commonwealth. The State entered a conditional appearance, denying the jurisdiction of this Court to entertain the action against the defendant State without its consent. The State is the King acting by one set of agents; and the Commonwealth is the King acting by another set of agents: and except by virtue of some Act of the British Parliament the King cannot sue himself, or be sued by other persons either

(1) (1892) 143 U.S., 621.
(2) (1921) 256 U.S., 70, at p. 86.
(3) (1902) 185 U.S., 373.
(4) (1907) 204 U.S., 331, at p. 342.

in contract or in tort. An action for collision is an action of tort.

But by sec. 78 of the Constitution power is given to the Federal Parliament to "make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power." If there is a right to proceed against the State for this collision, it must be by virtue of an Act of the Federal Parliament passed under this section of the Constitution. Before examining the Federal Act—the *Judiciary Act*—however, it is necessary to consider sec. 75 of the Constitution, which, it is contended, gives a right, without the aid of sec. 78, for the King in right of the Commonwealth to sue the King in right of the State—to sue him for a tort, for a wrong done by the King, even though (apart from statute) "the King can do no wrong."

Sec. 75 of the Constitution provides:—"In all matters—(I.) Arising under any treaty: (II.) Affecting consuls, or other representatives of other countries: (III.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party: (IV.) Between States, or between residents of different States, or between a State and a resident of another State: (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." Now, this section does not change the substantive law: it is a mere procedural section. If there is a matter to be tried, the High Court can try it; that is all: and the position remains untouched that, without statutory authority, the King cannot sue himself (it is a contradiction in terms), nor can one agent of the King sue another agent of the King. If a case were to arise such as the Admiralty claiming for a naval dockyard *jure coronæ* the same land as claimed for a charity under some will, I have no doubt that a Court of chancery would find a means to have both interests of the King properly represented in argument, but such an exceptional case does not justify the inference that the same party can be both plaintiff and defendant in an action for damages. Sec. 75 does not create a new cause of action, or make a matter justiciable which is not justiciable otherwise. Under pll. I. and II., if there is a justiciable matter arising under a treaty or affecting consuls, the High Court may try it; under pl. III., where there is a justiciable matter to

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which the Commonwealth is a party, the High Court may try it; under pl. IV., where there is a justiciable matter between States or between a resident of one State and a resident of another, the High Court may try it; under pl. V., where a mandamus, &c., would be a proper remedy, as between subject and subject, and the claim for a mandamus, &c., is a justiciable matter, the High Court may try the claim. It so happens that here the action for collision is an action in tort, and there is another constitutional principle to be faced—that the King can do no wrong; and there can be no action against him for a tort (without statutory authority). In most of the Australian States, I understand, there are statutes authorizing actions against the King in right of the State either in contract or in tort; in Victoria there is a right to petition the King in contract, not in tort.

There is a great gap between this sec. 75, giving jurisdiction to the High Court to try a justiciable matter, and the giving of a right to one agent of the King to sue another agent. As a learned writer (Dr. *Baty*) put it in the *Harvard Law Review*, vol. XXXIV., p. 846 (June 1921),—"The Government of the colony is simply the King acting by a particular set of agents. The suit of one colony by another colony would be like the suit of the cook by the butler because too much was spent on coals, or the suit of the War Office by" (? against) "the Board of Agriculture because men who might be soldiers were kept to work at the harvest." Of course, I reject the argument used by counsel for the State, that the State is to be treated as if it were a foreign country, or as if it were "sovereign." I have in other cases commented on the misapplication of the word "sovereign" to the States of the Commonwealth. As the same writer stated, in the same passage, "we forget that the colonies are not sovereign: not even (unless the Versailles Treaty has worked a change) *mi-souverain*." But the failure of this argument does not in the least afford an answer to the claim made in the summons to stay proceedings in this action, if the gap to which I have referred be not filled. But the gap can be filled by sec. 78 of the Constitution and the Commonwealth Parliament. Sec. 78 leaves to the Federal Parliament the power to "make laws conferring rights to proceed against the Commonwealth or a State."

If there were need of authority, it is to be found in the case of *South Australia* v. *Victoria* (1). It was an action between two States as to their boundary, and the defendant urged that the action did not lie. The majority of the Court treated the claim as a claim for property and possession or trespass. *Griffith* C.J. said (2):—"In substance the Sovereign as head of the body politic of the State of South Australia is plaintiff, and as head of the body politic of Victoria is also defendant. . . . So far . . . as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable under the Constitution." "Matters" in sec. 75 are confined to matters which might come before a Court of justice—as, for instance, running agreements over railways. "A matter between States, in order to be justiciable, must be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined upon principles of law. . . . In . . . trespass by one State upon territory in the de facto possession of another, I have no doubt that this Court would have jurisdiction." The late *Barton* and *O'Connor* JJ. concurred. The latter defined "matters" in sec. 75 as "matters capable of judicial determination" (3). *Isaacs* J. said (4) 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." As for myself, I doubted whether there was any cause of action, as the State was not proprietor of the lands, but only donee of a power over them; but I concurred with the view that the High Court had power to entertain the action under sec. 75, and to give some judgment in favour of the plaintiff, *if the plaintiff had a cause of action*: "Under the Constitution, it is our duty to give relief as between States in cases where, if the facts had occurred as between private persons, we could give relief on principles of law; but not otherwise" (5). In short, to give jurisdiction to a particular Court over actions or matters of a certain character is not to make a matter actionable or justiciable if it is not otherwise actionable or justiciable under some

(1) (1911) 12 C.L.R., 667.
(2) (1911) 12 C.L.R., at pp. 674-675.
(3) (1911) 12 C.L.R., at p. 708.
(4) (1911) 12 C.L.R., at p. 715.
(5) (1911) 12 C.L.R., at p. 742.

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law to which the parties are alike subject; and the King in right of one State is not subject to any law binding him in right of another State, or of the Commonwealth, unless by force of some positive enactment; and sec. 78 was designed to supply such an enactment, through the Federal Parliament. Sec. 78 has authority equal to sec. 75; and sec. 75 is to be read in the light of sec. 78. This case of *South Australia* v. *Victoria* (1) was taken to the Privy Council on appeal (2), and was affirmed on the merits; but, according to the report of the arguments, counsel for the State of Victoria did not again raise its point that the action did not lie. The decision of the High Court that the action did lie, therefore, remains undisturbed.

I pass on now to consider how the Federal Parliament has made use of its power under sec. 78 of the Constitution—what laws it has made "conferring rights to proceed against the Commonwealth or a State." To this end Part IX. of the *Judiciary Act* was enacted in 1903—headed "Suits by and against the Commonwealth and the States." Sec. 56 enables "*any person* making any claim against the Commonwealth, whether in contract or in tort," to bring a suit "against the Commonwealth in the High Court or in the Supreme Court of the State in which the claim arose," but sec. 57 provides what I regard as an exception—that where a State makes the claim against the Commonwealth the suit may be brought in the High Court. There is no power for a State to sue the Commonwealth in the Supreme Court. So far as to suits against the Commonwealth. Then sec. 58 enables "*any person* making any claim against a State, whether in contract or in tort, in respect of a matter in which the High Court has original jurisdiction" (sec. 75) "or can have original jurisdiction conferred on it" (sec. 76), to "bring a suit against the State in the Supreme Court of the State, or (if the High Court has original jurisdiction in the matter) in the High Court"; but sec. 59 provides what again seems to be an exception—that where a State makes a claim against another State it may bring the suit in the High Court. It is clear that secs. 58 and 59 are mutually complementary, dealing with suits against a State, just as secs. 56 and 57 are mutually complementary, dealing with suits against the

(1) (1911) 12 C.L.R., 667. (2) (1914) A.C., 283; 18 C.L.R., 115.

Commonwealth. The only question is, do the words "*any person*" in sec. 58 include the Commonwealth as a plaintiff against a State? Now, at the time that the *Judiciary Act* 1903 was passed, the *Acts Interpretation Act* 1901 was on the statute book; and by sec. 22 thereof it was enacted that "In any Act, unless the contrary intention appears, 'Person' . . . shall include a *body politic* or corporate as well as an individual." Prima facie, therefore, the Commonwealth can bring an action against a State "unless the contrary intention appears." Where does the contrary intention appear? Counsel for the State here rely on the special provision as to State suing State contained in sec. 59, and say that that special provision is useless if "any person" in sec. 58 includes bodies politic (the Commonwealth is a body politic) under "any person." But this sec. 59, as to State suing State, is probably due to the special provision in sec. 75 (IV.) of the Constitution giving the High Court jurisdiction in matters "between States"; and, having exhausted the provision of sec. 75 (III.) as to suits to which the Commonwealth is a party, it may well have been thought necessary to make it clear that suits between States are to be brought in the High Court only. It may well have been thought that no Court but the High Court should have the formidable power to grant and enforce an injunction against the State and its officers (sec. 60). But, whatever the explanation, sec. 61 allows the name of the Commonwealth to be used in "suits on behalf of the Commonwealth," just as sec. 62 allows the name of the State to be used in suits on behalf of the State; and there is no limitation of sec. 61 to suits on behalf of the Commonwealth *against individuals*. That Parliament had the widest definition of "person" in mind when it framed Part IX. appears also from sec. 67, taken with sec. 65; for, whereas sec. 65 forbids execution against property of the Commonwealth or of a State, sec. 67 provides for such execution when in any suit a judgment is given in favour of the Commonwealth or of a State and against "*any person*." It can hardly be contended that "any person" in sec. 67 does not include bodies corporate, such as limited companies.

The heading of Part IX., too—"Suits by and against the Commonwealth and the States"—favours the view that the Commonwealth

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can sue the States as the States can sue the Commonwealth. Unless "any person" in sec. 58 includes the Commonwealth, there is no provision whatever in Part IX. enabling the Commonwealth to sue the States, although the States can sue the Commonwealth; and we should not act on such an absurd conclusion unless forced to it—"unless the contrary intention appears." The contrary intention must "appear"—not be a matter of surmise.

In my opinion, therefore, the Commonwealth is enabled to bring this suit by the *Judiciary Act*; and the summons to set aside the service of the writ or to stay proceedings should be dismissed.

Application dismissed with costs.

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

Solicitors for the defendant, *Norton, Smith & Co.*

B.L.

[HIGH COURT OF AUSTRALIA.]

KING . . . . . APPELLANT;
DEFENDANT,

AND

POGGIOLI . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922-1923.

SYDNEY, *Sept.* 15, 18, 1922; *April* 26, 1923.

Knox C.J., Higgins and Starke JJ.

Vendor and Purchaser—Day named for delivery of possession—Refusal to give possession on day named—Suit for specific performance—Jurisdiction of Court of Equity to award damages arising out of refusal to give possession—Readiness and willingness—Abatement of purchase-money—Diminution or deterioration in value of property — Breach of contract — Measure of damages — Equity Act 1901 (*N.S.W.*) (*No. 24 of* 1901), *sec.* 9.*

By an agreement in writing the appellant agreed to sell to the respondent a certain pastoral property, and it was thereby provided that delivery of

* Sec. 9 of the *Equity Act* 1901 (N.S.W.) provides that "In all cases in which the Court has jurisdiction to entertain an application . . . for the specific performance of any contract, covenant, or agreement the Court may award damages to the party injured either in addition to or in substitution for such . . . specific performance."