[HIGH COURT OF AUSTRALIA.]

GRIFFIN . . . . . PLAINTIFF;

AGAINST

THE STATE OF SOUTH AUSTRALIA . . DEFENDANT.

H. C. OF A. 1924.

ADELAIDE, *Sept.* 18, 19.

MELBOURNE *Oct.* 14.

Isaacs A.C.J., Gavan Duffy and Starke JJ.

Practice—High Court—Discovery and interrogatories—Action by resident of one State against another State—Right to compel State to give discovery and answer interrogatories—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (XXXIX.), 75 (IV.), 76, 78—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 64.

Held, that in an action in the High Court by a resident of one State against another State, sec. 64 of the *Judiciary Act* 1903-1920 gives the plaintiff the right to obtain discovery of documents from, and to administer interrogatories to, the defendant, and that sec. 64, in so far as it gives that right is within the legislative power of the Commonwealth Parliament.

The Commonwealth v. *Miller*, (1910) 10 C.L.R. 742, and *Jamieson* v. *Downie*, (1923) A.C. 691, followed.

QUESTION RESERVED.

An action was brought in the High Court by Hurtle Griffin, a resident of the State of Victoria, against the State of South Australia, by which the plaintiff sought to recover damages for negligence in handling, storing and selling wheat which the plaintiff and other persons delivered to the Government of the defendant State pursuant to the *Wheat Harvest Acts* 1915 and 1916 (S.A.). An application was made by the plaintiff on summons to a Judge of the Supreme Court of South Australia, pursuant to sec. 17 of the *Judiciary Act*, for an order for discovery of documents and for leave to the plaintiff to administer interrogatories. The summons came on for hearing before *Poole* J., who, pursuant to sec. 18 of the *Judiciary Act*, reserved for the consideration of the Full Court of

the High Court, the question whether he had, upon the application, power either to order discovery of documents or to give leave to administer interrogatories.

The question reserved now came on for argument.

Piper K.C. (with him *Norman*), for the plaintiff. Sec. 64 of the *Judiciary Act* takes away the right of a State, as well as that of the Commonwealth, to resist discovery in actions brought against it in the High Court (*Jamieson* v. *Downie* (1)). [Counsel were stopped.]

Cleland K.C. (with him *McLachlan*), for the defendant. In an action in the Supreme Court of South Australia against that State a subject cannot get discovery. That is a substantive right of the State which the Commonwealth Parliament has no power to take away, and, if sec. 64 of the *Judiciary Act* is to be construed as purporting to take away that right, it is *ultra vires* the Constitution. The power in sec. 78 of the Constitution to make laws conferring rights to proceed against a State was intended to enable the Parliament to give a right to proceed in the High Court directly instead of by petition of right, but not to enable the Parliament to take away substantive or prerogative rights of a State. Sec. 4 of the *Claims against the Government and Crown Suits Act* 1912 (N.S.W.), which it was held in *Jamieson* v. *Downie* (1) took away the right of the Crown to resist discovery, is wider in its terms than sec. 64 of the *Judiciary Act*, and gave an ordinary right of action against the Crown. The decision in *Commonwealth* v. *Miller* (2) was based on the surrender of the Commonwealth by sec. 64 of the *Judiciary Act* of its immunity from discovery; the State of South Australia has not surrendered that immunity. In *Commonwealth* v. *Baume* (3) this Court held that in a common law action in the Supreme Court of New South Wales against the Commonwealth the Commonwealth could not be compelled to give discovery. The right of the Crown to resist discovery is more than a matter of procedure: it is a substantive right (*La Société des Affréteurs Réunis* v. *Shipping Controller* (4)) and a prerogative of the Crown (*Attorney-General* v. *Newcastle-upon-Tyne Corporation* (5)). Sec. 51 (xxxix.)

(1) (1923) A.C. 691.
(2) (1910) 10 C.L.R. 742.
(3) (1905) 2 C.L.R. 405.
(4) (1921) 3 K.B. 1.
(5) (1897) 2 Q.B. 384.

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of the Constitution does not authorize the Commonwealth Parliament to deprive a State of its power to resist discovery: the words "matters incidental to the execution of any power vested by this Constitution . . . in the Federal Judicature" are not wide enough for that purpose. The words "as nearly as possible" in sec. 64 of the *Judiciary Act* were introduced in order to preserve substantive rights such as the immunity of the Crown from discovery.

Piper K.C., in reply, referred to *Hare on Discovery*, 1st ed., p. 283; *Calvert on Parties*, 2nd ed., p. 386.

Cur. adv. vult.

Oct. 14.

The following written judgments were delivered:—

ISAACS A.C.J. In an action—and, therefore, within the meaning of the *Judiciary Act*, sec. 64, in a "suit"—instituted in this Court, the plaintiff, Hurtle Griffin, a resident of Victoria, sued the State of South Australia, claiming, in respect of wheat delivered to the Government of the State under the *Wheat Harvest* (1915-1916) *Act* 1915, a declaration that he is entitled to compensation or recoupment for negligence, and consequential judgment, accounts and inquiries. The Government in its defence (*inter alia*) denies negligence, and denies all obligations except as founded on the Act. On that defence the plaintiff joins issue. On 9th August 1924 a summons was taken out on behalf of the plaintiff returnable in Judges' Chambers, Supreme Court House, Adelaide, calling upon the defendant to attend on an application for discovery of documents on oath by the affidavit of George John Smith, a State officer, and for leave to deliver interrogatories to be answered by the same officer. The summons came on to be heard by *Poole* J., exercising as a Judge of the Supreme Court of South Australia the Federal jurisdiction conferred by sec. 17 of the *Judiciary Act* 1903-1920. After argument, *Poole* J., acting under sec. 18 of the Act, stated a case for the consideration of the Full High Court.

A few words from the statement of the case will indicate the question of law that arises. *Poole* J. says:—"The defendant contends that no order for discovery can be made against the State of South

Australia in a suit brought in the High Court of Australia by a resident of another State. It is not contended by the defendant State that the language of sec. 64 of the *Judiciary Act* is not wide enough to enable an order for discovery to be made against the Commonwealth in a suit instituted against it. That could not well be argued in the face of *Commonwealth* v. *Miller* (1) and *Jamieson* v. *Downie* (2). But it is argued that, giving the section its full meaning, it is *ultra vires* the Commonwealth Parliament."

The question therefore is: Has the Commonwealth Parliament power to enact that a State as litigant in Federal jurisdiction shall be liable to give discovery of documents and to answer interrogatories? It was contended before us on behalf of the State that to refuse discovery and to decline to answer interrogatories was a prerogative of the Crown, and that the Commonwealth Parliament has no power to affect the King's prerogative in relation to a State. This, being obviously a question of limits *inter se*, needs the most careful consideration. But after bestowing that care, it seems impossible to doubt the conclusion.

The defendant's argument rests ultimately on the position that the prerogative referred to is a "right" of the State and that the Federal judicial power, which is the subject of the Commonwealth legislative power with respect to sec. 64 of the *Judiciary Act*, does not include the alteration of rights. *Miller's Case* (1) was cited. It was there held that a subject plaintiff, suing the Commonwealth in the Victorian Supreme Court in Federal jurisdiction, had a right to discovery of documents by the Commonwealth. Precisely the same point was decided by the Judicial Committee, in *Jamieson* v. *Downie* (3), in relation to the State of New South Wales under a State Act. The *Law Journal* report is the fuller; and from that it appears that *Miller's Case* was cited. In view of those two decisions, which are in accord, there appears to be no room for doubt that sec. 64, so far as construction is concerned, affects the prerogative right referred to. But those cases decide, not that every right a suitor has is subject to the section dealt with, but only that discovery is one of the rights that are so subject. In neither

(1) (1910) 10 C.L.R. 742.
(2) (1923) A.C. 691.
(3) (1923) A.C. 691; 92 L.J. P.C. 185.

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case was it suggested that any right came within the scope of the section, if it were a substantive right—that is, a right arising entirely independent of the status of "litigant." Obviously the only rights pointed to by sec. 64 of the *Judiciary Act* are rights sometimes called adjective rights, but more properly procedural rights. They are rights which the parties have in the character of litigants, rights having for their sole purpose and end the allegation or denial, the ascertainment, establishment, refutation or enforcement of the substantive rights of the suitors as these existed the instant prior to litigation.

Jamieson's Case (1) does not directly afford us any assistance to determine how far the Commonwealth Constitution enables the Commonwealth Parliament to control the question of discovery by the State in an action in Federal jurisdiction. The State Constitution is general. But the case is a reminder that the prerogative right referred to is that of the King exercising executive power and not of the King in Parliament exercising legislative power. So that the question is narrowed down to a conflict between the Commonwealth legislative power and the executive power of a State.

Miller's Case (2) did not raise the question of legislative power: it went on a point of construction of sec. 56 and sec. 64 of the *Judiciary Act*—that is, whether "rights" in sec. 64 included discovery and whether the order appealed from went beyond the words "as nearly as possible."

Reliance for the defendant was, in this case, placed on the judgment of *Barton* J. (3) referring to "submission"; and it was urged that the case was supported on the voluntary submission of the Commonwealth, through its Legislature, to the "rights" referred to, and not on the ordinary compulsive force of the enactment as part of the law of Australia. Not only does that contention overlook that passage in the judgment (4) where compulsory subjection by statute is referred to, but it is a contention which on the explicit terms of the Constitution is altogether inadmissible. The authority to enact sec. 64 of the *Judiciary Act* rests entirely on the Commonwealth power of legislation granted in

(1) (1923) A.C. 691.
(2) (1910) 10 C.L.R. 742.
(3) (1910) 10 C.L.R., at p. 747.
(4) (1910) 10 C.L.R., at p. 748 (l. 1).

sec. 51 (XXXIX.) and chap. III., operating in respect of the judicial power conferred by the Constitution. Par. XXXIX. of sec. 51 is an express power quite as much as any other enumerated power, the Constitution not having left the existence or extent of so important a matter to the doubt of implication (see *Ruppert* v. *Caffey* (1)). The "power vested by this Constitution . . . in the Federal Judicature" (par. XXXIX. of sec. 51) includes *ex facie* whatever original jurisdiction the Federal Judicature possesses either directly under sec. 75 of the Constitution or indirectly by Commonwealth legislation under sec. 76 to sec. 80. Sec. 75 expressly refers to States as litigants. Sec. 76 in par. I. necessarily includes States as possible litigants, and par. II., when read with some of the paragraphs of sec. 51—as, for instance, XXXI., XXXII., XXXIII. and XXXIV.—cannot be read so as to exclude States as possible litigants in Federal original jurisdiction. It inevitably follows, when the well-known doctrine of *Hodge* v. *The Queen* (2) is applied, that the Commonwealth Parliament has the power of regulating the course of procedure in Federal jurisdiction from its initiation to its end, and the only question—subject to any express restrictions found in the Constitution itself—is how far it has assumed to regulate the subject matter. An Act of the Commonwealth Parliament authorized by the Imperial statute represents the legislative will of the Australian people as a whole, including the people of any State concerned in litigation, and every such Act, by sec. V. of the covering clauses of the Constitution, binds the people of every State. The common law, even that portion of it known as the prerogative, must, if the statute so require, yield to the will of the King in Parliament. In the American case of *Virginia* v. *West Virginia* (3) *White* C.J., for a unanimous Court, said: "That judicial power essentially involves the right to enforce the results of its exertion is elementary. . . . And that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this Court by the Constitution is therefore certain." And see the judgment *passim*.

The result arrived at by the Legislature in sec. 64 of the *Judiciary*

(1) (1919-20) 251 U.S. 264, at p. 301. (2) (1883) 9 App. Cas. 117, at p. 132.
(3) (1917-18) 246 U.S. 565, at p. 591.

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Act is not at all violent or surprising. Mr. *Cleland* urged that to determine this question against him would cause an anomaly. He said it would give a greater right against the State to a non-resident of the State than to a resident. The two instances are not parallel. Whether one, and if so which, has a greater right depends on the appropriate law. The State law may say what it pleases with respect to State jurisdiction and the functions of State Courts. The Commonwealth law, an entirely different standard, as different as if it were British or New Zealand law, may adopt for its jurisdiction and its Courts other regulations. So that the difference, if there be one, is not between residents and non-residents but between different codes of law. Further, the provision of sec. 64 is merely the legislative declaration of general application of a principle to some extent recognized by the common law, but largely obstructed by technicalities.

Prerogative to-day, as Lord *Macnaghten* for the Privy Council said in *New South Wales Taxation Commissioners* v. *Palmer* (1), "means that the interests of individuals are to be postponed to the interests of the community." *Rigby* L.J. said practically the same thing in *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (2). In *Esquimalt and Nanaimo Railway Co.* v. *Wilson* (3) Lord *Buckmaster*, speaking for the Privy Council, refers with approval to the broad basis on which, in an early case, *Atkyns* B. founded his judgment. That basis was that "the party ought . . . to be relieved against the King, because the King was the fountain and head of justice and equity, and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person, should not be equity against him"—"a ground of decision," adds Lord *Buckmaster*, "which has no relation whatever to the statute of 33 Hen. VIII., but is based on general principles."

With respect to discovery in an action—which, as *Hare* says in his treatise on *Discovery*, at p. 2, is "a branch of procedure"—the general practice has been as *Rigby* L.J. stated in *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (4): "There has always been

(1) (1907) A.C. 179, at p. 182.
(2) (1897) 2 Q.B., at p. 395.
(3) (1920) A.C. 358, at p. 366.
(4) (1897) 2 Q.B., at p. 395.

the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded." This principle and this practice the Commonwealth Parliament, following the example of some of the States, has transmuted into a law for the purposes of its judicial power. The defendant's contention would reduce this legislation to futility and make the relevant provisions of the Constitution one-sided and unjust.

The case of *La Société des Affréteurs Réunis* v. *Shipping Controller* (1), cited for the defendant, depends on the continuance in England of the doctrine of *Thomas* v. *The Queen* (2). That case, when referred to, shows that the matter of discovery of documents is one of procedure.

The question raised by the case stated ought to be answered in the affirmative both as to discovery of documents and as to interrogatories.

GAVAN DUFFY AND STARKE JJ. This is an action brought in this Court by the plaintiff, who is a resident of the State of Victoria, against the State of South Australia, seeking to render that State "liable for loss caused by the negligence of its servants and agents in the execution of the duties of the Government under the *Wheat Harvest Acts* 1915 to 1917 of South Australia." The claim is based upon allegations substantially the same as those dealt with by the Judicial Committee in *Welden* v. *Smith* (3). The matter raises a question of mixed law and fact determinable by reference to legal considerations only, and therefore justiciable in this Court by force of sec. 75 (IV.) of the Constitution (*South Australia* v. *Victoria* (4); *Commonwealth* v. *New South Wales* (5)).

A summons was issued by the plaintiff returnable before the Supreme Court of South Australia, pursuant to sec. 17 of the *Judiciary Act* 1903, seeking an order for the discovery of documents by the defendant, and also for leave to exhibit interrogatories to the defendant. This summons came before *Poole* J., who reserved for

(1) (1921) 3 K.B. 1.
(2) (1874) L.R. 10 Q.B. 44.
(3) (1924) A.C. 484; 34 C.L.R. 29.
(4) (1911) 12 C.L.R. 667.
(5) (1923) 32 C.L.R. 200.

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the consideration of this Court the question whether he had power either to order discovery of documents or to give leave to deliver interrogatories. It was argued that the Crown cannot be compelled to give discovery to a subject (*Thomas* v. *The Queen* (1); *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (2)). But the *Judiciary Act*, sec. 64, provides that "in any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject." Discovery can be ordered by this Court in suits between subject and subject (see *Rules of the High Court*, Order XXIX.), and is one of the rights of the parties in the conduct of their litigation. *Jamieson* v. *Downie* (3) is, then, a conclusive authority that the provisions of sec. 64, if valid, take away the right of the Commonwealth and the State to resist discovery in suits brought against them. Adapting the words used in that case, the Constitution has permitted actions against the Commonwealth and the States which were not theretofore allowed, and, as auxiliary and ancillary thereto, the *Judiciary Act*, sec. 64, has permitted a procedure theretofore inapplicable.

But we must still consider the contention that sec. 64 is beyond the competence of the Parliament. It was said that the States were immune from discovery, and that the Constitution conferred no power upon the Parliament to take away or impinge upon that right or privilege. The argument is untenable in the face of the Constitution, which enables the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to matters incidental to the execution of any power vested by the Constitution in the Federal Judicature (sec. 51, pl. XXXIX.). This power is amply sufficient to warrant a law equipping tribunals, which have been given jurisdiction to hear and determine suits to which the Commonwealth or a State is a party, "with any and every authority the exercise of which may in any way assist" those tribunals in performing their function (cf. *Willoughby's Constitutional Law of the United States*, vol. I., p. 58).

(1) (1874) L.R. 10 Q.B. 44.
(2) (1897) 2 Q.B. 384.
(3) (1923) A.C. 691.

What we have said makes it unnecessary to determine whether sec. 64 is not also within the legislative power conferred by sec. 78 of the Constitution; and we express no opinion on that point.

The provisions of sec. 64 do not, therefore, transcend the power of the Parliament, and the question reserved must be answered in the affirmative.

Question answered in the affirmative both as to discovery of documents and interrogatories. Case remitted to the Supreme Court of South Australia. Costs of the special case to be costs in the application.

Solicitors for the plaintiff, *Wadey, Norman & Waterhouse.*

Solicitors for the defendant, *Baker, Glynn, McEwin & Ligertwood.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

Income Tax—Assessment—Foreign shipping company—Taxable income—Deductions—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918) *secs.* 3, 16 (1), 22—*Income Tax Act* 1918 (*No.* 41 *of* 1918), *secs.* 2, 4 (5), *Fourth Schedule.*

In the assessment of the income of a shipping company, of which the principal place of business is out of Australia and which carries passengers, &c., shipped in Australia, from the sum which represents 10 per cent of the amount payable to it in respect of the carriage of passengers, &c., and upon which sec. 22 (2)