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substitution of a new set of provisions—a complete code, it was called—regulating the rights of mortgagors and mortgagees operated as the expression of a general intent to restore rights that had been destroyed by the repealed legislation. But legislative intent can only be gathered from what the Legislature has chosen to enact, either in express words or by reasonable and necessary implication. The Act No. 57 of 1932 explicitly states the legislative intent, as in sec. 34, and beyond the intent so expressed the Courts cannot go.

In my opinion the result is that the appeal should be allowed.

Appeal allowed with costs. Demurrer overruled.

Solicitor for the appellant, *F. P. Donohoe.*

Solicitor for the respondent, *R. S. B. Sillar.*

J. B.

[HIGH COURT OF AUSTRALIA.]

HEIMANN . . . . . APPLICANT;

AND

THE COMMONWEALTH . . . . . RESPONDENT.

H. C. OF A. 1935. SYDNEY, *Nov.* 20, 28. Evatt J.

Constitutional Law—Action against Commonwealth for breach of contract brought in State Supreme Court—Removal into High Court—"Cause . . . arising under the Constitution or involving its interpretation"—Judiciary Act 1903-1933 (*No.* 6 *of* 1903—*No.* 65 *of* 1933), *secs.* 40, 56.

Practice—Discovery—Action against Commonwealth—Jurisdiction of State Supreme Court to order discovery against the Commonwealth—Common informer—Equity Act 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *sec.* 45.

An action brought in the Supreme Court of a State for the determination, as between an individual and the Commonwealth, of rights and obligations arising *ex contractu* is not a cause arising under the Constitution or involving its interpretation within the meaning of sec. 40 of the *Judiciary Act* 1903-1933. Neither the action itself, nor any issue it involves, depends upon the meaning or application of the Constitution. The action is based solely upon the contract and upon sec. 56 of the *Judiciary Act.*

An individual who brings an action at law against the Commonwealth in the Supreme Court of New South Wales may, by invoking the auxiliary jurisdiction of that Court in equity, obtain an order for the discovery of documents against the defendant.

An individual who for reward contracts with the Crown to furnish information leading to the conviction of persons for evasion of customs duty and to the recovery of duty evaded and the penalties provided by law cannot be regarded, for the purpose of an action brought by him against the Crown on the contract, as a "common informer," and is not disentitled to an order for discovery of documents.

APPLICATION under sec. 40 of the *Judiciary Act* 1903-1933.

In an action brought in the Supreme Court of New South Wales, the plaintiff, John Heinrich Heimann, claimed from the defendant, the Commonwealth of Australia, the sum of £50,000 as damages for breach of contract. The contract alleged in the declaration was that, in consideration of the plaintiff's supplying to the defendant information which would lead to the conviction of a certain person or persons for the evasion of customs duty and to the recovery of the duty evaded and penalties provided by law for such evasion, the defendant promised the plaintiff, subject to his not being a principal or a beneficiary in that evasion, to pay him one-fourth of any fine so recovered, and also an amount—not exceeding £2,556—equal to one-fourth of the evaded customs duty recovered as a result of information supplied by the plaintiff. The plaintiff alleged that, relying upon the defendant's promise, he supplied information to the defendant as a result of which certain persons were convicted and evaded customs duty and penalties recovered, yet, although he was not disentitled to receive the moneys under the contract, the defendant had not paid and refused to pay to him any part of those moneys.

In addition to denying the promise and the indebtedness, the defendant pleaded that the claims sued upon did not arise in New South Wales, that the supplying of information by the plaintiff to the defendant leading to the conviction of the persons concerned and the recovery of evaded customs duty and penalties therefor was a condition precedent to payment by the defendant of any money to the plaintiff, and that no person had been convicted

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and no evaded customs duty or penalties recovered as a result of information supplied to the defendant by the plaintiff.

Issue was joined and the matter was set down for hearing in the Supreme Court.

In response to a request by the defendant for better particulars the plaintiff stated that the promise was made in London in September 1930 by the officer in charge of the Trade and Customs Department of the Commonwealth in London and was contained in a letter bearing date 2nd September 1930 and signed by the official secretary of the Commonwealth, Australia House, London; that, as the result of information supplied by the plaintiff to the defendant concerning the smuggling of diamonds into the Commonwealth by three named persons, those persons were convicted at Sydney, but he was unable to furnish the dates of the convictions.

In an application made before *Evatt* J. the plaintiff claimed that the action pending in the Supreme Court was a "cause" arising under the Constitution within the meaning of sec. 40 (1) of the *Judiciary Act* 1903-1933 and asked for an order removing the cause into the High Court. In support of the application the plaintiff stated that he desired mutual discovery and leave to administer interrogatories, and certain directions; and that these could not be obtained against the Commonwealth of Australia in the Supreme Court of New South Wales, but could be obtained only in the High Court.

Evatt J. directed that the application be treated as if made upon motion and that it be heard in open Court.

Isaacs, for the applicant.

G. J. O'Sullivan, for the respondent.

EVATT J. This is an application under sec. 40 of the *Judiciary Act* to remove into this Court a cause now pending in the Supreme Court.

The cause pending in the Supreme Court is an action brought by Joseph Heinrich Heimann against the Commonwealth of Australia. It is an action claiming £50,000 damages from the Commonwealth

for breach of contract, and the contract, as alleged in the declaration in terms which are admitted to be substantially accurate, was a contract between the Commonwealth and the plaintiff that, if the plaintiff would supply information leading to the conviction of persons for evasion of customs duty and to the recovery of duty evaded and the penalties provided by law, the Commonwealth would, subject to the plaintiff not being a principal or beneficiary in such evasion, pay to the plaintiff one-fourth of any fine recovered in respect of such evasion, and also an amount, not exceeding a certain stated sum, which was equal to one-fourth of the evaded customs duty recovered as a result of the information received.

Several pleas were filed by the Commonwealth in the Supreme Court, and issue was joined. The action was set down for trial in the Supreme Court before this application was made.

Now the first question is whether sec. 40 of the *Judiciary Act* applies to an action of the character I have indicated. Before an order can be made under sec. 40 for the removal of a cause, it must appear that the cause or a part of it arises under the Constitution, or involves its interpretation. Is this action such a cause ? It is a claim for breach of contract against the Commonwealth, and the action for breach of contract has been commenced in the Supreme Court of New South Wales because, by reason of sec. 56 of the *Judiciary Act*, any person making a claim against the Commonwealth in contract may, in respect of that claim, bring suit against the Commonwealth in the Supreme Court of the State where the claim arose.

In the case of *The Commonwealth* v. *New South Wales* (1) it was held that, in respect of an action of tort brought by the Commonwealth against a State, the High Court possesses original jurisdiction by reason of sec. 75 of the Constitution itself, and that such an action is not dependent upon the passing of the *Judiciary Act*. Recently, in the case of *New South Wales* v. *Bardolph* (2) the reasoning of this case was deemed applicable to an action in the original jurisdiction of this Court in respect of a breach of contract by a State of the Commonwealth, for it is quite clear that, if sec. 75 of the Constitution

(1) (1923) 32 C.L.R. 200.

(2) (1934) 52 C.L.R. 455.

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submits the Commonwealth and States to liability for tort, it must also submit them to liability for claims based upon breach of contract.

In the present case, all we have is an action in the Supreme Court of New South Wales against the Commonwealth for breach of contract. In my opinion, such an action cannot be said to be a cause arising under the Constitution or involving its interpretation, within the meaning of sec. 40 of the *Judiciary Act*. Neither the action itself, nor any issue it involves, depends upon the meaning or application of the Constitution. The action is based solely upon the contract, and upon sec. 56 of the *Judiciary Act*.

This ruling is sufficient to dispose of the application, but I am also of opinion that the facts of the case require the rejection of the present application. The sole ground upon which it is made is that the plaintiff requires discovery of documents for the purposes of forwarding his action in the Supreme Court.

It has been contended on behalf of the Commonwealth that, whether such an action proceeds in the High Court or the Supreme Court, an application for discovery would necessarily be dismissed, because the plaintiff is in the position of a common informer. It was said by Lord *Esher* M.R. in *Earl of Mexborough* v. *Whitwood Urban District Council* (1) that, where a common informer sues for a penalty, the Courts will not, or will not readily, assist him by their procedure. In accordance with such principles, *Pring* J., in the case of *Ballard* v. *Coles* (2), held that discovery should not be granted in aid of an action for a penalty brought by a common informer. To the same effect is *R.* v. *Associated Northern Collieries* (3), a judgment of *Isaacs* J.

But in my opinion such principles have no application at all to a case such as the present. The plaintiff does not occupy the role of common informer as against the defendant. He sues the Crown as represented by the Commonwealth in respect of a contract concerning information alleged to have been supplied by the plaintiff. Heimann would not, or might not, be entitled to discovery in any proceedings he institutes as common informer against persons

(1) (1897) 2 Q.B. 111, at p. 115. (2) (1906) 23 W.N. (N.S.W.) 80.
(3) (1910) 11 C.L.R. 738.

alleged to have committed offences. But, as against the Crown which deliberately makes a contract with a person to procure information for its own purposes, the principle suggested is quite inapplicable.

I therefore address myself to the question whether, as contended by the plaintiff, an order for discovery cannot be made by the Supreme Court in reference to the present action.

In my opinion, there is no obstacle to the plaintiff's obtaining discovery in the Supreme Court. Under secs. 102 and 103 of the *Common Law Procedure Act*, wide powers of ordering discovery are granted to the Supreme Court of New South Wales on its common law side. But it was held in the case of *The Commonwealth* v. *Baume* (1) that, in an action brought in the Supreme Court of New South Wales by an individual against the Commonwealth, the Court cannot, in its common law jurisdiction, make an order for discovery of documents against the defendant. An analysis of that case shows clearly that the reason for the decision was that, under sec. 102 of the *Common Law Procedure Act*, those against whom the order to make an affidavit of documents may be directed do not include such an entity as the Commonwealth of Australia. (Cf. *The Commonwealth* v. *Miller* (2), per *O'Connor* J.) Therefore, owing to the phraseology of sec. 102, this Court was compelled to hold that orders for discovery could not be made against the Commonwealth in the Supreme Court of New South Wales on its common law side.

After *Baume's Case* (3), in *The Commonwealth* v. *Miller* (4) the High Court held that the rights conferred by sec. 64 of the *Judiciary Act*, which provides for the assimilation of the rights of litigants against the Commonwealth to the rights they would enjoy if suing private individuals, include the right of discovery, and that, in an action against the Commonwealth brought in the Supreme Court of Victoria, that Court possessed, by the combined effect of the *Judiciary Act* and the *Supreme Court Act* 1890 and Rules of the State of Victoria, jurisdiction to order the Commonwealth to make discovery of documents. And *Higgins* J. said :—

> "If there were no other rule in the Order, and if it were a proper case for interrogatories and for discovery as between subject and subject, it would

(1) (1905) 2 C.L.R. 405.
(2) (1910) 10 C.L.R. 742, at p. 752.
(3) (1905) 2 C.L.R. 405.
(4) (1910) 10 C.L.R. 742.

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be the duty of the Judge to frame an order therefor suitable to the circumstances of the defendants with which he has to deal—the Commonwealth. The Commonwealth cannot itself take an oath; for the Commonwealth consists of the people of six Colonies of Australia united, by Act of the British Parliament, under the name of the Commonwealth of Australia (*Commonwealth of Australia Constitution Act*, clause III.). Therefore, to comply with the words 'as nearly as possible' in sec. 64, the obvious course is to direct that the answer to interrogatories and the affidavit of discovery be made by some suitable officer of the Commonwealth" (1).

Therefore, although the Crown, whether represented by the Commonwealth or a State, originally enjoyed the prerogative right of refusing discovery of documents, the passage of such Acts as the *Judiciary Act* in respect of the Commonwealth, and the *Claims Against the Government and Crown Suits Act* 1912 in respect of the State of New South Wales, has resulted in the disappearance of the old prerogative right by reason of the clearly expressed grant of inconsistent rights to litigants against the Crown.

As long ago as 1896, in the case of *Morissey* v. *Young* (2), a successful suit for discovery of documents was brought by an individual against the defendant representing the Government of New South Wales. The suit was entertained in the exercise of the auxiliary jurisdiction of the Court of equity in aid of an action at law, and it was held that a decree for discovery could be made against the nominal defendant. That decision showed the wide effect of the local statute, and it has been followed subsequently. Thus, in *Downie* v. *Jamieson* (3) the Supreme Court held that, in an action at law against a nominal defendant, the latter could be ordered to make an affidavit of discovery under sec. 102 of the *Common Law Procedure Act* without the necessity of commencing a suit in equity for discovery in aid of the common law action. The last decision shows the limited operation of *Baume's Case* (4), because the nominal defendant was deemed to be caught by the words used in sec. 102. The decision in *Downie* v. *Jamieson* (3) was affirmed by the Privy Council (5).

The position now is that, as a result of *Baume's Case* (6), and for want of a deponent, the Supreme Court on its common law side is

(1) (1910) 10 C.L.R., at p. 758.
(2) (1896) 17 L.R. (N.S.W.) Eq. 157; 12 W.N. (N.S.W.) 90.
(3) (1922) 22 S.R. (N.S.W.) 121; 39 W.N. (N.S.W.) 70.
(4) (1905) 2 C.L.R. 405.
(5) (1923) A.C. 691.
(6) (1905) 2 C.L.R. 405.

not competent to order discovery as against the Commonwealth. But the reasoning of *Morissey* v. *Young* (1), *The Commonwealth* v. *Miller* (2) and *Downie* v. *Jamieson* (3) makes it quite plain that, if an individual brings an action at law against the Commonwealth in the Supreme Court of New South Wales, he may, by invoking the auxiliary jurisdiction of the Supreme Court in equity, obtain discovery against the Commonwealth (*Equity Act* 1901, sec. 45). In such case the difficulties raised in *Baume's Case* (4) disappear, because the Supreme Court in equity may indicate which officer of the Commonwealth should make the necessary discovery of documents and verify it. As *O'Connor* J. said in *The Commonwealth* v. *Miller* :—

> " The Courts of equity have always exercised the jurisdiction of compelling discovery by affidavit according to well recognized methods. Their practice has been to direct the making of the affidavit in such a way as will be effective, having regard to the parties before them. In the early practice, where the remedy was asked against a corporation, one of its officers was ordered to make the affidavit, he being when necessary added as a party for that purpose. There are cases also in which an equity Court, having before it a foreign Government which, by becoming the party plaintiff, had submitted itself to the jurisdiction, has directed the foreign Government to make discovery by the affidavit of one of its officers. The order made in the case of *Republic of Liberia* v. *Imperial Bank* (5) is a case of that kind " (6).

Therefore I hold that the ground of the present application, namely, the supposed incapacity of the Supreme Court to grant discovery in respect of this action, fails. I hold that there is jurisdiction in the Supreme Court in its equitable jurisdiction to require that discovery of documents shall be made in the present case.

The position therefore is this :—In the first place, sec. 40 of the *Judiciary Act* does not apply to the case. Secondly, the ground upon which Mr. *Isaacs* has based his application, namely, the impossibility of obtaining discovery in the Supreme Court, is not substantiated. Finally, I desire to add that, apart from all other objections, this Court should not be expected to make an order under sec. 40 at this stage of an action, for the plaintiff has made his election of the Court in which he desires to sue. If he decides that it is undesirable to proceed with his action in the Supreme

(1) (1896) 17 L.R. (N.S.W.) Eq. 157 ; 12 W.N. (N.S.W.) 90.
(2) (1910) 10 C.L.R. 742.
(3) (1922) 22 S.R. (N.S.W.) 121 ; 39 W.N. (N.S.W.) 70.
(4) (1905) 2 C.L.R. 405.
(5) (1873) L.R. 16 Eq. 179.
(6) (1910) 10 C.L.R., at pp. 752, 753.

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Court, there is nothing to prevent him from commencing a fresh action in this Court and discontinuing the action in the Supreme Court.

For these reasons I hold that this application fails and should be dismissed.

Application dismissed.

Solicitor for the applicant, *W. Lieberman.*

Solicitor for the respondent, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

J. B.

Discd *Bond Media Ltd v John Fairfax Group Pty Ltd* (1988) 16 NSWLR 82

Foll *Trade Practices Commission v TNT Management Pty Ltd* (1984) 56 ALR 647

Cons/Foll *R W Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1991) 32 NSWLR 152

Discd *Smith v Joyce* (1954) 89 CLR 529

Cons *Permanent Trustee Aust v FAI General Insurance* (2001) 187 ALR 380

Cons *Permanent Trustee Aust v FAI General Insurance* (2001) 50 NSWLR 679

[HIGH COURT OF AUSTRALIA.]

LUSTRE HOSIERY LIMITED . . . . APPELLANT;
PLAINTIFF,

AND

YORK . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1935.

SYDNEY, *Oct.* 3, 4.

MELBOURNE, *Nov.* 22.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Evidence—Admission—Admissibility—Probative value.

Words or conduct amount to an admission receivable in evidence against a party if they disclose an intention to affirm or acknowledge the existence of a fact whatever be the party's source of information or belief. Although the meaning of his words or conduct may depend upon the state of his knowledge, once that meaning appears and an intention is disclosed to assert or acknowledge the state of facts, its admissibility in evidence as an admission is independent of the party's actual knowledge of the true facts. When admitted in evidence, however, its probative force must be determined by reference to the circumstances in which it is made and may depend altogether upon the party's source of knowledge.

Decision of the Supreme Court of New South Wales (Full Court) affirmed, subject to a variation.