Dist
Greguric v Department of Works, Queensland [1988] 2 QdR 545

[HIGH COURT OF AUSTRALIA.]

THE CROWN . . . . . APPELLANT;
RESPONDENT,

AND

DALGETY AND COMPANY LIMITED . . RESPONDENT.
SUPPLIANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1943-1944.

SYDNEY, 1943. *Nov.* 29, 30.

MELBOURNE, 1944. *Mar.* 2.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Crown—Money had and received by Government of State—Claim by subject—Form of procedure—State statutory provision—Petition of right at common law—Right of subject to present petition to His Majesty the King—Crown Suits Act 1898 (*W.A.*) (62 *Vict. No.* 9), *ss.* 22, 33.

A common law petition of right is no longer available to the subject in respect of a claim against the Crown in Western Australia Such a claim can be prosecuted only by way of petition under and in accordance with the *Crown Suits Act* 1898 (W.A.).

So *held* by *Latham* C.J., *Rich*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting).

Decision of the Supreme Court of Western Australia (*Dwyer* J.): *Dalgety & Co. Ltd.* v. *The Crown*, (1942) 44 W.A.L.R. 49, by majority, reversed.

APPEAL from the Supreme Court of Western Australia.

A petition of right, bearing date 17th September 1940, was presented to His Majesty the King by Dalgety & Co. Ltd. It was substantially as follows:—

The suppliant company carries on the business of merchants, shipping agents, wool brokers, and other activities in the State of Western Australia. Its registered office and principal place of business are situate at Perth, Western Australia.

A certain named person had been employed since 1929 by the suppliant as a senior clerk in its wool department at Perth. It was one of the duties of the senior clerk to arrange for the payment to

carters for carting wool and to other persons having dealings with the wool department of the suppliant's business of moneys due to those persons for services or goods. For that purpose it was necessary for the senior clerk to check the relevant accounts and invoices and if satisfied with the correctness thereof to thereupon pass the same and prepare and initial as correct a slip known as a " debit slip " which set out, *inter alia*, the name of the creditor, the nature of the claim, that is, whether for services or goods, and the amount payable to him. The senior clerk then presented the slip to another clerk to be passed, who also initialled the slip, and the senior clerk then took the slip to another clerk, who by affixing his initials authorized payment of the amount shown to be due. A crossed cheque bearing the words " not negotiable " drawn on the suppliant's bankers, the Union Bank of Australia Ltd., Perth, was then prepared for the amount payable to the order of the creditor and it was then signed and countersigned on behalf of the suppliant by other clerks having authority in that behalf. The signed cheque was then handed to the senior clerk for payment to the creditor.

During the years 1931 to 1939 inclusive the senior clerk obtained three hundred and six cheques drawn for various amounts, by falsely certifying by means of debit slips that moneys were owing to the persons therein named whereas in fact as to certain of those slips and cheques the persons therein named and who were designated as payees were fictitious persons and in other cases the persons therein named were not creditors of the suppliant company and no moneys were due or payable to them. The senior clerk then indorsed the said cheques either by writing thereon the names of fictitious payees or by forging the names as being the alleged signatures of other payees.

The senior clerk had purchased a dwelling house from the War Service Homes Commissioner under the provisions of the *War Services Homes Act* 1918 as amended, and the purchase price with interest thereon was payable by instalments extending over a long period of years. The Department of the Treasury of the Government of Western Australia acted as the agent of the Commissioner for the collection of the instalments.

Certain of the cheques were from time to time handed by the senior clerk to a clerk employed in the Treasury in payment of instalments which had become due in respect of the dwelling house. The Treasury clerk deducted the amount of the instalments due, retained the cheques on behalf of the Treasury, and handed to the senior clerk cash for the balance of the cheques. Other cheques appeared to have been received by the Treasury clerk and retained

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by him on behalf of the Treasury in exchange for cash paid by him to the senior clerk.

The whole of the cheques were paid into the Treasury account which the Treasurer of the Government of Western Australia had with the Commonwealth Bank of Australia. The Commonwealth Bank collected the cheques from the suppliant's bank, the Union Bank of Australia Ltd., which debited the suppliant's account with the amount of the cheques, and the Commonwealth Bank then passed the proceeds of the cheques to the credit of the said Government Treasurer.

Section 87 of the *Bills of Exchange Act* 1909-1936 enacts that where a person takes a crossed cheque which bears on it the words " not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

By reason of the premises the suppliant claimed that the proceeds of the cheques which were collected and credited to the account of the Treasurer as aforesaid were moneys which were received by the Government of Western Australia, or by the Treasurer or Treasury Department on its behalf, for the use of the suppliant and that the suppliant was entitled to recover payments of those moneys from the said Government.

The suppliant therefore humbly prayed that His Majesty the King would be most graciously pleased to order that right be done in the matter and that the Government of Western Australia or some officer appointed in that behalf should be required to answer the same and that the suppliant should thenceforth be at liberty to prosecute its claim in the Supreme Court of Western Australia and take such other proceedings in relation thereto as should be necessary.

The petition of right was indorsed by His Majesty the King with a fiat in the following words : " Let right be done in the Supreme Court of Western Australia subject to the right of the Crown to demur to the Petition. George R.I."

The petition accordingly came to the Supreme Court of Western Australia for hearing.

The Crown denied each and every allegation contained in the petition, and said, further, that if, as alleged, certain cheques were handed to and received and retained by a clerk employed in the Treasury that clerk was not acting within the scope of his authority as servant or agent of the Treasury or of His Majesty but was acting contrary to an express prohibition.

The Crown also demurred to the petition on the ground that it did not disclose a sufficient or lawful or any obligation on His

Majesty towards the suppliant or any legal or equitable right of the suppliant against His Majesty cognizable by the Court or enforceable therein.

A special case was stated upon, so far as material to this report, the following questions of law which arose upon the pleadings :—

1. Whether the suppliant has the right to take proceedings by way of petition of right otherwise than under and in accordance with the provisions of the *Crown Suits Act* 1898 (W.A.) ?

2. Whether the cause of action alleged in the petition, namely, a claim for money had and received by the Government of Western Australia or by the Treasury or Treasury Department on its behalf for the use of the suppliant is such as to found a petition of right at common law ?

3. Whether the *Bills of Exchange Act* 1909-1936 binds the Crown and if not whether this is a good defence to the petition ?

5. Whether it is a bar to granting the suppliant the relief claimed in the petition if such petition was not submitted to a Commission for investigation prior to filing in the Court ?

In 1867 an Ordinance (31 Vict. No. 7) was passed in Western Australia setting forth that the ordinary remedy by petition of right is of limited operation and insufficient to meet all cases that may arise, and is attended with great expense and delay, and it enacted that in all cases of dispute or difference touching any claim between any person and the Colonial Government arising within the Colony, it should and might be lawful for any person to present a petition to the Governor and that such petition should be referrred to the Executive Council ; and if the Governor with the advice of the Council thought fit, the petition should be referred to the Supreme Court for trial, the Governor naming some person to be nominal defendant.

This Ordinance was repealed and replaced by the *Crown Suits Act* 1898 (W.A.), Part III. of which is headed : "Mode of enforcing Claims against the Crown." This Part provides by s. 22 that any person who has any claim or demand against the Crown which has arisen or accrued within Western Australia since the coming into operation of the Act may set forth in a petition the particulars of his claim or demand, and such petition shall be in the form contained in the Ninth Schedule. Section 33 provides that no claim or demand shall be made against the Crown under this Part of the Act unless founded upon and arising out of some one of the causes of action mentioned in the section, namely, breach of any contract entered into by or under the lawful authority of the Governor on behalf of the Crown

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or of the Executive Government of the Colony, or a wrong or damage, independent of contract, done or suffered in, upon, or in connection with a public work as therein defined. By s. 34 no-one shall be entitled to sue for or recover from the Crown more than £2,000 by reason of any personal injury sustained by him. A month's notice must be given of all petitions, and a petition must be filed within twelve months after the claim or demand has arisen.

Dwyer J. answered the questions as follows:—1. Yes; 2. Yes; 3. Yes; 5. No: *Dalgety & Co. Ltd.* v. *The Crown* (1).

From this decision the Crown, by leave, appealed to the High Court.

The relevant statutory provisions are set forth in the judgments hereunder.

Dunphy, for the appellant. The right of a subject against the Crown in Western Australia lies under the *Crown Suits Act* 1898 (W.A.) and not otherwise. The common law petition of right has been abolished. The right of the subject to proceed by way of petition to the Crown in England was abolished by the Ordinance of 1867. The words "shall and may" in clause 1 of that Ordinance are imperative and restrictive (*Chapman* v. *Milvain* (2)). The proviso to clause 1 does recognize that certain petitions, that is, in respect of claims affecting the prerogative, may be sent for the direct signification of His Majesty's approval or disapproval; therefore an inference should be drawn therefrom that any other petition to the King as a petition of right is no longer available. It is significant that although the Ordinance was promulgated seven years after the Imperial *Petitions of Right Act* 1860 was enacted, which Act is permissive and procedural almost entirely and preserves the right of petition at common law, the Ordinance contains no such provision. That fact supports the inference that it was intended by the Ordinance to abolish the common law petition of right. That right having been so abolished it was not, and could not be, revived or restored upon the repeal of the Ordinance by the *Crown Suits Act* 1898. The *Crown Remedies and Liability Act* 1915 (Vict.) and the Ordinance which preceded that Act limit the right of subjects to bring claims against the King to those arising *ex contractu* (*Daly* v. *Victoria* (3)). There was no such limitation in the Western Australian Ordinance of 1867. That Ordinance was a code. The Supreme Court of Western Australia has no jurisdiction to deal with this petition of

(1) (1942) 44 W.A.L.R. 49.
(2) (1850) 5 Ex. 61, at p. 65 [155 E.R. 27, at p. 29].
(3) (1920) 28 C.L.R. 395.

right. The petition was not submitted to a commission for investigation prior to its being filed in the Court (*Encyclopedia of the Laws of England* (1898), vol. 10, p. 63, par. *b*).

[STARKE J. referred to *Re the Queen and Carl von Frantzius* (1).]

The prerogative right of dealing with the petition must follow the practice. In this case the practice was not followed. The Ordinance was not merely a procedural enactment: it created rights and also contained a remedy, therefore it was exclusive. The new right created by the Ordinance was the right to issue the petition against the Governor and the Executive Council in Western Australia (*Josephson* v. *Walker* (2)). The *Crown Suits Act* 1898 is the code in force in Western Australia for actions against the Crown (*The Crown* v. *McNeil* (3)). So far as Western Australia is concerned that Act, except under s. 24 as to claims affecting the prerogative, provides the only remedies for relief against the Crown. Otherwise the limitation contained in s. 23 of the Act would be completely ineffective. If the right to bring a common law petition of right was not abolished by the Ordinance of 1867, it must be inferred from s. 4 (3) and s. 5 (1) of the *Crown Suits Act* 1898 that the right ceased upon the passing of that Act. The provisions of statutes of a self-governing State are binding upon its citizens and they are precluded from availing themselves of a procedure in conflict with those provisions (*Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (4)). This claim is made against the exchequer of Western Australia, and not against the Imperial exchequer. By the setting up of the Parliament of Western Australia and empowering it to legislate, the Crown surrendered its prerogative in matters of this nature. The Government of a Dominion or self-governing State is not suable in the courts of another Dominion or self-governing State (*Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (5); *Reiner* v. *Marquis of Salisbury* (6)). *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (7), referred to in *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 445, is a case of the prerogative of the Crown being affected and thus is distinguishable from this case, because the *Crown Suits Act* affects the right of the subject to petition the Crown.

[LATHAM C.J. referred to *In re Ferdinand, Ex-Tsar of Bulgaria* (8).]

An action with respect to not-negotiable cheques did not constitute a cause of action under the common law petition of right. The

(1) (1858) 2 DeG. & J. 126 [44 E.R. 936].
(2) (1914) 18 C.L.R. 691, at p. 701.
(3) (1922) 31 C.L.R. 76, at p. 99.
(4) (1940) 63 C.L.R. 278, at pp. 302, 303.
(5) (1925) A.C. 754, at p. 779.
(6) (1876) 2 Ch. D. 378, at pp. 384-386.
(7) (1920) A.C. 508.
(8) (1920) 90 L.J. Ch. 1.

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common law cannot be extended by statute ; therefore the common law petition could only give a common law right of action. The remedies conferred by the Imperial *Bills of Exchange Act* 1882 and by the Commonwealth *Bills of Exchange Act* 1909-1936 are statutory remedies only. Until the introduction of the *Bills of Exchange Act* there was no remedy available to the drawer of a not-negotiable cheque which had been cashed. Dealing with a not-negotiable cheque at common law gave a good title to the holder, so that there could be no action for conversion or for money had and received if any person took a not-negotiable cheque which was subsequently proved to be a fraud (*Commissioners of the State Savings Bank of Victoria* v. *Permewan, Wright & Co. Ltd.* (1)). A common law process can be used only with respect to a common law right of action. That position is not affected by the intervention of any statute. It follows that the common law petition of right is not exercisable if a statutory cause of action is created, especially as the *Crown Suits Act* itself provides that no new cause of action or no new remedy is to be provided under the statute. It is important that there is no precedent for a common law petition of right in the circumstances present in this case (*Thomas* v. *The Queen* (2)). The *Bills of Exchange Act* 1909-1936 does not bind the Crown, that is, it does not confer any right on the subject as against the Crown (*Roberts* v. *Ahern* (3)). An inquisition was essential. As the petition was not submitted to a commission for investigation prior to it being filed in the court the court has no jurisdiction (*Monckton* v. *Attorney-General* (4) ; *Clode* on *Petition of Right*, (1887), pp. 11, 13, 18, 174 ; *Chitty's Prerogatives of the Crown*, (1820), p. 346).

[RICH J. That does not seem to be in accordance with *R.* v. *Hornby* (*The Bankers Case*) (5).]

Barwick K.C. (with him *Kerrigan*), for the respondent. The Crown, even in the days of the Crown Colony and since, has been part of the local legislature. The prerogative to grant a petition came with the settlement of the colony. The power to grant a fiat was never delegated to the Governor nor included in his instructions so that, unless there were special legislation, every petition would need to have the personal fiat upon it. A statute, while it is in force, abridges the royal prerogative to the extent that the Crown can only do the particular thing under and in accordance with the statute and that its prerogative power to do that thing is in abeyance

(1) (1914) 19 C.L.R. 457, at pp. 473, 476.
(2) (1874) L.R. 10 Q.B. 31, at pp. 34, 35.
(3) (1904) 1 C.L.R. 406.
(4) (1850) 2 Mac. & G. 402 [42 E.R. 156].
(5) (1699) 5 Mod. 29 [87 E.R. 500].

(*Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (1)). The prerogative is simply placed in abeyance, it is not abolished. The *Crown Suits Act* 1898 does not disclose any intention to make the provisions of that statute the sole provisions regulating the grant of a fiat. The Act was not intended to be exclusive. The respondent's claim does not come within the provisions of s. 33 of the Act, nor does the Act as a whole provide the respondent with a remedy. The respondent's claim is a claim for restitution of property in the hands of the Crown. There is no provision in the *Crown Suits Act* for the recovery of property in the hands of the Crown. The Act is an Act to facilitate, and not to restrict, the right of the subject as against the Crown. Section 4 (3) of the Act finds an application in relation to (i) possible proceedings under the Ordinance which were pending, and (ii) causes of action for which there was a remedy under the Ordinance but for which there would not be a remedy under the Act. The words " subject to the provisions of this part " in s. 22 are very important and show that the words " any claim " must be read down to mean any claim within s. 33. As regards s. 22 the principle is that a statute does not alter the common law except by express statement or necessary intendment. The word " may " in s. 22 is permissive. The intention of the Act is to leave the Crown powers, authorities, privileges and rights unimpaired. When s. 24 and s. 25 are applied they depend upon the existence of a prerogative to grant a fiat in such cases and, therefore, at least, presume the continuance of the prerogative in those cases. In those cases the fiat is granted on a prerogative, and not on a statutory basis. This supports the argument that the Act has not affected the common law prerogative of the Crown to grant a fiat. The approach to the construction of the statute must be : Does it evidence an intention (*a*) to remove temporarily the prerogative, and (*b*) to preclude the subject from a large class of rights which he would have had at common law and which are not provided for in the statute ? The statute does not contain express words on the matter and there are many indications in the statute which point the other way. The statute leaves untouched the prerogative to grant a fiat with respect to matters outside s. 33. The Court did not decide in *The Crown* v. *McNeil* (2) that a subject must bring a petition within s. 33 of the *Crown Suits Act* 1898. It is conceded that the respondent's claim does not come within either par. 1 or par. 2 of s. 33. The authorities referred to on behalf of the appellant are directed to the question of whether the Act has conferred a new right as distinct from removing the prerogative. It does not necessarily follow that

(1) (1920) A.C., at pp. 539, 540. (2) (1922) 31 C.L.R. 76.

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because a statute creates a new right the prerogative is thereby abridged. The Crown is part of the local legislature. Assuming that it has not been party to any statute which on its construction has removed that prerogative, the prerogative which came with the settlement of the colony remains. The dominant feature of the respondent's claim is that it is suing in substance for restitution of property in the hands of the Crown. So far as the Crown's right to get from the cheques the respondent's money is concerned, two factors are present, namely, 1. that if the cheques were not-negotiable instruments then whether the senior clerk forged the instruments or not, or if the name thereon was that of the senior clerk and he had no title thereto, the Crown would get no title, and 2. even assuming them to be negotiable, if the alleged title depended upon forged instruments there was no title because they were never transferred. The second factor disposes of any argument that the Crown is not bound by the *Bills of Exchange Act*. Although some of the payees were fictitious persons that fact was unknown to the respondent (*Vagliano Brothers* v. *Bank of England* (1)), consequently the forged indorsement was a complete bar to any title in the Crown. Even apart from the *Bills of Exchange Act*, a cheque bearing the words " not negotiable " is strictly a not-negotiable instrument (*Hibernian Bank Ltd.* v. *Gysin and Hanson* (2)). This provides a further answer to the contention that the Act does not bind the Crown.

[WILLIAMS J. referred to *Dominion Building Corporation Ltd.* v. *The King* (3).]

The test is : Was " the statute directed towards divesting, taking away, interfering with or affecting any prerogative, estate, right, title or interest of the Crown ? " This cannot be done by mere general words (*Magdalen College Case* (4)). In principle a petition of right will lie in any circumstances which as between subject and subject would constitute a good cause of action except causes of action in tort which sound only in unliquidated damages : See *Holdsworth, History of English Law*, (1926), vol. 9, pp. 16, 19, 21, 40-42. The so-called theoretical difficulty about regarding the proceeds of the cheques as being property of the Crown which was converted is not a real difficulty. In *Morison* v. *London County and Westminster Bank Ltd.* (5) the court looked at the substance and decided that the conversion was of the money. Money is property and is recoverable from the Crown by petition even though it came into the possession of

(1) (1889) 23 Q.B.D. 243, at p. 260.
(2) (1939) 1 K.B. 483.
(3) (1933) A.C. 533, at p. 549.
(4) (1615) 11 Co. Rep. 66b, at p. 74b [77 E.R. 1235, at p. 1247].
(5) (1914) 3 K.B. 356.

the Crown by tortious means (*Baron de Bode's Case* (1); *Tobin* v. *The Queen* (2); *Feather* v. *The Queen* (3); *Thomas* v. *The Queen* (4); *Windsor and Annapolis Railway Co.* v. *The Queen and The Western Counties Railway Co.* (5); *R.* v. *Inland Revenue Commissioners*; *In re Nathan* (6); *Buckland* v. *The King* (7)). If the property is in the hands of the Crown that is the critical fact irrespective of whether it came there tortiously or not. As between subject and subject the respondent could waive the tort and sue for money had and received. In *United Australia Ltd.* v. *Barclay's Bank Ltd.* (8) it is clear that the remedy of money had and received is independent of the tort; it is a matter of electing between two alternative remedies. *Brocklebank Ltd.* v. *The King* (9) and *Hardie and Lane Ltd.* v. *Chiltern* (10) merely involve the construing of a statute. Neither of them touches the point that the Crown would be liable on a petition of right in respect of a claim *quasi contractu*. There is not any need at any stage for an inquisition (*Clode* on *Petition of Right*, (1887), p. 166; *Holdsworth, History of English Law*, (1926), vol. 9, p. 37).

Dunphy, in reply. The proposition in *Robertson's Civil Proceedings by and against the Crown*, (1908), p. 381, is applicable to this case. The Crown will pay regard to local legislation. The statement in *Holdsworth's History of English Law*, (1926), vol. 9, p. 10, that tort is a matter which can be sued under a petition of right was criticized in *McArthur* v. *The King* (11). On the question of whether a tort can be treated as a breach of contract, see *Clode* on *Petition of Right*, (1887), p. 139.

Cur. adv. vult.

1944, Mar. 2.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal by leave from an order made by the Supreme Court of Western Australia (*Dwyer* J.) upon a case stated in a proceeding by way of common law petition of right, the Crown having pleaded a demurrer to the petition as well as a defence. The *Crown Suits Act* 1898 (W.A.) provides that a petition for the purpose of enforcing a claim or demand against the Crown which has arisen or accrued within Western Australia since the coming

(1) (1845) 8 Q.B. 208, at pp. 271, 274 [115 E.R. 854, at pp. 877, 879].
(2) (1864) 16 C.B.N.S. 310 [143 E.R. 1148].
(3) (1865) 6 B. & S. 257, at pp. 293-297 [122 E.R. 1191, at pp. 1204-1206].
(4) (1874) L.R. 10 Q.B. 31.
(5) (1886) 11 App. Cas. 607, at pp. 614, 615.
(6) (1884) 12 Q.B.D. 461, at pp. 473, 476, 478.
(7) (1933) 1 K.B. 329, at p. 343.
(8) (1941) A.C. 1.
(9) (1925) 1 K.B. 52.
(10) (1928) 1 K.B. 663.
(11) (1943) 3 D.L.R. 225, at p. 230.

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into operation of the Act may be filed in the Supreme Court, that the filing of the petition shall be the commencement of a suit (s. 22), and that a law officer may defend the suit (s. 23). Section 33 of the Act provides that no claim or demand shall be made against the Crown under Part III. of the Act (which is headed " Mode of enforcing Claims against the Crown ") unless it is founded upon and arises out of some one of the causes of action mentioned in the section. Those causes of action are (1) breach of a contract made by or under the lawful authority of the Governor on behalf of the Crown or of the Executive Government, and (2) a wrong or damage, independent of contract, done or suffered in, upon, or in connection with a public work as defined in par. 3 of s. 33. The claim made by the present suppliant is a claim for money had and received based upon alleged wrongful dealing by the Crown with crossed cheques marked " not negotiable " belonging to the suppliant and with the proceeds thereof. If the facts alleged in the petition were proved in an action by the suppliant company against a subject of the Crown the company could recover either damages for conversion of the cheques or the same sum as money had and received: See the cases cited in *Morison* v. *London County and Westminster Bank Ltd.* (1). Admittedly the claim made in the petition does not fall within the provisions of s. 33, and it could not be prosecuted under the Act.

The petition of right has been presented to His Majesty the King and has been indorsed by His Majesty with a fiat in the following words:—" Let right be done in the Supreme Court of Western Australia subject to the right of the Crown to demur to the Petition. George R.I." The petition has accordingly come into the Supreme Court of Western Australia for hearing. A case was stated upon certain questions of law which arose upon the pleadings. The first question is as follows:—

" Whether the suppliant has the right to take proceedings by way of petition of right otherwise than under and in accordance with the provisions of the *Crown Suits Act* 1898."

This question, which must be determined at the threshold of the case, has been answered in favour of the suppliant.

In support of its demurrer the Crown contends that procedure by way of petition of right at common law has been abolished by Western Australian legislation.

It is not disputed that before any of the legislation to which reference is to be made the subject had the privilege or possibly the right (*In re Nathan* (2)) of proceeding by way of petition of right according to the course of the common law. In 1867 " An Ordinance to facilitate

(1) (1914) 3 K.B., at p. 365.

(2) (1884) 12 Q.B.D. 461.

proceedings by persons having claims against the Government" was enacted—31 Vict. No. 7. The Ordinance recited that the ordinary remedy by way of petition of right was of limited operation, was insufficient to meet all cases that might arise, and was attended with great expense and delay. It was therefore enacted that: "In all cases of dispute or difference touching any claim between any person and the Colonial Government, which may have arisen, or may hereafter arise within the said Colony, it shall and may be lawful for any person or persons having such disputes or differences to present a petition to the Governor of the said Colony setting forth the particulars of the claim of such petitioner." The Ordinance provided for the steps to be taken upon the petition by reference to the Supreme Court for trial by a jury or otherwise, and there was a provision that where the petition affected the royal prerogative it might be transmitted to the Secretary of State for the Colonies for the signification of Her Majesty's approval or disapproval, and that, if it were approved, proceedings might be taken as in an ordinary case.

The Ordinance was general in its terms. It recited difficulties attending the existing remedy, i.e., at common law, by petition of right, and was evidently intended to remove those difficulties. The Ordinance applied to "all cases of dispute or difference touching any claim between any person and the Colonial Government." It provided for a new remedy in all such cases. The question is whether the new and more convenient procedure was substituted for, or added to, the old procedure. The new procedure was available in all cases. Did the Ordinance make it compulsory or necessary in all cases? In *Chapman* v. *Milvain* (1), the court considered a statute which provided that proceedings by a banking co-partnership for debts due "shall and lawfully may . . . be prosecuted" in the name of a public officer of the co-partnership. It was held that the words quoted were obligatory and that the co-partnership was bound to sue by a public officer. If the Ordinance now under consideration had been in the form "all claims against the Government shall and may" be enforced in the manner stated in the Ordinance, it would, I think, be clear that the Ordinance was intended to exclude all proceedings in respect of such claims unless brought in accordance with the Ordinance. But the words are in the active, not in the passive, voice. They are that "it shall and may be lawful" for a person to present a petition in all cases of dispute or difference touching any claim against the Government. A provision that proceedings of a certain description shall be brought by a particular person is

(1) (1850) 5 Ex. 61 [155 E.R. 27].

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obligatory and exclusive. A provision that a person having a claim of a particular kind shall present a petition would also, prima facie, be obligatory and exclusive. Here, however, the provision is that it " shall and may be lawful " for a person to present a petition. I am unable to see that these words are other than permissive. It is a general rule for the construction of statutes that " you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature " (*In re Cuno* ; *Mansfield* v. *Mansfield* (1), per *Bowen* L.J.). In the case of the creation of new remedies this rule produces the result that, in the absence of words in the statute which necessarily exclude the common law remedy, a party has his election to pursue either the common law remedy or the statutory remedy (*Wolverhampton New Waterworks Co.* v. *Hawkesford* (2)). I am of opinion that the Ordinance should not be construed as abolishing the possibility of proceeding at common law by petition of right.

But it is contended that, even if the Ordinance left unimpaired the common law petition of right, the *Crown Suits Act* 1898 abolished it. That Act is entitled : " An Act to facilitate the Protection and Recovery of Crown Property, and the Enforcement of Claims against the Crown." The question which arises is whether the terms of the Act show that it was the intention of Parliament that the Act should provide the only method of enforcing claims against the Crown or whether, on the other hand, it was intended that such rights or methods of enforcing claims against the Crown as existed at common law (if they had not been abolished by the Ordinance) should continue alongside the Act, either completely or, at least, in relation to claims which could not be enforced under the terms of the Act.

In the *Petitions of Right Act* 1860 (Imp.) (23 & 24 Vict. c. 34) s. 18 expressly provided that : " Nothing in this Act contained shall prevent any Suppliant from proceeding as before the passing of this Act." It is plain, therefore, that that Act provides only an alternative procedure to the old practice at common law and that it does not abolish that practice. There is no such provision in the *Crown Suits Act* 1898. But neither is there any provision in that Act which expressly abolishes the common law procedure. It is therefore necessary to examine the provisions of the statute as a whole for the purpose of answering the question which arises.

(1) (1889) 43 Ch. D. 12, at p. 17.
(2) (1859) 6 C.B. N.S. 336, at p. 356 [141 E.R. 486, at p. 495].

The Act repeals the Ordinance to which reference has already been made, and substitutes new provisions for dealing with claims against the Crown. Even if it could have been argued that, if the Ordinance had excluded the common law right, a mere repeal of the Ordinance would have revived the common law (as to which see *New Windsor Corporation* v. *Taylor* (1)), the repeal of the Ordinance, not *simpliciter* but associated with the introduction of new provisions, cannot be relied upon as reinstating the common law.

Section 4 (3) of the Act provides that all proceedings, of whatever kind, by or on behalf of or against the Crown commenced before the coming into operation of the Act and all rights accrued or liabilities incurred or proceedings for causes of action arising prior to the coming into operation of the Act may be enforced, continued, commenced and prosecuted in like manner as if the Act had not been passed. This provision is not limited to the continuance of pending proceedings. It deals also with certain causes of action, namely, causes of action arising prior to the Act. The section expressly preserves rights to proceed and causes of action against the Crown as if the Act had not been passed, but only in the case of proceedings commenced before the Act and of causes of action arising before the Act. The terms of the section strongly suggest that there is to be no right to proceed against the Crown except under the Act in other cases—i.e., in cases where the cause of action (as in the present case) arises after the Act. *Expressio unius exclusio alterius.* If the Act, taken as a whole, does not affect common law rights, this section is unnecessary for the purpose of preserving such rights even in the cases to which it applies. But, on the other hand, the section is necessary to secure the desired purpose of preserving, in those cases, rights under the repealed Ordinance. Accordingly this section is not inconsistent with the contention that the Act does not diminish rights at common law.

A much stronger argument for the Crown depends upon s. 5 of the Act, which preserves in careful detail rights and privileges of the Crown. It provides that nothing in the Act shall prevent the Crown from taking proceedings for the recovery of any debt, damages, duty, sum of money, land, or goods in any court of competent jurisdiction, which prior to the coming into operation of the Act could have been commenced and taken in any such court. Thus there is an express preservation of the rights of the Crown to proceed otherwise than under the Act. There is no such preservation of the rights of the subject, except in so far as s. 4 (3), to which reference has already been made, provides for the continuance of proceedings

(1) (1899) A.C. 41.

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begun and the enforcement of rights accrued or liabilities incurred prior to the coming into operation of the Act.

Section 5 further provides in par. 2 that nothing in the Act shall interfere with or in any way restrict any privilege vested in the Crown in respect of all or any of the matters within the provisions of the Act. There is no such provision relating to any privilege of subjects of the Crown.

Part II. of the Act relates to recovery of debts and property by the Crown. These provisions are, by virtue of s. 5, plainly additional to, and are not substituted for, any rights which the Crown had apart from the Act. Section 8 is as follows :—" All debts, damages, duties, sums of money, land or goods due, payable, or belonging to the Crown, may be sued for and recovered by the means and in the manner prescribed in this Act."

Part III. of the Act relates to the mode of enforcing claims by subjects against the Crown. In this Part the provisions are very different in character from those contained in Part II. Section 22 (1) is in the following terms :—" Subject to the provisions of this part of this Act, whenever any person has any claim or demand against the Crown which has arisen or accrued within Western Australia since the coming into operation of this Act, such person may set forth in a petition the particulars of his claim or demand as nearly as may be in the same manner as in a statement of claim in an action in the Supreme Court between subject and subject."

The words " whenever any person has any claim or demand against the Crown " are very wide. They are as general as the words which are used in s. 8 : " All debts, damages, duties, sums of money, land or goods," &c. But in s. 8 the words are subject to no limitation by reference to any other provisions of the Act. They are positive and facultative. The general words of s. 22, however, are limited by the introductory words " Subject to the provisions of this part of this Act." There is thus a marked contrast between this provision, giving the subject rights under the Act, and the terms of s. 8, giving the Crown rights under the Act. Section 22 is a general provision allowing the subject to make claims against the Crown by petition under the Act, but only subject to the provisions of the Act. It is, therefore, necessary to examine other provisions of the Act to ascertain what claims are permitted by the Act to be made against the Crown.

Section 33, to which reference has already been made, begins with the following words : " No claim or demand shall be made against the Crown under this Part of this Act unless it is founded upon and arises out of some one of the causes of action mentioned in

this section." Thus no claim can be made against the Crown *under Part III.* of the Act unless it is founded upon one of the two classes of causes of action mentioned in the section. Accordingly the limitation placed in the initial words of s. 22 upon the general words of that provision means that the only claims which can be made against the Crown are those for which the Act provides, i.e., the claims defined in s. 33. In my opinion the combined effect of ss. 22 and 33 can be stated by saying that s. 22 is an affirmative provision conferring a right to proceed against the Crown in the manner provided in the Act " whenever " there is a claim against the Crown, but only " subject to " the provisions of the Act, that is, only in cases which fall within s. 33. The contrary view is that, notwithstanding the Act, any claim against the Crown can be prosecuted as at common law. Upon that view I can find no meaning for the words " subject to the provisions of this part of this Act " in s. 22. Upon that view the Act would have precisely the same effect as if these words had been omitted. Section 33 limits claims under Part III. to two classes of claims. No proceeding in respect of any other claim could possibly be brought under Part III. Therefore either the words " subject to the provisions of this part of this Act " in s. 22 are useless and unmeaning, or they impose a limitation upon all claims against the Crown. In order to give a meaning to these words they must be interpreted in the latter sense. Accordingly I am of opinion that the only claims which can now be prosecuted against the Crown in Western Australia are those defined in s. 33 and that the subject can no longer proceed against the Crown in any manner in respect of other claims. Thus, in my opinion, a common law petition of right is no longer available to the subject.

This conclusion is supported by a consideration of s. 37 of the Act, which provides that: " No person shall be entitled to prosecute or enforce any claim or demand under this Part of this Act unless the petition setting forth the relief sought is filed within twelve months after the claim or demand has arisen." Claims or demands against the Crown upon contracts were enforceable by petition of right at common law. Claims for the torts mentioned in s. 33 were not so enforceable (*Tobin* v. *The Queen* (1); *Feather* v. *The Queen* (2)). If the Act does not exclude proceedings at common law, s. 37 would have no effect in protecting the Crown against the claims on contract mentioned in s. 33. If s. 37 imposed a time limitation upon a claimant only when he proceeded under the Act, but left

(1) (1863) 14 C.B.N.S. 505 [143 E.R. 543]; (1864) 16 C.B.N.S. 310 [143 E.R. 1148].

(2) (1865) 6 B. & S. 257 [122 E.R. 1191].

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him free from any such limitation if he chose to proceed at common law, it would be a useless provision affording no protection whatever to the Crown. In *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (1), in referring to an argument that a common law prerogative of the Crown was not affected by a statute dealing with the same subject matter, Lord *Dunedin* repeated an observation of *Swinfen Eady* M.R. which, he said, was unanswerable—" What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative ? " So here I ask—" What use would there be in imposing the limitation prescribed by s. 37 if the subject could at his pleasure disregard it and fall back on the common law ? " The provisions of s. 37 provide, in my opinion, a further reason supporting the view that the *Crown Suits Act* was intended to provide a code for proceedings by subjects against the Crown and that it abolished the right to proceed by petition at common law. Accordingly, I am of opinion that the first question in the case should be answered in the negative, and that therefore it is unnecessary to answer the other questions.

In the present case the Crown has, according to the allegations in the petition, received a sum of over £8,000 as a result of fraudulent dealing in cheques by an employee of the suppliant. It has been conceded in argument that if the facts alleged in the petition were proved against any person other than the Crown, the suppliant company would have a full remedy. It is for the Government of Western Australia to consider whether, if the allegations in the petition are true, the Crown should rely upon the protection which it derives from the law as it at present stands.

In my opinion the appeal should be allowed with costs, the order of the Supreme Court (except as to costs) set aside, and in lieu thereof the first question in the case should be answered " No," and it should be declared that it is unnecessary to answer the other questions.

RICH J. The point which arises for determination in the present appeal is whether a person who claims that the Government of Western Australia has received certain moneys to his use is entitled to adopt, for the purpose of enforcing his claim, the procedure of a petition of right addressed to His Majesty the King and presented to His Majesty in England. This procedure has in fact been adopted, and His Majesty, on the advice of his Ministers in England, has indorsed the petition with the fiat : " Let right be done in the Supreme Court of Western Australia, subject to the right of the Crown to

(1) (1920) A.C. 508, at p. 526.

demur to the Petition." The Supreme Court of Western Australia has upheld the petition as being maintainable before it, and this is an appeal from its determination.

There can be no doubt that at common law a subject who conceives that he is damnified because the Crown withholds from him money or other property to which he claims to be entitled, or has broken a contract with him, may address a petition to the Crown praying for an order that right be done ; and it is the regular practice for the Crown to accede to the request if it appears that there is a substantial question to be determined. But a subject who desires to litigate a matter with the Crown by this form of procedure must consider whether his petition should be addressed to His Majesty himself or to one of His Majesty's representatives, and must take care to see that the procedure by common law petition is still available. Where the claim affects the Crown as a constituent of the government of a self-governing dominion or possession which is governed by the King, acting through his local representative, by means of local Ministers and a local parliament, it is to the King in that capacity that the petition should be presented, in order that his local representative may have the assistance of his local Ministers (*Re Holmes* (1)) ; although the ordinary procedure may be available in the case of a new colony which is being administered on the advice of British Ministers in the absence of local representative institutions (*Lautour* v. *Attorney-General* (2)).

Where the claim affects the Crown as Sovereign of the United Kingdom, it is clear, from s. 18 of the *Petitions of Right Act* 1860 (Imp.) (23 & 24 Vict. c. 34), that a suppliant proceeding by petition of right may use either the old form of procedure or the new and simpler form provided by that Act. Where it affects the Crown in some other capacity, it is necessary for the claimant to observe any provisions as to procedure which are prescribed by the local law.

In the light of these considerations, I am of opinion that the petition now in question was wholly misconceived. Assuming the procedure by common law petition of right to be still available in Western Australia, the petition should have been addressed not to His Majesty himself but to His Majesty's representative in Western Australia, the Governor of Western Australia, who would, no doubt, have dealt with it on the advice of his Ministers in the manner appropriate to the ancient procedure. In the case of a claim against the Government of Western Australia, to be entitled to receive moneys out of the revenues of Western Australia, a fiat of His Majesty authenticated not by a responsible Minister of Western Australia

(1) (1861) 2 J. & H. 527 [70 E.R. 1167]. (2) (1865) 5 New Rep. 102, 231.

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but by one of His Majesty's Ministers in England is insufficient to invest a Western Australian court with authority to proceed on the petition (*Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (1); *Faithorn* v. *Territory of Papua* (2)). This is, in my opinion, sufficient to dispose of the appeal.

A further question has been argued, whether the old form of procedure by petition of right is still available in Western Australia, assuming it to be addressed to the proper person and dealt with in the proper way.

The subject was first dealt with in Western Australia in 1867 by the Ordinance 31 Vict. No. 7, which appears to have been adopted with a few verbal variations from the New South Wales Act of 1857, 20 Vict. No. 15. This treats the ordinary remedy of petition of right as having been available. It refers to it as being of limited operation, insufficient to meet all cases that may arise, and attended with great expense and delay. It goes on to provide that it shall and may be lawful for any person or persons having disputes or differences touching any claim between any person and the Colonial Government which may have arisen or may arise within the Colony to present a petition to the Governor of the Colony setting forth the particulars of the claim of such petitioner. Such petition shall be referred by the Governor to his Executive Council, and, if the Governor shall with the advice of his Executive Council think fit, the petition shall be referred to the Supreme Court of the Colony for trial. If the Governor, with such advice, is of opinion that the royal prerogative is affected, he may, with such advice, transmit the petition to His Majesty's Principal Secretary of State for the Colonies for the signification of His Majesty's approval or disapproval. The Chief Justice may make rules for the regulation of pleadings, practice or proceedings on any such petition. It shall be lawful for the Governor, with the advice of the Executive Council, to satisfy and pay any judgment or decree recovered by any such petitioner out of any available balance of the revenue of the Colony.

This Ordinance was repealed and replaced in 1898 by the Act 62 Vict. No. 9, Part III. of which is headed: "Mode of enforcing Claims against the Crown." This provides, by s. 22, that any person who has any claim or demand against the Crown which has arisen or accrued within Western Australia since the coming into operation of the Act may set forth in a petition the particulars of his claim or demand, and such petition shall be in the form contained in the Ninth Schedule. Section 33 provides that no claim or demand shall be made against the Crown under this Part

(1) (1925) A.C. 754, at pp. 779, 780. (2) (1938) 60 C.L.R. 772, at p. 792.

of the Act unless founded upon and arising out of some one of the causes of action mentioned in the section, namely, breach of any contract entered into by or under the lawful authority of the Governor on behalf of the Crown or of the Executive Government of the Colony, or a wrong or damage, independent of contract, done or suffered in, upon, or in connection with a public work (as therein defined). By s. 34 no-one shall be entitled to sue for or recover from the Crown more than £2,000 by reason of any personal injury sustained by him. A month's notice must be given of all petitions, and a petition must be filed within twelve months after the claim or demand has arisen.

As to the effect of this legislation, assuming that after the Ordinance of 1867 the procedure by a properly addressed common law petition of right would still have been available to a claimant against the Government of Western Australia, a point which it is not necessary to decide, I am of opinion that this was no longer so after the passing of the Act of 1898. I think that it sufficiently appears from the language and general arrangement of that statute that it was intended by the legislature that all claims against the Crown arising after it came into operation should, as regards their enforceability both as a matter of substance and as a matter of procedure, be governed exclusively by that Act, which provides a complete and exhaustive code.

For the reasons which I have stated, I am of opinion that the petition which was referred to the Supreme Court of Western Australia is defective in two respects. In the first place, it seeks authority to prosecute a claim against the Government of Western Australia, a self-governing State of the Commonwealth of Australia, but the authority purported to be given by the fiat has not been authenticated by any of His Majesty's responsible Ministers in Western Australia. In the second place, it does not comply with the provisions of the Western Australian statute which regulates claims against the Government of that State.

It is the constitutional principle involved which is the chief obstacle in the respondent's way. If the person sought to be sued were a private individual, for the time being resident in England, legislation dealing with the subject matter with which a petition of right is concerned would be procedural, and procedure is governed by the *lex fori*. The cause of action is transitory and not local so far as the nature of the claim is concerned (*British South Africa Co.* v. *Companhia de Mocambique* (1)), and since it was sought to bring

(1) (1893) A.C. 602, at pp. 618, 619, 622.

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the action in England it would be English statutes regulating procedure which would prima facie be applicable. But here the person sought to be sued is the King in his character of constitutional sovereign, and the immunity which he is asked to waive is a prerogative which he enjoys not for his personal behoof or for that of the United Kingdom but for the benefit of the State of Western Australia.

It follows that in my opinion the appeal should be allowed.

STARKE J. Appeal by leave from a judgment of the Supreme Court of Western Australia upon a special case stated for the opinion of that Court.

Dalgety & Co. Ltd. presented a petition of right to His Majesty the King setting forth in substance that the Government of Western Australia had received the proceeds of certain cheques to which the petitioner was entitled and wrongfully detained the same. This petition had been indorsed by His Majesty: "Let right be done in the Supreme Court of Western Australia subject to the right of the Crown to demur to the Petition." The Crown did demur, whereupon the special case already mentioned was stated for the opinion of the Supreme Court. On the argument before this Court the Crown Solicitor for Western Australia asserted that this fiat of the King had been granted without the advice of any responsible Minister in Western Australia. Constitutionally this may be unusual and irregular in the case of a self-governing colony, but it does not, I think, affect the validity of the fiat. The petition was not presented pursuant to the provisions of any statute, but according to the course of the common law.

All subjects of the Crown governed by the law of England might present a petition of right in cases "where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service" (*Feather* v. *The Queen* (1); *Brocklebank Ltd.* v. *The King* (2), per *Scrutton* L.J.). It may be that this passage does not exhaustively define the scope or ambit of a petition of right: See *Robertson, Civil Proceedings by and against the Crown*, (1908), at pp. 331, 332; *Clode* on *Petition of Right*, (1887), pp. 66, 90; *Holdsworth, History of English Law*, (1926), vol. 9, pp. 7-45. But it seems settled that according to the course of the common law no claims for damages in respect of torts could be sustained against the Crown

(1) (1865) 6 B. & S., at p. 294 [122 E.R., at pp. 1204, 1205].
(2) (1925) 1 K.B., at pp. 67 et seq.

by petition of right or otherwise (*Tobin* v. *The Queen* (1); *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (2)), though Sir *William Holdsworth* questions this proposition: See *History of English Law*, (1926), vol. 9, at pp. 42 et seq.

The procedure on a petition of right according to the old law was somewhat cumbrous, as may be gathered from *Baron de Bode's Case* (3). But, "the granting of the" King's "fiat being entirely voluntary, it would seem to follow that the King may grant his fiat in whatever words he pleases, and with whatever qualification he chooses. *Staundford, Praerog.* 73a, is particularly definite on the subject: 'And note, that when the petition is endorced . . . the partie must follow and pursue the same according to the endorcement, or otherwise hys suit is voide: because the endorcement is his warrant therin, . . . and therfore some time bills of petition be endorced and sent into the Kinges Bench or Common place, and not into the Chauncerie, and that groweth upon a speciall conclusion in his petition, and a speciall endorcement upon the same, for the general conclusion is, "Que le Roy luy face droit et reason," which is as much as if he had prayed restitution of that that he sueth for: And there upon such a generall conclusion the endorcement is "Soit droit fait as parties," which ever is delivered unto the Chauncelor, as is declared. But if the conclusion in the petition be speciall and the endorcement speciall, then they shall proceede according to the said speciall endorcement . . . So ever the following and the pursuing of a thing must be according to the endorcement, for howsoever the conclusion in the petition be, the endorcement may be alwaies as it shal please the King as mee seemeth, and according to that the partie must pursue it' " (See *Robertson, Civil Proceedings by and against the Crown*, (1908), at p. 378).

Accordingly the King may, I think, subject to some qualifications, grant a fiat for the trial of a petition of right presented by a subject in a British possession governed by the law of England and direct the trial of the petition there, particularly before a superior court of law endowed with the jurisdiction of the courts of common law and chancery. It is unnecessary at the moment to work out in detail those qualifications, but the following propositions suggest themselves:—1. The petition must relate to the acts or defaults of the governmental authorities of that possession. 2. Any judgment in favour of the petitioner should be enforceable in that possession or against its revenues. 3. The matter should be one within the

(1) (1863) 16 C.B.N.S. 310 [143 E.R. 1148].
(2) (1920) A.C., at p. 523.
(3) (1840) 2 Ph. 85 [41 E.R. 874]; (1845) 8 Q.B. 208 [115 E.R. 854].

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jurisdiction of the Court if it were a proceeding between subject and subject: See *Robertson, Civil Proceedings by and against the Crown*, (1908), p. 381; *Clode* on *Petition of Right*, (1887), pp. 35 et seq.

Prima facie, therefore, the petitioner is entitled in this case to pursue its petition pursuant to the indorsement thereon unless this process is ousted by some statutory provision. The "rule for interpreting statutes which may affect the rules of common law . . . is to consider whether the statutory provision is repugnant to the former substantive . . . law, or whether it merely operates to strengthen the former law by giving more effectual remedies, whether exclusive or alternative" (*Craies* on *Statute Law*, 4th ed. (1936), pp. 286, 287; *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1)).

The Crown contends that the right of the petitioner in this case to take proceedings by way of petition of right was taken away by the *Crown Suits Act* 1898 (W.A.), but the Supreme Court came to the contrary conclusion. The Act is intituled: "An Act to facilitate the Protection and Recovery of Crown Property, and the Enforcement of Claims against the Crown." The relevant provisions of the Act are as follows:—

Section 22. "(1) Subject to the provisions of this part of this Act, whenever any person has any claim or demand against the Crown which has arisen or accrued within Western Australia since the coming into operation of this Act, such person may set forth in a petition the particulars of his claim or demand as nearly as may be in the same manner as in a statement of claim in an action in the Supreme Court between subject and subject."

Section 23. "The proceedings in the suit commenced by . . . petition shall be conducted in the same manner and subject as nearly as may be to the same rules of practice as in an ordinary action between subject and subject."

Section 33. "No claim or demand shall be made against the Crown under this Part of this Act unless it is founded upon and arises out of some one of the causes of action mentioned in this section. Provided that nothing herein contained shall be deemed to give a cause of action for breach of contract which would not have arisen in like circumstances before the passing of this Act.

(1) Breach of any contract entered into by or under the lawful authority of the Governor on behalf of the Crown or of the Executive Government of the Colony, whether such authority is express or implied.

(2) A wrong or damage, independent of contract, done or suffered in, upon, or in connection with a public work as hereinafter defined."

(1) (1859) 6 C.B.N.S. 335 [141 E.R. 486].

Section 34. " No person, or the representatives or relatives of any person deceased, shall be entitled to sue for or recover from the Crown, or any Minister or officer of the Crown, any sum . . . exceeding Two thousand pounds for or by reason of any personal injury sustained by such person."

Section 37. " No person shall be entitled to prosecute or enforce any claim or demand under this Part of this Act unless the petition setting forth the relief sought is filed within twelve months after the claim or demand has arisen."

Now it is to be observed that claims for land or goods or money of the subject which have found their way into the possession of the Crown are not mentioned or provided for by the Act. Such claims are not repugnant to nor ousted by any explicit provisions of the Act. All the Act provides is that no claim or demand shall be made against the Crown *under the Act* unless founded upon or arising out of some one of the causes mentioned in the Act. In the absence of words excluding expressly or by necessary implication the common law remedy, that remedy is not ousted, and especially is this so if the statute provides no alternative remedy. But then it is argued that the claim in the petition of right before the Court is ousted by force of the statute because provision is made for the enforcement of certain causes of action against the Crown in contract and in tort. In terms the statute is not prohibitive or exhaustive: it enables (s. 22) the subject to proceed under the Act, but s. 33 precludes any claim or demand " *under this Part of this Act* " unless founded upon certain causes of action mentioned in the section. Moreover, the proviso that nothing in the Act contained shall be deemed to give a cause of action for breach of contract which would not have arisen in like circumstances before the passing of the Act contemplates the existence and continuance of the old remedy against the Crown and restricts the improved method of proceeding to the same causes as before. Further still, s. 37 is not a general limitation of causes of action but of the right to pursue the simplified method of procedure under the Act. And the provision of s. 33 dealing with actions against the Commissioner of Railways is noticeable, for it specially provides (par. 4) that " no action shall lie against the Commissioner . . . in respect of any claim or demand unless the same be founded upon, or arise out of some one of the causes of action " mentioned in the section. This section is explicit, but finds no counterpart in the provisions relating to claims or demands against the Crown. The provision in s. 33 as to torts creates a new remedy against the Crown which did not exist at the

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common law, and the procedure provided by the statute is consequently, I should think, the appropriate and only method of enforcing it.

This leads to the second question stated: Whether the cause of action alleged in the petition, namely, a claim for money had and received by the Government of Western Australia or by the Treasury or Treasury Department on its behalf for the use of the suppliant, is such as to found a petition of right at common law. For the reasons already given this question should be answered, as it was in the Supreme Court, in the affirmative. But let it be assumed that the exclusive method of pursuing claims and demands against the Crown in Western Australia founded upon or arising out of some breach of contract is that prescribed by the *Crown Suits Act*, still, in my opinion, the present petition stands outside those provisions. As between subject and subject the petitioner's cause of action might have been framed in contract or in tort (*Morison* v. *London County and Westminster Bank Ltd.* (1)). But the matter was one of substance, not of form. And "the substance is the right of the plaintiff to recover property or its proceeds from one who has wrongfully received them": See *United Australia Ltd.* v. *Barclay's Bank Ltd.* (2). Thus Lord *Wright*, reviewing this case, has said (*Law Quarterly Review*, vol. 57, p. 198): "The abolition of the Forms of Action has made it clear that besides the categories of contract and tort, there is a further distinct category, which has been variously named quasi-contract, restitution, unjust enrichment . . . Professor *Winfield* (*Province of Tort*, p. 119) had suggested the following definition: 'So far as current English law is concerned, genuine quasi-contract signifies liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit'": See also *Holdsworth, History of English Law*, (1926), vol. 9, p. 42. And in my opinion such a claim can be asserted against the Crown for reasons so strongly asserted by *Scrutton* L.J. in *Brocklebank Ltd.* v. *The King* (3). In truth such a proceeding is to recover property or money of the petitioner which has found its way into the hands of the Crown and is wrongfully detained. Further I would add that the decision in *Brocklebank Ltd.* v. *The King* (4) suggests that the claim or demand within s. 33, par. 1, must arise under a definite contract, whether expressed or implied, and not a contract assumed in law upon a liability arising upon quasi-contracts as for money had and received.

(1) (1914) 3 K.B., at p. 364.
(2) (1941) A.C., at pp. 4, 19, 29.
(3) (1925) 1 K.B., at pp. 67 et seq.
(4) (1925) 1 K.B. 52.

The third question stated is whether the *Bills of Exchange Act* 1909-1936 binds the Crown, and, if not, whether this is a good defence to the petition. The first part of the question seems irrelevant to any question in this action, for, if I am right, moneys of the subject have come to the hands of the Crown by means of cheques within the meaning of the Act which moneys are wrongfully detained by the Crown.

The fifth question stated is: "Whether it is a bar to granting the suppliant the relief claimed in the petition if such petition was not submitted to a commission for investigation prior to filing in this Honourable Court." The answer is in the negative for the reasons set forth in *Staundford Praerog.* already mentioned.

This appeal should be dismissed.

McTIERNAN J. The judgment of the Supreme Court of Western Australia, against which this appeal is made, upholds as good and sufficient in law a common law petition of right which is in that Court.

By this petition of right, the respondent, who is the suppliant, claims to recover in the Supreme Court of Western Australia from the Government of Western Australia sums of money which the suppliant claims are moneys had and received by the Government to the use of the suppliant. The petition of right was presented to His Majesty the King, who with the advice of Ministers in England indorsed his fiat on the petition. The fiat is in these terms: "Let right be done in the Supreme Court of Western Australia subject to the right of the Crown to demur to the Petition." The liberty to the Crown to demur was granted at the request of the Government of Western Australia. The fiat was not granted with the advice of Ministers who were responsible to the Parliament of Western Australia. If the suppliant were successful, the judgment would need to be satisfied out of the revenues of Western Australia.

The legislature of Western Australia by an Ordinance made on 15th July 1867 and by an Act entitled the *Crown Suits Act* 1898, which repealed the Ordinance, legislated on the subject of claims by the subject against the Crown and the mode of enforcing them. This petition of right was not presented to His Majesty pursuant to any Act. It has been observed that it is a common law petition of right.

There are no express words in either the Ordinance or the Act, like s. 18 of the *Petitions of Right Act* 1860 (Imp.) (23 & 24 Vict. c. 34), which provides that nothing in the Act shall prevent any suppliant from proceeding as before the passing of the Act. On the

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other hand, there are no express words taking away the common law remedy of petition of right.

When an Act by affirmative words gives a new right it does not necessarily take away a previously existing right. But the latter right may be taken away by express words, or, if there are no words expressing that intention, the destruction of the previously existing right may be plainly implied by the Act creating the new right (*Steward* v. *Greaves* (1); *O'Flaherty* v. *M'Dowell* (2)).

The recital in the Ordinance describes the defects of petition of right as a remedy of the subject against the Crown. It said that the ordinary remedy of petition of right is of limited operation and is insufficient to meet all cases that may arise and is attended with great expense and delay. It seems to me that the apparent intention of the provisions of the Ordinance, which are professedly enacted to give the subject a wider and more effective remedy, was to substitute a statutory remedy and a new mode of procedure for the common law petition of right. The Ordinance provides that in all cases of dispute or difference touching any claim between any person and the Colonial Government, which may have arisen or which may thereafter arise, it shall and may be lawful for any person to present a petition to the Governor setting forth the particulars of the claim of the petitioner. The Ordinance vests the constitutional discretion to decide whether the petition should be referred to the Supreme Court in the Governor of the Colony and provides that this discretion is to be exercised on the advice of Ministers in Western Australia. The Ordinance entrusts the Governor with the duty of safeguarding the royal prerogative from invasion by proceedings taken by a subject pursuant to the Ordinance. It is clear from the recital and the scope of these provisions that the legislature intended to give a new right to the subject and to provide a mode of enforcing it and that this right and the mode of procedure should supersede the common law remedy of petition of right. The apparent intention of the Ordinance is that the right of the subject to sue the Crown in the Supreme Court of Western Australia should depend on the exercise by the Governor of the discretion which the Ordinance vests in him and that the previously existing right of the subject to petition the Sovereign for redress and the new right created by the Ordinance should not exist together. In my opinion the Ordinance was in substitution for, not in addition to, the common law petition of right to the extent to which the Ordinance covered the causes of action to which the petition of right extended. So far as

(1) (1842) 10 M. & W. 711 [152 E.R. 658].

(2) (1887) 6 H.L.C. 142, at p. 157 [10 E.R. 1248, at p. 1255].

regards causes of action to which the common law petition of right did not extend, the Ordinance, of course, provided a new remedy.

The *Crown Suits Act* 1898 is a complete code regulating the mode of procedure in actions by and against the Crown in Western Australia. This Act repeals the Ordinance and by s. 4 (3) saved all proceedings begun before the Act came into operation and all rights and liabilities that had then accrued. There are no express words saving any other previously existing rights.

Part III. of the Act provides the mode of enforcing claims against the Crown. Section 22 provides that, subject to the provisions of this Part of this Act, whenever any person has any claim or demand against the Crown, which has arisen or accrued within Western Australia since the coming into operation of the Act, such person may proceed by petition. The provisions to which s. 22 is subject include those contained in s. 33. This section provides that no claim or demand shall be made against the Crown under Part III. unless it is founded upon and arises out of some one of the causes of action mentioned in this section. These causes of action are limited to breaches of contract and certain classes of torts. The section does not extend, it is contended, to all claims that come within the scope of the common law petition of right. The suppliant contends that the claim in the present petition of right is within the scope of the remedy provided by the common law petition of right. It was within the scope of the Ordinance. But it is not within the scope of s. 33 of the Act. The Act does not by express words say that a subject shall not be entitled to prosecute any claim or demand by the common law petition of right: the Act repealed the Ordinance but saved by express words only rights which had accrued or proceedings which had been begun before the Act came into force.

The question is whether since the Act came into operation the subject has the right in Western Australia to prosecute a claim against the Crown, if it is within the remedy of petition of right, but is not within s. 33. The apparent intention of the Act is to define exhaustively the cases in which the subject may sue the Crown in Western Australia and to provide the mode of procedure in those cases. The Act assimilates the procedure as far as possible to proceedings between subject and subject: it provides a special procedure for obtaining payment out of consolidated revenue of damages awarded to the subject. The Act provides that no person shall be entitled to claim any sum exceeding £2,000 by way of damages for personal injury. It also provides that no person shall be entitled to prosecute or enforce any claim or demand under Part III. of the Act unless the petition is filed in the Supreme Court within

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twelve months after the claim or demand has arisen. The Act empowers the Governor to reserve any petition for the signification of the Crown's approval if any law officer certifies to the Governor that the matter of the petition affects the royal prerogative: the Act stays the action until the petition is approved and if it is disapproved the reasons for the disapproval are required to be published in the *Gazette*.

In my opinion it would be contrary to the plain implication and necessary intendment of the Act to hold that it reserves the common law right of the subject to proceed against the Crown by petition of right or that the prerogative of the Crown to be sued by petition of right in the Supreme Court of Western Australia still survives. In my opinion the first question in the special case should be answered in the Crown's favour. It is not necessary to answer the other questions.

The appeal should be allowed.

WILLIAMS J. On 15th July 1867 the Legislative Council of Western Australia made an Ordinance stated to be an Ordinance to facilitate proceedings by persons having claims against the Government. This Ordinance, after reciting that the ordinary remedy by petition of right was of limited operation and was insufficient to meet all cases that might arise and was attended with great expense and delay, provided that *in all cases of dispute or difference touching any claim between any person and the Colonial Government which might have arisen or might hereafter arise within the Colony*, it should and might be lawful for any person having any dispute to present a petition to the Governor setting forth the particulars of his claim. The Ordinance then provided that if the Governor, with the advice of the Executive Council, should think fit, the petition should be referred to the Supreme Court for trial by jury or otherwise as the Court should direct. The Ordinance then went on to assimilate the procedure upon such trials to that applicable to actions between subject and subject. The Ordinance contained a proviso reserving petitions, the subject matter of which affected the royal prerogative, for Her Majesty's approval.

It is evident from the preamble to the Ordinance that it was intended to enlarge the class of cases in which the subject could sue the Crown as well as to provide a new procedure, and that the operative words which I have italicized were sufficiently wide to include all claims and demands in contract and tort, so that, to adopt the words of Sir *Barnes Peacock* when delivering the judgment of the Privy

Council in *Farnell* v. *Bowman* (1) (in referring to a similar Ordinance made in New South Wales the details of which are set out on the preceding pages), " a complete remedy is given to any person having or deeming himself to have any just claim or demand whatever against the Government " : See also *Ricketson* v. *Smith* (2).

The Western Australian Ordinance was in force for thirty-one years before it was repealed by the *Crown Suits Act* 1898. During that period the royal prerogative to grant a petition of right at common law was completely in abeyance. If the Act had not been substituted for the Ordinance the royal prerogative would have revived upon its appeal (*Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (3)). But the simultaneous coming into force of the Act would have prevented this to the extent to which the Act was intended also to be a complete code regulating both the remedies of the subject against the Crown and the procedure to enforce them.

The preamble to the Act states that it is " An Act to facilitate the Protection and Recovery of Crown Property, and the Enforcement of Claims against the Crown." A preamble has been described as a key to open the meaning of the nature of an Act and the mischiefs it was intended to remedy : See *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 461. The present preamble would lead the reader to anticipate that the Act was intended completely to facilitate the recovery of all debts and property by the Crown and the manner of enforcing all claims against the Crown, because it would be entirely capricious if, for no apparent reason, the recovery of some but not all debts and property by the Crown and the enforcement of some but not all claims against the Crown were facilitated and regulated by an Act which was professedly passed to facilitate and regulate these matters generally.

The Act contains two saving sections, 4 and 5. Section 4 (3) provides that all proceedings by or against the Crown commenced before the coming into operation of the Act and all rights accrued or liabilities incurred or proceedings for causes of action arising prior to the coming into operation of the Act may be enforced, continued, commenced and prosecuted in like manner as if the Act had not been passed. Section 5 saves all rights and immunities of the Crown which are to continue as though the Act had not been passed.

Part II. of the Act provides, as the preamble foreshadowed, new remedies in addition to those already existing for the recovery of all debts, damages and property by the Crown.

(1) (1887) 12 App. Cas. 643, at p. 648.
(2) (1895) 16 L.R. (N.S.W.) (Eq.) 170, at pp. 176-178 ; 12 W.N. 14, at pp. 15, 16.
(3) (1920) A.C., at pp. 539, 540.

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Part III. of the Act relates to the mode of enforcing claims against the Crown. Section 22 provides that, subject to the provisions of this Part of the Act, whenever any person has *any* claim or demand against the Crown which has arisen or accrued within Western Australia since the coming into operation of the Act, such person may set forth in a petition the particulars of his claim or demand as nearly as may be in the same manner as in a statement of claim in an action in the Supreme Court between subject and subject. " Any " is a word of the widest import (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (1)), so that the section professes to lay down the procedure for all and every claim and demand against the Crown.

Sections 23 and 27 provide that proceedings in a suit commenced by petition shall be conducted in the same manner and subject as nearly as may be to the same rules of practice as in an ordinary action between subject and subject, and that the court shall give and pronounce such and the like judgment as such court would give in any action between subject and subject, and that there shall be the same right of appeal and liability for costs as there is in such an action. Section 32 provides that, so far as they are applicable, the laws, statutes, and rules in force as to pleading, evidence, hearing, trial, security for costs, amendment, special cases, the means of procuring and taking evidence, set-off, limitations, judgment, appeal, and all other laws, statutes and rules available as between plaintiffs and defendants in actions between subject and subject, and the practice and course of procedure of the court in its legal and equitable jurisdiction respectively, for the time being, in reference to such actions shall, unless the court otherwise orders, be applicable and extend to proceedings on a petition under this Part of the Act.

Section 33 provides that no claim or demand shall be made against the Crown under Part III. of the Act unless it is founded upon and arises out of some one of the causes of action mentioned in the section, provided that nothing therein contained shall be deemed to give a cause of action for breach of contract which would not have arisen in like circumstances before the passing of the Act. The causes of action mentioned in pars. 1 and 2 of the section are (1) breach of any contract entered into by or under the lawful authority of the Governor on behalf of the Crown or of the Executive Government of the Colony, whether such an authority is express or implied, and (2) a wrong or damage, independent of contract, done or suffered in, upon, or in connection with a public work as thereinafter defined.

(1) (1943) 67 C.L.R. 335.

When ss. 22 and 33 are read together they indicate, in my opinion, that Part III. of the Act is intended to be applicable to all claims and demands against the Crown arising in Western Australia after the commencement of the Act which are to be justiciable in that State, and that these claims and demands are to be confined to those defined by s. 33. They include breach of contract for which a petition of right was open to the subject at common law, and some cases of tort, although it was never open at common law to sue the Crown in tort, but exclude the class of cases referred to compendiously in the judgment of *Cockburn* C.J. in *Feather* v. *The Queen* (1) (cited with approval by Lord *Watson* in delivering the judgment of the Privy Council in *Windsor and Annapolis Railway Co.* v. *The Queen and the Western Counties Railway Co.* (2)): " Where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money."

The view that s. 33 is intended to define all the claims and demands that can be made against the Crown in Western Australia is strengthened by a consideration of ss. 32, 35, 36 and 37 of the Act. Section 32 would allow the Court to make an order for discovery in an action against the Crown (*Jamieson* v. *Downie* (3) ; *Heimann* v. *The Commonwealth* (4) ; *Skinner* v. *Commissioner for Railways* (5)). But discovery would be just as necessary in the case of any claim or demand previously justiciable at common law upon a petition of right as in the case of a claim or demand defined by s. 33. Section 35, which enables actions to be brought in the inferior courts, refers, like s. 22, to any claim or demand against the Crown, but it is clear from the succeeding provisions of the section that these claims or demands are confined to those which are defined by s. 33. Section 36 provides that no petition shall be filed unless and until one month's previous notice in writing has been given to the Crown Solicitor setting out the nature of the claim and the relief sought. The object of this section is to give the Crown an opportunity to consider whether the claim or demand should be acceded to before the Crown is involved in the expense of litigation, but it is impossible to conceive why notice should have to be given in the case of claims and demands defined by s. 33 while notice need not be given in the case of other claims and demands previously justiciable upon a petition of right. Section 37 provides that no person shall be entitled to prosecute or enforce any claim or demand under Part III.

(1) (1865) 6 B. & S., at p. 294 [122 E.R., at pp. 1204, 1205].
(2) (1886) 11 App. Cas., at p. 614.
(3) (1923) A.C. 691.
(4) (1935) 54 C.L.R. 126.
(5) (1937) 37 S.R. (N.S.W) 261 ; 54 W.N. 108.

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of the Act unless the petition is filed within twelve months after the claim or demand has arisen. It is again impossible to conceive why such a Statute of Limitations should be required in the case of some claims and demands but not in others. Section 24 of the statute, like the proviso in the Ordinance, contains a provision reserving petitions the subject matter of which affects the royal prerogative for the approval of the Crown. As appears from the article by Sir *Berridale Keith* in *Halsbury's Laws of England*, 2nd ed., vol. 11, p. 77, it is now usual to regulate the rights of subjects against the Government in the Dominions, Provinces and States by statute and to allow suits to be brought against these Governments in contract and in certain cases of tort. Indeed, it would be strange if the Parliament of Western Australia had not, with Her Majesty's approval, regulated the prerogative of the Crown to grant relief in respect of claims and demands which had to be met out of the revenue of that State. Sections 4 and 5 define the remedies of the Crown against the subject and of the subject against the Crown that are to continue to exist outside those conferred by the Act. But otherwise, as the Act specifically states, all such remedies and the procedure by which they are to be enforced are prescribed by the Act. So, too, the Act prescribes what petitions are to be approved of by the Sovereign in person.

For these reasons I am of opinion that the first question in the case should be answered in the negative.

It was not contended that the respondent's claim is within the claims and demands defined by s. 33, so that it is unnecessary to answer the remaining questions.

The appeal should be allowed.

Appeal allowed with costs. Order of Supreme Court set aside, except as to costs. Answer first question in case "No" and declare that it is unnecessary to answer the other questions.

Solicitor for the appellant, *E. A. Dunphy*, Crown Solicitor for Western Australia.

Solicitors for the respondent, *Parker & Parker*, Perth, by their agents, *Minter, Simpson & Co.*

J. B.