

[HIGH COURT OF AUSTRALIA.]

CLYDESDALE
 

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 APPELLANT ;  
 DEFENDANT,  
  
 AND  
  
 HUGHES
 

. . . . .

 RESPONDENT.  
 PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF  
WESTERN AUSTRALIA.

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*Member of the Legislative Council—Appointed to Lotteries Commission—Office of  
 profit under the Crown—Sitting and voting—Vacant seat—Penalties—Effect of  
 Act—Constitution Act of Western Australia 1889 (53 & 54 Vict. c. 26), Schedule  
 sec. 73—Constitution Acts Amendment Act 1899 (W.A.), (63 Vict. No. 19), secs.,  
 38\*, 39\*—Constitution Acts Amendment Act 1933 (W.A.) (No. 25 of 1933),  
 sec. 2.\**

PERTH,  
Sept. 11, 13.

Rich, Dixon  
and McTiernan  
JJ.

The appellant, a member of the Legislative Council of Western Australia, became a member of the Lotteries Commission, and thereby, as was alleged, accepted an office of profit from the Crown. Thereafter he sat and voted in the Council. Respondent sued him in the Supreme Court, claiming a for-

\* The *Constitution Acts Amendment Act* 1899 (W.A.) provides :—By sec. 38 : “ If any member of the Legislative Council . . . after his election . . . (6) Accepts . . . any office of profit from the Crown, . . . his seat shall thereupon become vacant.” By sec. 39 : “ If any person under any of the disqualifications mentioned in this Act, shall presume to sit or vote as a member of the said Council, . . . such person shall forfeit the sum of Two hundred pounds, to be recovered . . . by any person who shall sue for the same in the Supreme Court.”

The *Constitution Acts Amendment Act* 1933 (W.A.) provides :—By sec. 2 : “ Notwithstanding the provisions of . . . sections thirty-eight and thirty-nine of the *Constitution Acts Amendment Act*, 1899, no disability, disqualification, or penalty shall be incurred by any person who is at present both a member of Parliament and a member of the Commission constituted under the *Lotteries (Control) Act*, 1932, by reason of having accepted or continuing to hold before or after the commencement of this Act the office of a member of the said Commission, or any emolument pertaining to that office.”



feiture of £200 under the provisions of the *Constitution Acts Amendment Act* 1899 (W.A.), sec. 39. While the action was pending, the *Constitution Acts Amendment Act* 1933 (W.A.) was passed, enacting that no disability, disqualification or penalty should be incurred by a person then both a Member of Parliament and a member of the Lotteries Commission by reason of having accepted or continuing to hold office as a member of the Commission.

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The Supreme Court gave judgment for the respondent for £200.

*Held*, that the Act of 1933 sufficiently expressed an intention to exclude any liability arising from the acceptance by a Member of Parliament of the office of a member of the Lotteries Commission, whether by sitting or voting the member had already incurred the penalty before the commencement of the Act, or might, but for its enactment, have afterwards done so.

*Held*, further :—(1) That the Bill for the *Constitution Acts Amendment Act* 1933 did not require reservation for the Royal assent. (2) That it did not amount to an alteration or change in the constitution of the Legislative Council so as to require under sec. 73 of the *Constitution Act* 1889 (W.A.) absolute majorities of the respective Houses. (3) That in any case it was so passed, even if amendments which had been made in the Legislative Council, were assented to in the Legislative Assembly by less than an absolute majority.

Decision of the Supreme Court of Western Australia (Full Court) : *Clydesdale v. Hughes*, (1933) 36 W.A.L.R. 73, reversed.

#### APPEAL from the Supreme Court of Western Australia.

The appellant, Alexander McAllister Clydesdale, a member of the Legislative Council of Western Australia, accepted an appointment and had acted as a member of the Lotteries Commission of that State, constituted under the provisions of the *Lotteries (Control) Act* 1932, sec. 3 of which provides that the members of the Commission shall be appointed by the Minister of the Crown for the time being administering the Act. Subsequent to appellant's acceptance of the office of Commissioner, and while so acting, and receiving remuneration therefor, he sat and voted as a member of the Legislative Council. On the 14th October 1933 the respondent, Thomas John Hughes, issued a writ against appellant in the Supreme Court of Western Australia, and his statement of claim as amended was substantially as follows :—1. The plaintiff is a public accountant, and the defendant is a member of the Lotteries Commission. 2. The defendant was on 7th May 1932 duly elected as a member of the Legislative Council of Western Australia, and since then up to the date of the issue of the writ in this action has acted and continued



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so to act in that behalf. 3. The defendant contrary to the *Constitution Acts Amendment Act* 1899, sec. 38 (6), has since 24th February 1933 accepted a certain office of profit from the Crown, namely, the office of member of the Lotteries Commission and/or chairman thereof. 4. By reason of the premises the defendant as from 24th February 1933 became disabled and incapable of being elected or sitting or voting as a member of the Legislative Council. 5. Notwithstanding the matters aforesaid the defendant has presumed to sit and vote in and as a member of the Legislative Council on divers occasions since 24th February 1933, and thereby has forfeited the sum of £200. 6. The plaintiff claims £200. The defendant, by his defence as amended denied all the allegations contained in pars. 3, 4 and 5, and admitted those in pars. 1 and 2 of the statement of claim as above set out, and in further reply to pars. 3, 4 and 5, said that by reason of the *Constitution Acts Amendment Act* 1933 no cause of action was disclosed therein. The respondent by his reply, said (a) that the *Constitution Acts Amendment Act* 1933 was not passed in the manner and form prescribed in that behalf by the *Constitution Act* 1889 and the Standing Orders and Rules 1891-1926 made thereunder; (b) that the *Constitution Acts Amendment Act* 1933 had not been reserved for the signification of His Majesty's pleasure, contrary to the provisions of the *Australian States Constitution Act* 1907. Evidence was given that the Bill for the Act of 1933 had been passed by the Legislative Assembly with the concurrence of an absolute majority. The Bill was then sent to the Legislative Council in the following form:—"This public Bill originated in the Legislative Assembly and passed its second and third reading in the Assembly with the concurrence of an absolute majority of the whole number of the members of the Assembly, and having been this day passed is now ready for presentation to the Legislative Council for its concurrence. Francis G. Steere, Clerk of the Assembly. 14th November, 1933.—Legislative Assembly.—Read 1st, 14th November, 1933.—A Bill for An Act to amend Section 6 of the *Constitution Act*, 1889, and Sections 32, 34, 37, 38 and 39 of the *Constitution Acts Amendment Act*, 1899.—Whereas doubts have arisen as to members of the Parliament of Western Australia having committed breaches of the provisions of Section 6 of the *Constitution Act*, 1889, or of



Sections 32, 34, 37, 38 or 39 of the *Constitution Acts Amendment Act*, 1899, or of any one or more of the provisions of the said sections, or having incurred any disqualifications or penalties thereunder by acceptance of the office of a member of the Commission appointed under Section 3 of the *Lotteries (Control) Act*, 1932, and of a fee as remuneration for their services as provided for in the said section : And whereas it is desirable to resolve such doubts : Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia in the present Parliament assembled and by the authority of the same, as follows :—1. This Act may be cited as the *Constitution Acts Amendment Act*, 1933. 2. No action or other legal proceeding shall lie or be further maintained or continued if already commenced against any member of the Parliament of Western Australia for any violation of the provisions of any one or more of the following sections of the *Constitution Act*, 1889, and the *Constitution Acts Amendment Act*, 1899, namely, Section 6 of the *Constitution Act*, 1889, Sections 32, 34, 37, 38 and 39 of the *Constitution Acts Amendment Act*, 1899, nor shall any disqualification be incurred thereunder by reason of such member of Parliament having accepted the office of a member of the Commission appointed under Section 3 of the *Lotteries (Control) Act*, 1932, at any time since the coming into operation of that Act and of the holding of such office up to and until the thirty-first day of December, one thousand nine hundred and thirty-three, and by reason of such member of Parliament having accepted any fee as remuneration for his services as provided for under the said section. 3. The acceptance by a member of Parliament of Western Australia of the office of a member of the Commission appointed under Section 3 of the *Lotteries (Control) Act*, 1932, or of any Act amending same, and of any fee as remuneration for his services as provided for in the said section shall not be and shall not be deemed to be a violation of the provisions of Section 6 of the *Constitution Act*, 1889, or of Sections 34 or 38 of the *Constitution Acts Amendment Act*, 1899, to render such member of Parliament to be liable to be adjudged to pay any penalty or suffer any disqualification under any of the provisions of the *Constitution Act*, 1889, or the *Constitution Acts Amendment Act*, 1899, in consequence of his

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acceptance and tenure of such office or the acceptance by him of any fee as remuneration for his services therein." The second reading of the Bill was passed in the Council by an absolute majority. In Committee, amendments were made and the Bill was read a third time with the concurrence of an absolute majority. It was indorsed as follows:—"This Bill has been agreed to by the Council with the amendments indicated by the annexed Schedule, and passed its second and third reading with the concurrence of an absolute majority of the whole of the members of the Council. A. R. Grant, Clerk of the Council, 22/11/1933." The following message was then sent to the Assembly:—"Mr. Speaker,—The Legislative Council acquaints the Legislative Assembly that it has agreed to a Bill intituled "An Act to amend Section 6 of the *Constitution Act*, 1889, and Sections 32, 34, 37, 38 and 39 of the *Constitution Acts Amendment Act*, 1899," subject to the amendments contained in the Schedule annexed; in which amendments the Legislative Council desires the concurrence of the Legislative Assembly. J. W. Kirwan, President. Legislative Council Chamber, Perth, 22nd November, 1933.—Schedule showing amendments made by the Legislative Council in the Constitution Acts Amendment Bill:—No. 1. Clause 2.—Delete this clause. No. 2. Clause 3.—Delete this clause. No. 3. New clause.—Insert a new clause to stand as Clause 2, as follows:—2. Notwithstanding the provisions of Section 6 of the *Constitution Act*, 1889, or Sections 32, 34, 37, 38 and 39 of the *Constitution Acts Amendment Act*, 1899, no disability, disqualification, or penalty shall be incurred by any person who is at present both a member of Parliament and a member of the Commission constituted under the *Lotteries (Control) Act*, 1932, by reason of having accepted or continuing to hold before or after the commencement of this Act the office of a member of the said Commission or any emolument pertaining to that office, but no such office or emolument arising therefrom shall be held or enjoyed by any such member of Parliament beyond the thirty-first day of December, one thousand nine hundred and thirty-four. A. R. Grant, Clerk of the Council. 22nd November, 1933." In response to this message the Legislative Assembly replied concurring in the amendments, and the Bill was then indorsed with a certificate that it had been duly passed. There was, however,



no evidence as to the number of members who actually voted when the amendments were accepted by the Assembly.

The Supreme Court of Western Australia (*Northmore C.J.*) gave judgment for the plaintiff for the amount claimed and costs, and from that decision the defendant appealed to the Full Court of the Supreme Court, which dismissed the appeal, being of opinion that the *Constitution Acts Amendment Act 1933* did not relieve the defendant of any liability incurred by sitting and voting in the Legislative Council.

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From that decision the defendant now appealed to the High Court.

*Keenan K.C.* and *Walsh*, for the appellant. The acceptance of the position of Commissioner was not an office of profit, and even if it were, the acceptance was not a disqualification. The Crown is not defined in the Act, only Her Majesty (*Interpretation Act 1918*, sec. 4; *Constitution Act 1889*, sec. 3). Before the *Lotteries (Control) Act 1932* was passed, the Police Commissioner had charge of all lotteries, but after the Act the Minister was the person designated to make appointments on behalf of the public; the Commissioner had no interest, and merely acted on behalf of the subscribers; he was acting as agent for the Crown.

[*DIXON J.* referred to the *Succession Act 1707*; *Halsbury*, vol. 21, p. 659.]

In the Act of 1899, sec. 38 must be read strictly. There is nothing in the *Constitution Act* to show that the appointment was by the Crown. All appointments must be made by the Governor in Council, except appointments to political offices, which are made by the Governor alone. As to the office being an office of profit, by the Statute of Anne 1707, the profit did not flow directly from the Crown, but here it must flow directly from the Crown or from some source connected with the Crown. Appellant submits that "profit" from the Crown connotes source of origin "from" or "under" the Crown, as well as the source of profit connected with the office. As to appointments by the Ministers under the *Roads Districts Acts 1933-1934*, sec. 151, the Board may remove the secretary, as he is not holding an appointment of profit from the Crown. The Minister is only *persona designata* to appoint. [Counsel referred to the



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 following sections as to disqualification and vacation of seats in Parliament: 31, 32, 33, 34, 37, 39, of the *Constitution Acts Amendment Act* 1899.] In the *Constitution Acts Amendment Act* 1933, sec. 2, the word "shall" is clearly used in a mandatory sense, and has no future intent. It could not be retrospective unless specifically stated to be so in the statute itself (*Pardo v. Bingham* (1) ).

*Hughes*, in person. As to retrospective construction, see *Salomon v. Salomon & Co.* (2); *Young v. Adams* (3). If an appointee accepts an office of profit under the Crown, and is also a member of Parliament, he cannot hold both offices (*Moon v. Durden* (4) ). The Court will not construe statutes retrospectively unless expressly declared to have a retrospective operation (*Marsh v. Higgins* (5); *Jackson v. Woolley* (6); *Midland Railway Co. v. Pye* (7); *Evans v. Williams* (8); *Pardo v. Bingham* (1); *Phillips v. Eyre* (9) ). These latter cases show that strong language must be used for a Court to construe retrospectively. In the case of *The Queen v. Ipswich Union* (10) there is no retrospective right given to a person to revive a vested right; in *Quilter v. Mapleson* (11) there is no authority to support retrospectivity. In *Hickson v. Darlow* (12) there is no retrospective operation given to the statute. (See also *Lauri v. Renad* (13); *In re Athlumney*; *ex parte Arlson* (14); *Smithies v. National Association of Operative Plasterers* (15); *Lemm v. Mitchell* (16); *Beal on Cardinal Rules of Legal Interpretation*, 3rd ed. (1924), p. 474.) The *Constitution Acts Amendment Act* 1933 was not passed in proper manner or form, and is therefore not a valid enactment, and has not received the assent of His Majesty (*Attorney-General of N.S.W. v. Trethowan* (17) ). Sec. 73 of the *Constitution Act* 1889 says that the Constitution may be altered from time to time, but on the true construction it can only be altered prospectively (*Cooper v. Commissioner of Income Tax for the State of Queensland* (18); sec. 106 of the Constitution).

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| (1) (1869) 4 Ch. App. 735.                 | (9) (1870) L.R. 6 Q.B. 1.  |
| (2) (1897) A.C. 22, at p. 38.              | (10) (1877) 2 Q.B.D. 269.  |
| (3) (1898) A.C. 469.                       | (11) (1882) 9 Q.B.D. 672.  |
| (4) (1848) 2 Ex. 22; 137 E.R. 1007.        | (12) (1883) 23 Ch. D. 690. |
| (5) (1850) 9 C.B. 551; 154 E.R. 389.       | (13) (1892) 3 Ch. 402.     |
| (6) (1858) 8 E. & B. 784; 120 E.R. 292.    | (14) (1898) 2 Q.B. 547.    |
| (7) (1861) 10 C.B.N.S. 179; 142 E.R. 419.  | (15) (1909) 1 K.B. 310.    |
| (8) (1865) 2 Drew. & Sm. 324; 62 E.R. 644. | (16) (1912) A.C. 400.      |
|  | (17) (1932) A.C. 526.      |
|  | (18) (1907) 4 C.L.R. 1304. |



Keenan K.C., in reply. Sec. 73 of the *Constitution Act* 1889 gives full power to alter the Constitution (*McLeod on Interpretation of Statutes*, (1924), p. 193; *Moss v. Donohoe* (1) ).

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*Cur. adv. vult.*

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The Court delivered the following written judgment :—

RICH, DIXON AND McTIERNAN JJ. This appeal arises out of an action for penalties under sec. 39 of the *Constitution Acts Amendment Act* 1899 of Western Australia, brought by the respondent as a common informer against the appellant, a member of the Legislative Council. Sec. 39 provides that, if any person under any of the disqualifications mentioned in the Act shall presume to sit or vote as a member of the Council, he shall forfeit the sum of £200 to be recovered by any person who shall sue for the same in the Supreme Court. Sec. 38 provides that, if any member of the Council after his election, amongst other things, accepts any office of profit from the Crown, except in the Forces, his seat shall thereupon become vacant. The Minister, to whom the administration of the *Lotteries (Control) Act* 1932 had been committed by the Governor, appointed the appellant to be a member of the Lotteries Commission pursuant to sec. 3 (c) of that Act. The appellant without resigning his seat in the Legislative Council accepted the office. Thereafter he sat and voted in the Council. The respondent issued his writ on 14th October 1933 in respect of the appellant's so sitting and voting. While the action was pending the *Constitution Acts Amendment Act* 1933 was passed, enacting that no disability, disqualification, or penalty should be incurred by a person then both a Member of Parliament and a member of the Lotteries Commission by reason of having accepted or continuing to hold the office of a member of the Commission.

The appellant in answer to the action relied upon this enactment as absolving him from any liability to the penalties sued for. He also maintained that he had not incurred any penalty, because, as he contended, the office of member of the Lotteries Commission was not, within the meaning of sec. 38 (6) of the *Constitution Acts*



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 CLYDESDALE the meaning of sec. 39. Upon the trial, before *Northmore* C.J.,  
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 and *Dwyer* JJ., the appellant failed in all these contentions. He  
 Rich J. was adjudged liable to a penalty of £200. Their Honors were all  
 Dixon J. of opinion that the *Constitution Acts Amendment Act* 1933 did not,  
 McTiernan J. upon its proper construction, relieve the appellant of any liability  
 to a penalty, which, before its enactment, he had incurred by sitting  
 and voting. After consideration, we have reached the conclusion  
 that the Act of 1933 sufficiently expresses an intention to exclude  
 any liability arising from the acceptance by a Member of Parliament  
 of the office of a member of the Lotteries Commission, whether by  
 sitting or voting the member had already incurred the penalty  
 before the commencement of the Act, or might, but for its enact-  
 ment, afterwards do so. In the circumstances, we do not propose  
 to enter upon a consideration of the other contentions of the appellant,  
 but we shall confine our judgment to the operation of the Act of 1933.

That statute begins within the following preamble :—“Whereas doubts have arisen as to members of the Parliament of Western Australia having committed breaches of the provisions of section six of the *Constitution Act* 1889, or of sections thirty-two, thirty-four, thirty-seven, thirty-eight, or thirty-nine of the *Constitution Acts Amendment Act*, 1899, or of any one or more of the provisions of the said sections, or having incurred any disqualifications or penalties thereunder by acceptance of the office of a member of the Commission appointed under section three of the *Lotteries (Control) Act*, 1932, and of a fee as remuneration for their services as provided for in the said section : And whereas it is desirable to resolve such doubts.”

It is to be noticed that the doubts to be resolved, which are recited by the preamble, include doubts as to members of Parliament having incurred disqualifications or penalties by accepting office in the Commission. Although in strictness it is the sitting or voting after disqualification that is penalized, the preamble states clearly enough the desirability of removing doubts upon the question whether in this manner a penalty has already been incurred. The enacting provision is expressed as follows :—“Notwithstanding the



provisions of section six of the *Constitution Act*, 1889, or sections thirty-two, thirty-four, thirty-seven, thirty-eight, and thirty-nine of the *Constitution Acts Amendment Act*, 1899, no disability, disqualification, or penalty shall be incurred by any person who is at present both a member of Parliament and a member of the Commission constituted under the *Lotteries (Control) Act*, 1932, by reason of having accepted or continuing to hold before or after the commencement of this Act the office of a member of the said Commission, or any emolument pertaining to that office, but no such office or emolument arising therefrom shall be held or enjoyed by any such Member of Parliament beyond the thirty-first day of December, one thousand nine hundred and thirty-four."

The words "shall be incurred" appear to us to be mandatory or imperative. They express the immediate will of the Legislature. Read in conjunction with the words following, namely, "by reason of having accepted or continuing to hold before or after the commencement of this Act" they ought not to be taken as expressing a prospective intention only. The section says, in effect, that the fact that a member has, before the enactment, accepted office in the Commission shall not expose him to a penalty, to a disability or to a disqualification. It is true, as pointed out by *Dwyer J.*, that no penalty is incurred unless he sits or votes. But we are unable to regard this circumstance as contributing to an interpretation which leaves accrued liabilities untouched. Disqualification is an essential condition of liability to a penalty under sec. 39. It is incurred, if at all, when the office of profit is accepted. When the section enacts that, by reason of having accepted before the Act the office of member of the Commission, no disqualification shall be incurred, it must mean that his having accepted the office shall not constitute a disqualification. Apart, therefore, from the reference to penalty, inasmuch as in point of law the member must be taken never to have been disqualified, no liability to a penalty under sec. 39 could remain. Moreover the reference to penalty appears to us to bear an analogous interpretation. It treats the liability as depending upon the acceptance, whether prior or subsequent, of the office in the Commission, and says the liability shall not be so incurred. This does not mean that sitting and voting, only if after

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the Act, shall not expose to liability a person who has before or after the Act accepted the office. Whether accurately or inaccurately, the provision assumes the sitting and voting, and expresses itself as to the acceptance of the office. The "shall be" cannot be understood as a reference to future sitting or voting. It is the past and future acceptance of office to which it refers as a ground of liability. If further evidence of its meaning be required, the recital of doubts in the preamble shows, we think, conclusively, that the object was by declaratory enactment to settle a disputed question, not to make a mere prospective enactment. We think the provision is expressed with sufficient clearness to overcome the ordinary presumption against retroactive enactment or interference with accrued liabilities already put in suit.

The contention cannot be supported that, because sec. 38 renders vacant the seat of a member who comes within its provisions, the appellant cannot bring himself within the description contained in the Act of 1933, viz., a person who is at present both a Member of Parliament and a member of the Commission. It is apparent that the enactment, being directed to the removal of doubts by validation, speaks on the assumption that the challenged membership is not lost, and, therefore, that the member acting *de facto* may properly be described as a Member of Parliament.

The validity of the Act of 1933 was attacked. It was said that it amounted to an alteration or change in the Constitution of the Legislative Council, and, therefore, that under sec. 73 of the *Constitution Act* 1889, the second and third readings of the Bill required absolute majorities of the members of the respective Houses of Parliament. We do not agree that it effected a change in the constitution of the Legislative Council. In fact such majorities were obtained. But it appears that the enacting provisions of the original Bill were recast in the Council after it had left the Assembly, which thereupon accepted the amendments made by the Council. It was suggested that the Bill thus lost its identity, so that to comply with sec. 73 it needed a new introduction into the Assembly, and passage at its second and third readings by an absolute majority. We do not think that sec. 73 requires a Court to consider how far amendments allowed under Parliamentary



procedure affect the substantial identity of the measure. The section relates to and speaks in terms of legislative procedure. It must be taken to recognize the possibility of substantial amendment in the other House after the passage of the Bill by the requisite majorities through the House where it originates. The exact requirements prescribed by the section were complied with. The Bill was not, in our opinion, one which needed reservation under the *Australian States Constitution Act 1907*, as was contended, and notwithstanding its retrospective operation, it is plainly within the legislative competence of the State Parliament.

For these reasons we think the appeal should be allowed.

The judgment of *Northmore C.J.* should be discharged, and judgment in the action should be entered for the defendant. We think that the appellant should have his costs of the proceedings in the Supreme Court after 1st December 1933, the date upon which the *Constitution Acts Amendment Act 1933* was passed, including the costs of the appeal to the Full Court, and that he should have the costs of this appeal.

*Appeal allowed with costs. Judgment of the Full Court and of Northmore C.J. discharged. In lieu thereof judgment in the action entered for the defendant. Order that the plaintiff respondent pay the costs of the appellant defendant of the proceedings in the Supreme Court after 1st December 1933 including the costs of the defendant's appeal to the Full Court. Order respondent to restore to the appellant the sum of £321 18s. 7d., being the amount of the penalty and costs received by him under the judgment. Stay of fourteen days.*

Solicitors for the appellant, *Lavan, Walsh & Seaton*.

Solicitor for the respondent, *C. Grief*.

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